THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY AND VICE ADMIRALTY JURISDICTION

NOTICE OF MOTION NO.2780 OF 2005
AND
NOTICE OF MOTION NO.3287 OF 2005
IN
ADMIRALTY SUIT NO.11 OF 2005

J.S. Ocean Liner LLC, a
foreign Company incorporated under
foreign laws and carrying on business at P.O.Box- 52480,
Bur Dubai (U.A.E.) .. Plaintiffs

v/s.

1. M.V. Golden Progress
A foreign flag vessel, flying the flag
of Mongolia and presently in port and
harbour Bombay together with her hull,
tackle, machinery, apparel and otherwise
paraphernalia

2. Abhoul Marine LLC (FZCO), a
foreign company, incorporated under
foreign laws and carrying on business at
P.O. Box 1286, Dubai (U.A.E.) .. Defendants

Mr. J.P. Sen with Mr. Ashwin Shankar, Vishal Seth and Mr. R.A. Fernandes for the plaintiffs.

Mr. A.M. Vernekar with Ms. Bharti Narichania and Ms. Reena Sharma i/by M/s M/s. Vibha Juris Consult & Co. for the defendants.

Mr. V.C. Kotwal, senior counsel with Mr. V.R. Dhond for the intervenor.
Mr. Prashant Pratap with Mr. H.G. Pratap and Ms. Monica Kohli for

the intervenor.

CORAM : R.M.LODHA, S.A.BOBDE AND
S.J. VAZIFDAR, JJ.

DATED OF RESERVING
THE JUDGMENT : 13TH OCTOBER, 2006.

DATE OF PRONOUNCING
THE JUDGEMENT : 25TH JANUARY, 2007

JUDGMENT (Per R.M. Lodha, J.)

The Single Judge of this court in his detailed order of reference had doubted the correctness of the judgment of the Division Bench of this court in the case of Islamic Republic of Iran Shipping Lines v. m.v. Mehrab 2002(4) Mh.LJ 584 and so also another Division Bench judgment in the case of Blue Diamond Freight Pvt.Ltd. v. m.v. Indurva Vally (Appeal Lodging No.503 of 2003) with regard to the question of maintainability of the suit for security of the award in the admiralty jurisdiction of this court when there is an arbitration agreement between the parties though the arbitration proceedings have not commenced or when the arbitration is actually commenced. The Single Judge also doubted whether the court entertaining an application under section 9 of the Arbitration and Conciliation Act, 1996 would have jurisdiction to treat the vessel as a `person' for the purpose of order of arrest and whether an application under section 9 of the Arbitration and Conciliation Act, 1996 (for short `Act of 1996') can be filed when a suit for arrest of the vessel is not maintainable. In the opinion of the Single Judge, these issues frequently arise and

need to be considered by the larger Bench and, consequently, he directed the office to place the papers before the Chief Justice for the constitution of the larger Bench. Accordingly, the Chief Justice constituted this Bench for consideration of the matter referred to by the Single Judge vide his order dated 20th July, 2006.

2. After hearing the counsel for the parties and upon perusal of the referral order dated 20th July, 2006, we indicated in our order dated 29th September, 2006 that the following questions arise for our consideration in the reference made by the Single Judge:

i) Whether an application under section 9 of the Arbitration and Conciliation Act, 1996 is maintainable for the arrest of a vessel for obtaining the security of an Award that may be made in the arbitration proceeding?

ii) If the answer to the aforesaid question is in the negative, whether a suit only for arresting a ship by way of obtaining the security in the pending arbitration can be maintained or proceeded with?

3. Another facet to the aforesaid question No.(ii) that requires consideration is: in the admiralty jurisdiction where there is an arbitration agreement between the parties though arbitration proceedings have not yet commenced or when the arbitration is actually commenced, whether the suit for security simplicitor for the award that may be made in the pending arbitration proceedings can

be maintained and order of arrest made?

4. In order to appreciate the aforesaid questions in the right perspective, we may immediately notice the relevant facts.

5. J.S. Ocean Liner LLC- the plaintiffs- are the foreign company incorporated under the foreign laws and carrying on the business at Bur, Dubai (U.A.E.). The plaintiffs are charterers of vessel for carriage of cargo. M.V. Golden Progress – the first defendant – is a foreign flag vessel and was lying in port and harbour Bombay on the date of the filing of the suit. Abhoul Marine LLC (FZCO) – the second defendant- are also the foreign company incorporated under the foreign laws and carrying on business at Dubai (U.A.E.). The second defendant are the owner of the first defendant vessel. The plaintiffs filed the present suit for the purposes of recovering an amount aggregating US$ 46,913.52 (together with interest thereon and costs) due and payable to them by the second defendants or in the alternative, for securing the said amount pending the commencement and outcome of the arbitration proceedings to be initiated in London against the second defendants.

6. The plaintiffs averred that a “BALTIME 1939” time charter party dated 15th February, 2005 was entered into between the plaintiffs and the second defendants at Dubai under the terms of which the second defendants agreed to charter the first defendant vessel to the plaintiffs for carriage of cargo. The daily charter hire

payable by the plaintiffs under the charter party was fixed at US$ 5,250.00 per day, less 2.5% address commission and brokerage.

7. The first defendant vessel was delivered to the plaintiffs by the second defendants on 27th February, 2005 at about 12.00 noon at Singapore and the plaintiffs became liable to make payment of charter hire to the second defendants from this date at the aforementioned rate.

8. The plaintiffs' case is that the charter party being in the nature of the time charter, speed of and bunker consumption by the first defendant vessel were very important terms of the charter but soon after delivery of the first defendant vessel, it was found that the first defendant vessel could not meet with the bunker consumption and speed stipulations contained in the charter party. These deficiencies were brought to the attention of the second defendants and on 3rd April, 2005, an agreement was arrived at between the plaintiffs and the second defendants that with effect from 2nd April, 2005, 00.01 hours (Dubai local time) the charter hire payable by the plaintiffs shall stand reduced to US$ 4,000.00 per day (pro rata).

9. According to the plaintiffs, the first defendant vessel/her machinery/her crew did not perform as required under the terms of the charter party and, consequently, the plaintiffs declared the first defendant vessel “off-hire”. The particulars of “off-hire” period have been given by the plaintiffs in para 6 of the plaint.

10. The plaintiffs have further averred that as the first defendant vessel was plagued by problems and the dispute arose between the second defendants and their agents at Bombay viz. Damani Shipping vide correspondence dated 8th April, 2005, the plaintiffs redelivered the first defendant vessel to the second defendants and terminated the charter party with retrospective effect from 2230 hrs. on 6th April, 2005.

11. In view of the termination of the charter party and redelivery of the first defendants vessel to the second defendants, the plaintiffs' case is that they prepared their final hire statement. After accounting for the total amount of US$ 1,56,891.42 paid by the plaintiffs towards charter hire upto 17th April, 2005 (including an advance amount of US$ 11,000.00 paid to the master of the first defendant vessel) and adjusting the same against, interalia, the “off-hire” periods, the second defendants were found to be liable to refund to the plaintiffs a sum aggregating US$ 46,913.52. Having not made the payment of this sum, the plaintiffs filed the present suit claiming that they are entitled to a decree in their favour and against the first defendant vessel and second defendants jointly and severally for the said sum together with the interest from the date of the suit until realisation.

12. In the alternative, the plaintiffs pleaded that in view of the arbitration clause contained in the charter party, they are entitled to seek arrest and sale of the first defendant vessel in the present suit,

so as to secure their claim pending the commencement and outcome of the arbitration proceedings in London to be instituted against the second defendants. The plaintiffs averred that other than the first defendant vessel, the second defendants do not possess any valuable assets within the jurisdiction of this court. The plaintiffs also averred that apart from the fact that the first defendant vessel was presently in Bombay, there exists no other nexus with Bombay in the instant case and consequently, an admiralty suit was the only remedy available to the plaintiffs.

13. It transpires from the proceedings that on 11th April, 2005, an order of arrest of the first defendant vessel was made. Pursuant to the warrant of arrest dated 11th April, 2005 and executed upon the first defendant vessel m.v. Golden Progress, the second defendants provided the security towards the suit claim, costs and Sheriffs Poundage by depositing in this court a pay order for US$ 47,952.00 and the vessel was released vide order dated 19th April, 2005 in terms of minutes of the order. While providing security, the second defendants made it clear that the same was being done without prejudice to their rights and contentions in the matter.

14. By way of notice of motion No.2780 of 2005, the defendants sought the relief that dispute between the parties be referred to the arbitration in terms of the arbitration clause contained in the charter party. The defendants also sought the dismissal of the admiralty suit and in the alternative for an order of unconditional stay of the suit

pending adjudication of the dispute by the Arbitral Tribunal.

15 On the other hand, the plaintiffs took out notice of motion No.3287 of 2005 and they prayed for a decree against the defendants for want of written statement and also for stay of the hearing of the notice of motion No.2780 of 2005 taken out by the defendants.

16. These two notices of motion were taken up for consideration by the Single Judge together and as noticed above, vide order dated 20th July, 2006, the matter has been referred to the larger Bench for consideration.

17. We may notice here only that after the notice of motion No.2780 of 2005 taken out by the defendants was served upon the plaintiffs' advocate, the plaintiffs invoked the arbitration clause being clause No.23 in the charter party nominating their arbitrator and called upon the second defendants to nominate their arbitrator so as to constitute the Arbitral Tribunal for entering upon the dispute at London. Pursuant to the location provided in the arbitration clause, the Arbitral Tribunal has been constituted at London. The plaintiffs have filed their statement of claim interalia claiming the same amount as claimed in the suit and the second defendants have also filed the counter-claim against the plaintiffs for US$ 2,00,00,000 on the ground that the plaintiffs were guilty of breach of charter party. The said arbitration proceedings are going on at London.

18. The parties have not joined the issue that both of them are foreign companies incorporated outside India having their place of business outside India.

19. In m.v. Mehrab, the Single Judge held that the order for arrest of the ship m.v. Mehrab to provide security of an award which the plaintiffs may obtain in arbitration proceedings instituted in London could not be passed. The Single Judge further held that the suit of this nature to arrest the ship to force security for a future arbitration award was not maintainable. The order of Single Judge was carried in appeal. The Division Bench held that the Court in its admiralty jurisdiction has power to arrest a ship to secure a claim in future or pending arbitration. While holding so, the Division Bench considered the following judgments: (i) M/s. WO Tractoroexport Moscow v. M/s. Tarapore and Co., Madras, AIR 1971 SC 1, (ii) Jolly George Varghese v. The Bank of Cochin, AIR 1980 SC 470, (iii) m.v. Elizabeth v. Harwan Investment and Trading Pvt.Ltd. AIR 193 SC 1014, (iv) Cap Bon (1967) 1 Lloyd's Rep 543, (v) Rena K, (1978) 1 Lloyd's Rep 545, (vi) Vasso (formerly Andria), (1984) 1 Lloyd's Re 235, (vii) Tuyuti, (1984) 1 QB 838, (viii) The Jalamatsya, (1987) 2 Lloyds Rep 164, (ix) The ship "Amanda N" 21 FCR 60, (x) Atlantic Lines and Navigation Company Inc v. The Ship "Didymi", (1985) FC 240, (xi) Pictou Industries Ltd. v. Secunda Marine Services Ltd.et al, (194) 78 (FCTD), (xii) Unitramp, (1994 AMC 476), (xiii) Trendtex Trading v. Bank of Nigeria, (C.A.) 1977 Appeal Cases 548, (xiv) m.v. Mariner IV v. V.S.N.,L., 1998(1) Mh. L.J. 751 and the Division Bench

judgment of this court in m.v. Sea Success 1 v. Liverpool and London Steamship Protection and Indemnity Association Ltd. and anr. (Appeal No.226 of 2001 decided on 28.11.2001.

20. The Division Bench in m.v. Indurva Valley was concerned with the order of the Single Judge refusing to grant ad-interim relief for arrest of the vessel. That was a case where a time charter party was entered into between the plaintiffs and the second defendants in Mumbai for the use and hire of the first defendant vessel- m.v. Indurva Valley. The plaintiffs alleged breaches of the charter party by the owners-second defendants and claimed the amount in the sum of US$ 46,751. Under the terms of the charter party, all disputes were to be referred to the arbitration in Sri Lanka. The plaintiffs therein invoked the admiralty jurisdiction of this court by seeking arrest of the first defendant vessel m.v. Indurva Valley for the purpose of securing their claim. At the interim stage, the Appeal Bench ordered arrest of the vessel and upon deposit of the security, the vessel was ordered to be released. Before the Division Bench, when the appeal came up for final hearing, preliminary objection was raised about the maintainability of the suit by relying upon the judgment of the Supreme Court in the case of Bhatia International v. Bulk Trading S.A. and another (2002) 4 SCC 105. The Division Bench considered the earlier Division Bench judgment of this court in the case of m.v. Mehrab and also the decision of the Supreme Court in Bhatia International and held that the suit in admiralty jurisdiction for securing the claim in arbitration was not maintainable but the remedy was to

make an application for interim relief in terms of section 9 of the Act of 1996. This is what the Division Bench said:

> "In the instant case the charter party agreement was entered into in Mumbai and, thus, this court has jurisdiction to grant relief under section 9 of the Arbitration and Conciliation Act, 1996 in the light of the decision of the Supreme Court in Bhatia International. Section 5 of the Arbitration and Conciliation Act clearly provides that in matters governed by Part I, no judicial authority shall intervene except, where so provided in that Part. Consequently, a suit in admiralty jurisdiction for securing the claim in arbitration is not maintainable. The remedy of the appellants is to make an application for interim relief in terms of section 9 of the Arbitration and Conciliation Act, 1996."

re: Question (i)

21. Section 9 of the Act of 1996 provides for interim measures by court before or during the arbitral proceedings. It reads thus-

> "9. Interim measures, etc., by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it enforced in accordance with section 36, apply to a Court:-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii)for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

22. `Court' is defined in section 2(e). It includes the principal civil court of original jurisdiction in a district, and, includes the High Court in exercise of its ordinary original civil jurisdiction, having

jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit.

23. Sections 8 and 9 fall in Part I of the Act of 1996.

24. Section 8 empowers the Judicial Authority to refer parties to arbitration where there is an arbitration agreement.

> "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.
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> (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 or continued and an arbitral award made."

25. Part II of the Act of 1996 deals with the enforcement of foreign awards. Chapter I thereof deals with New York Convention Awards while Chapter II deals with Geneva Convention Awards.

26. Section 44 in Chapter I of Part II defines the foreign award which means an arbitral award in pursuance of an agreement made on or after 11th October, 1960 – (a) in pursuance of an agreement in writing for arbitration to which the convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

27. Section 45 empowers the Judicial Authority to refer parties to arbitration. The said provision reads thus-

> "45. Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 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."

28. In Bhatia International v. Bulk Trading S.A. and another, (2002)4 SCC 105, the Supreme Court considered Part I and Part II of the Act of 1996 and, particularly, sections 2(2), (3), (4), (5), 2(1)(f), (e), (a), 2(7), 9, 17, 28, 36, Rules of International Chamber of Commerce (ICC) and UNCITRAL Model Law and concluded that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India,

the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. It was held that in cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case, the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

29. The conclusions drawn in Bhatia International by the Supreme Court and the law declared therein, in our view, does not lead to the conclusion that an application under section 9 of the Act of 1996 is maintainable for the arrest of the vessel for obtaining security of an award that may enure for the benefit of the foreign award. The reason is not far to seek. Section 9 confers the jurisdiction in a District Court having jurisdiction to decide the question forming the subject matter of the arbitration if the same had been the subject matter of the suit. The definition of `court' does include the High Court in exercise of its ordinary original civil jurisdiction.

However, the principal civil court of original jurisdiction in district that is District Court is not empowered to exercise the admiralty jurisdiction. It cannot make any order for arrest of vessel. For any order under section 9 of the Act of 1996, the court must have jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of the suit.

30. The pecularity of the admiralty action in rem is that the coastal authorities in respect of any maritime claim can assume jurisdiction by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or place of business or dismissal or residence of its owners or the place where the cause of action arose wholly or in part. In admiralty, the vessel has a juridical personality. Admiralty law confers upon the claimant right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. A ship may be arrested: (i) to acquire jurisdiction; (ii) to obtain security for satisfaction of the claim when decreed or (iii) in execution of the decree.

31. Section 9(ii)(b) of Act of 1996 cannot be construed so as to read into it in rem jurisdiction. This provision does not cover the arrest of the ship or the keeping of a ship under arrest in the exercise to the court jurisdiction in rem at all. What is provided by section 9(ii)(b) is securing the amount in dispute in the arbitration by way of an interim measure which in our considered view does not include the arrest of vessel.

32. The question as to whether the arbitration court, while passing the interim orders, can exercise power in admiralty came up for consideration directly before the English courts while considering section 12 of the English Arbitration Act, 1950. Section 12(6) of the English Arbitration Act, 1950 (since repealed) provided, “The High

Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of.....(f) securing the amount in dispute in the reference; as it has for the purpose of and in relation to an action or matter in the High Court. A look at this provision would show that it is quite similar to section 9(ii)(b) of the Act of 1996.

33. In the case of Tuyuti, 1984(2) Lloyd's Law Reports, 51, the Court of Appeal held that the jurisdiction to issue a warrant of arrest ought not to be described as power of the court to make an order securing the amount in dispute but as a power to issue a warrant- the warrant being rather an instruction to the admiralty Marshal than an order. Section 12(6)(f) of the Arbitration Act that provided that the High Court had power to make order in respect of securing the amount in dispute in the reference did not refer to the jurisdiction to issue a warrant of arrest. This is how the matter was considered by Lord Justice Robert Goff:

> "The submission of Mr. Aikens before the Judge, which he repeated before us, was that the power to issue a warrant of arrest under which the Admiralty Marshal is commanded to execute the warrant by arresting the ship constitutes a power of the High Court of making an order securing the amount in dispute within this sub-section. A similar submission was considered on two occasions by Mr. Justice Brandon, first in The Golden Trader, [1974] 1 Lloyd's Rep. 378; [1975] Q.B.348, pp. 384 and 358, and second in The Rena K (sup) itself at pp. 561 and 408. On each occasion the submission was rejected by

him.

I turn straight to The Rena K. where Mr. Justice Brandon had this to say:

I was unable to accept the basic argument with regard to section 12(6)(f) put forward for the charterers in The Golden Trader, [1974] 1 Lloyd's Rep. 378; [1975] Q.B. 348, because it appeared to me that, on the true construction of that provision, it did not cover the arresting of a ship, or the keeping of a ship under arrest, in the exercise of the court's jurisdiction in rem at all. The provision refers to the power of "making orders in respect of securing the amount in dispute." This did not seem to me to be appropriate language to describe the process of arrest in an action rem, because such arrest does not result from the making of any order by the court, but from the party concerned himself causing a warrant of arrest to be issued under R.S.C., Ord. 75, r. 5, subject to the requirements of that rule. The matters to which I thought the provision related were the court's powers of securing amounts in dispute in various other ways, for instance by making orders under R.S.C., Ord.29, rr. 2(3) and 6.

I still think that section 12(6)(f) of the Arbitration Act 1950 does not cover the arresting of a ship under arrest, in the exercise of the court's jurisdiction in rem. It follows that I am equally unable to accept the extended argument as to the effect of that provision put forward for the cargo owners in the present case. The point involved in the extension itself, however, is a separate one, and I shall return to it shortly.

This reasoning was followed and applied by the Judge in the present case, and I find myself to be in agreement with him. I must confess that it would not

> have occurred to me to describe the jurisdiction to issue a warrant of arrest as a power of the Court of making an order securing the amount in dispute. I would describe it as a power to issue a warrant- the warrant being rather an instruction to the Marshal than an order in the sense in which the latter word is usually used in interlocutory orders of the Court, especially having regard to the orders listed in paras (a)-(h) of s. 12(6), relating to such matters as security for costs, discovery, and so on. I agree with Lord Brandon that s. 12(6)(f) relates to the Court's powers under such rules as O. 29, rr.(2)(3) and (6), and that it does not, on its true construction, refer to the jurisdiction to issue a warrant of arrest. I can see no ground for interfering with the Judge's decision on this point."

The other Lord Justice Ackner agreed with the view of Lord Justice Robert Goff.

34. On thoughtful consideration and true construction of section 9(ii)(b), we also take the view that section 9(ii)(b) does not refer to the jurisdiction to issue a warrant of arrest. We find ourselves in respectful concurrence with the view of Lord Justice Robert Goff in Tuyuti which is also in line with the view of Lord Brandon in Rena K (1978) 1 Lloyd's Report 545 while dealing with section 12(6)(f) of the English Arbitration Act, 1950; the said provision being quite similar to our provision 9(ii)(b).

35. It is not infrequent that the persons who are not concerned with the arbitration may be affected by the arrest of the ship. These

affected persons like charterer, cargo owners and other persons having a maritime claim, are permitted to intervene in the action in rem; this is permitted by Rule 949 of the Bombay High Court (O.S.) Rules. Such affected persons like charterer, cargo owners and other persons would not be entitled to have their say if the proceedings are dealt with by the High Court under section 9 of the Act of 1996.

36. In what we have discussed above, and upon taking into consideration all relevant aspects, we have no hesitation in holding that an application under section 9 of the Arbitration and Conciliation Act, 1996 is not maintainable for the arrest of the vessel and that section 9(ii)(b) “securing the amount in dispute in the arbitration” cannot be held to be referable to the arrest of the ship. The view of the Division Bench in m.v. Indurva Valley to the effect: “The remedy of the appellants is to make an application for interim relief in terms of section 9 of the Arbitration and Conciliation Act, 1996”, is not correct view and is accordingly, overruled.

re : Question (ii)

37. In the debate on this point before we deal with the views of the counsel for the parties as well as the counsel for the intervenors, we shall first refer to some of the English and Indian judgments cited before us.

38. In m.v. Elisabeth, the Supreme Court observed that once a foreign ship is arrested in Indian waters by an order of the High Court,

in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a court of record, in respect of maritime claim against its owner, wherever the cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit. The arrest of the vessel while in Indian waters by an order of the concerned High Court, attracts the jurisdiction of the competent court to proceed with the trial, as in the case of any other suit, as an action against the owner, and any decree obtained by the plaintiff is executable against any property of the owner available within jurisdiction, including the security furnished by him for release of the vessel.

39. The Cap Bon, (1967) 1 Lloyd's Report, 543 was concerned with the claim by charterers against the ship owners under a charter party containing an arbitration clause. The ship was carrying potatoes from Alexandria to London and while she was being discharged at Liverpool, the charterers commenced an action in rem against her for a cargo damage claim. The writ was served upon the vessel and she was arrested. The ship owners then entered an appearance and the bail bond was provided to obtain the ship released. Nearly three months later, the ship owners commenced arbitration proceedings against the charterers for damage. The charterers then appointed an arbitrator, both in respect of their cargo damage claim and in respect of the ship owners damage claim. The ship owners subsequently asked the charterers for a statement of claim in the action. The

charterers answer was that the dispute fell within the arbitration clause; that purpose of the action was to obtain security; and that they would consent to the action being stayed and that they would resist application for dismissal of the action. The ship owners then applied for an order that unless the charterers served statement of claims on certain dates, action should be dismissed. Brandon, J. granted the order for which the ship owners asked and also ordered that in the event of the action being so dismissed, the bail should be released. Brandon J. opined that the charterers had sought to invoke the admiralty jurisdiction not to obtain the hearing and determination of claim but for the purpose of obtaining security for an award for arbitration proceedings, and that an admiralty court had no jurisdiction to arrest the ship or to keep ships under arrest for that purpose.

40. The decision in Cap Bon was followed by Brandon, J in the Golder Trader, 1974(1) Lloyd's Report, 378 and after reconsideration in the Rena K, (1978) 1 Lloyd's Law Reports 545.

41. In Rena K, Brandon, J. reiterated that it is not the purpose of arresting a ship in an action in rem to provide the plaintiff with security for payment of an award which he may obtain in an arbitration of the same claim as that raised in the action and, therefore, the court has no jurisdiction to arrest a ship, or keep her under arrest, for such other purpose.

42. With regard to the decision given by him in the Golden Trader, in Rena K, Brandon, J. reproduced his conclusions thus-

> "(1) That the Court had no jurisdiction to keep the ship under arrest in order to provide the charterers with security for an award in the arbitration. It only had jurisdiction to keep her under arrest in order to provide security for a judgment or settlement in the action. This conclusion accorded with my earlier decision in The Cap Bon, which was not, as I have said, challenged by Counsel for the charterers, and which appeared to me in any event to derive support from the approach adopted in three earlier cases which I examined: The Athenee, (1922) 11 LI.L.Rep. 6; Foresta Romana S.A. v. Georges Mabro (Owners), (1940) 66 LI.L.Rep. 139; and The Fehmarn, [1957] 1 Lloyd's Rep. 511; [1957] 1 W.L.R. 815; [1957] 2 Lloyd's Rep 551; [1958]1 W.L.R. 159.
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> (2) That a stay of the action, not being final, could later be removed for good cause, in which case the action could still proceed to judgment or settlement.
>
> (3) That good cause for removal of the stay might arise if the arbitration subsequently (in the words of s. 4 (2) of the 1950 Act) became inoperative or could not proceed. There was, however, no evidence of there being more than a remote possibility of events of that kind supervening in that case. The Court would not, therefore, be justified in keeping the ship under arrest in order to cater for the possibility of the stay being removed and the action proceeding by reason of such supervening events.
>
> (4) That failure by the shipowners to satisfy any award which the charterers might later obtain in the arbitration would not necessarily be good cause for the removal of the stay. In the event of such failure the charterers

> would be entitled either to enforce the award as a judgment under s. 26 of the 1950 Act, or to sue for breach of the arbitration agreement (see Bremer Oeltransport G.m.S.H. v. Drewry, (1933) 45 Ll.L. Rep. 133; [1933] 1 K.B. 753 to which I referred earlier). There was no evidence before the Court to suggest that the shipowners, if an award were to be made against them, would not pay under it. The Court would not, therefore, be justified in keeping the ship under arrest in order to cater for the possibility of the stay being removed and the action proceeding by reason of the shipowners not paying under an award.
>
> (5) That s. 12(6)(f) of the 1950 Act did not give the Court power to arrest a ship, or to keep her under arrest, in order to provide security for the claim of a claimant in an arbitration. The argument for the charterers based on that provision accordingly failed.
>
> (6) That since, in all probability at least, the stay would be final and there would be no judgment or settlement in the action to be satisfied, the Court should make an unconditional order for the release of the ship, and should not qualify such order by attaching to it a term with regard to the provision of alternative security."

43. Confronted with the submission made in Rena K that the decision given by him in the Golder Trader was distinguishable, Brandon, J. considered the two aspects viz. (i) whether the view which he expressed in the Cap Bon and followed in the Golden Trader that the court has no jurisdiction to arrest a ship or keep her under arrest, in order to provide a plaintiff with security for payment of an arbitration award, as distinct from payment of a judgment or settlement in the action in rem concerned is correct or not which he dealt with as a

`jurisdiction point' and (ii) whether assuming that view is correct, the Court nevertheless has a discretion when it grants a mandatory stay under the Arbitration Act, 1975 of an action in rem in which a ship has been arrested, to refuse to release the ship from arrest unless alternative security for payment of an award in the arbitration was provided; or, to put the same thing in a different way, to attach to any order made for the release of the ship, as distinct from the order for the stay of the action, a term relating to the provision of such alternative security discussed by him under the head “discretion point”.

44. Dealing with the jurisdiction point, Brandon, J. in Rena K said thus-

> “The conclusion on the jurisdiction point which I reached in The Cap Bon and followed in The Golden Trader was, from the point of view of what I believe that the law on the matter ought to be, as distinct from what I felt obliged to hold that it was, an unsatisfactory conclusion.
>
> I say this for two reasons. The first reason is that I think that, quite apart from any International Convention relating to the matter to which the United Kingdom is a party, the Court should have power, when it grants a stay, on the ground that the dispute should be decided by another tribunal, of an action in rem in which security has been obtained, to retain such security to satisfy any judgment or award of the other tribunal. When the grant of a stay is discretionary, as in domestic arbitration cases, foreign jurisdiction clause cases and vexation cases, the Court can get round the lack of such power, and has in practice got round it, by using the

alternative security method. It would, however, be more satisfactory, in my view, even in those cases, to use the retention method, which is both more simple and direct, and which is, I believe, commonly used in other jurisdictions.

The second reason is that art. 7 of the Brussels Arrest Convention, to which the United Kingdom is a party, contemplates that a Court, which stays an action on the ground that the dispute should be decided by another tribunal, will have power to retain any security obtained in the action for the purposes mentioned above. I drew attention to this fact, as I said earlier, in the course of my judgment in The Golden Trader. I further thought it right to point out at the end of my judgment in that case that, if the view on the jurisdiction point which I had formed was correct, this Court did not have the power which the Convention contemplated that it would have, and this was a situation which could not be regarded as satisfactory and which it would be desirable for Parliament to remedy."

45. With regard to the `discretion point', Brandon, J. said:

"On the footing that the question is an open one, it was suggested for the shipowners that a party to an arbitration agreement should be treated as having, by entering into such an agreement, abandoned the rights which he would otherwise have had to security for any claim covered by the agreement.

I do not accept this proposition at all. The choice of forum for the determination of the merits of a dispute is one thing. The right to security in respect of maritime claims under the Admiralty law of this country is another. This distinction has been recognised and given effect to by the way in which the Court has exercised its

discretion in foreign jurisdiction clause cases and vexation cases, in which it has either treated the plaintiff's right to security as a material factor in refusing a stay: The Athenee and The Fehmarn above, or else has only granted a stay subject to a term for the provision of alternative security: The Eleftheria and The Atlantic Star above, and more recently The Makefjell, [1975] 1 Lloyd's Rep. 528; [1976]2 Lloyd's Rep.29.

If this distinction between choice of forum on the one hand and right to security on the other is recognised and given effect to in foreign jurisdiction clause cases and vexation cases, I cannot see any good reason why it should not equally be recognised and given effect to in arbitration cases, whether the grant of a stay is discretionary under s. 4(1) of the 1950 Act, or, as in the present case, mandatory under s. 1(1) of the 1975 Act.

I would stress again in this connection also that the distinction in question is clearly recognised and given effect to by the Brussels Arrest Convention.

The process by which property, which has been lawfully arrested in an action in rem, can be released at the instance of the party interested in it, is the making by the Court of an order for the issue of a release under R.S.C. O. 75, r. 13(4). That rule provides, so far as material:-

A release may be issued at the instance of a party interested in the property under arrest if the Court so orders.....

That rule, as I understand it, gives the Court a discretion, when an application for an order for the issue of a release is made, whether to make such order or not. The discretion so given is, so far as the terms of the rule go, unfettered, but it must, like any other discretion, be

exercised judicially.

There is nothing in s. 1(1) of the 1975 Act which obliges the Court, whenever it grants a stay of an action in rem in which security has been obtained, to make an order for the unconditional release of such security. Nor did s. 4(2) of the 1950 Act, now repealed, impose any such obligation. That being so, I think that it is a matter for the discretion of the Court, acting under the rule referred to above, what order it should make with regard to such security, and that the way in which it exercises that discretion must depend on the circumstances in each particular case.

If, on the one hand, the case is one where in all probability the stay will be final and there will therefore never be any judgment in the action to be satisfied, the Court should exercise its discretion by releasing the security unconditionally, as was done in The Golden Trader. If, on the other hand, the case is one where the stay may well not be final and there may well therefore still be a judgment in the action to be satisfied, the Court should exercise its discretion either by refusing to release the security at all, or by only releasing it subject of a perm that the defendants shall provide alternative security for payment of any award in the arbitration.

46. Brandon, J. then went on to hold thus-

"On the footing that the procedure is available to provide a plaintiff, in a case where no question of arbitration arises, with security for any judgment which he may obtain in an action, I see no good reason in principle why it should not also be available to provide a plaintiff, whose action is being stayed on the application of a defendant in order that the claim may be decided by arbitration in accordance with an arbitration agreement between them, with security for the payment of any award

> which the plaintiff may obtain in the arbitration. I have further been informed by Counsel that the Commercial Court has granted injunctions on this extended basis in a number of unreported cases."

47. In Vasso, (formerly `Andria'), the Court of Appeal was concerned with the appeal from the decision by Sheen, J. wherein he held that the court had no jurisdiction to arrest the vessel where the only purpose in arresting the vessel is to obtain security for the satisfaction of the whatever award might ultimately be made by the Arbitrators; the plaintiffs did not purport to invoke the jurisdiction of the court for the purpose of hearing and determining any claim.

48. The Court of Appeal speaking through Lord Justice Robert Goff said thus:

> "It follows that we are, with respect, unable to agree with the opinion expressed by Mr. Justice Brandon that an Admiralty Court has no jurisdiction to arrest, or to maintain an arrest of, a ship when the purpose of the plaintiff is simply to obtain security for an award in arbitration proceedings; and it also follows that, in the present case, the Judge erred in following that opinion, and in making the declaration sought by the respondents. However, the matter does not stop there. For the real point at issue between the parties in the present case is whether the club should or should not be released from its letter of undertaking. We have therefore to consider whether, on the basis that the Court did have jurisdiction to arrest the ship in the present case, we should interfere with the Judge's order that the club's letter of undertaking should be discharged.

We are concerned in this case with a letter of undertaking given to secure the release of a ship from arrest, when that arrest was obtained by a party as security for a claim which he was actively pursuing in arbitration proceedings. We have to consider the propriety of an arrest obtained in such circumstances; and we think it right to approach that question in the context of the general principles governing the relationship between proceedings in arbitration and actions (in particular, actions in rem) in Court.

The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action. Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action in rem) procuring the arrest of the ship, or otherwise proceeding with the action. But the arbitration agreement can, of course, have certain consequences. For example, if an action is begun, the other party may apply for a stay of proceedings. Generally speaking, the Court's power to grant a stay in such a case is discretionary; though of course in cases falling within s. 1 of the Arbitration Act, 1975, the Court is bound to grant a stay. Again, if a party actively pursues proceedings in respect of the same claim both in the Court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the Court; if so, the Court may, in the exercise of its inherent power, require him to elect in which forum he will pursue his claim (see The Cap Bon).

Next, let it be supposed that, before the Court has granted a stay of proceedings under the Arbitration Acts, the plaintiff has obtained security by the arrest of a ship in an action in rem. If the stay is granted in the exercise of its discretionary power under s. 4 of the Arbitration Act, 1950, the Court may require, as a condition of granting a stay, that alternative security should be made available to secure an award made in the arbitration proceedings; see The Golden Trader, [1974] 1 Lloyd's rep. 378. If a mandatory stay is granted under s. 1 of the Arbitration Act, 1975, no such term can be imposed. But it has been held by Mr. Justice Brandon that, where it is shown by the plaintiff that an arbitration award in his favour is unlikely to be satisfied by the defendant, the security available in the action in rem may be ordered to stand so that, if the plaintiff may have thereafter to pursue the action in rem (possibly using an unsatisfied arbitration award for the purpose of an issue of estoppel) the security will remain available in that action: see The Rena K. (We have not had to consider the principle in that case, and we have not heard argument on the point; however, we proceed on the basis that that principle is sound.)

However, on the law as it stands at present, the Court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, for example, arbitration proceedings. The time may well come when the law on this point may be changed: see s. 26 of the Civil Jurisdiction and Judgments Act, 1982, which has however not yet been brought into force. But that is

> not yet the law. It follows that if a plaintiff invokes the jurisdiction of the Court to obtain the arrest of a ship as security for an award in arbitration proceedings, the Court should not issue a warrant of arrest. Of course, if the plaintiff fails to reveal that arbitration proceedings are being actively pursued and that his purpose is to obtain security for an award in those proceedings, the Court may inadvisedly issue a warrant. But for a plaintiff so to proceed may be vexatious and an abuse of the process of the court. Not only has he failed to disclose material facts to the Court on an ex parte application; but he has actively pursued proceedings in Court at the same time as actively pursuing arbitration proceedings, which is (unless the plaintiff is seeking, on appropriate evidence, security in the action on the principle in The Rena K) vexatious. If so, the Court may, on learning of the material facts, order the release of the ship from arrest; and may order the discharge of any security provided consequent upon the arrest."

49. The Court of Appeal in Tuyuti had an occasion to consider the decisions in Golder Trader, Rena K and Vasso and found that on the evidence that was an appropriate case for application of Rena K principle. This is what was observed by the Court of Appeal in Tuyuti:-

> "It follows, in my judgment, that on the evidence in this case The Rena K principle is applicable and that the warrant of arrest should not be stayed but should be allowed to stand to be executed as appropriate. For these reasons I would give leave to appeal and, treating the hearing of the renewed application for leave as the hearing of the appeal, I would allow the appeal and

> reverse the Judge's order in so far as it imposed a stay upon the execution of the warrant."

50. In the case of Bazias 3 and Bazias 4, the Court of Appeal considered the effect of section 26 of the Civil Jurisdiction and Judgments Act, 1982 and the decisions in Rena K and Tuyuti and observed:

> "The reason for the wider discretion in arbitration cases was, as I see it, an inevitable consequence of the security afforded by in rem proceedings not being available to enforce an award and only being available in respect of the in rem proceedings. Once that distinction had gone- as it did with the advent of s. 26 – the need and the occasion for the wider discretion disappeared. It seems to me that Miss Bucknall is right in her essential submission that the purpose of s. 26 was to assimilate the three classes of claim in all respects and that there is nothing in the language of s. 26 not in the cases decided immediately before the section came into effect, namely, The Andria and The Tuyuti, to which I have already referred, which is inconsistent with that submission. If that is right, then it is accepted by Mr. Boyd and by Mr. Males, on behalf of the defendants, that on an application for release under O. 75, r.13 the usual practice has always been that the vessel will only be released on the provision of sufficient security to cover the amount of the claim, plus interest and costs, on the basis of the plaintiffs' reasonably arguable best case. The authority for that is The Moschanthy, [1971] 1 Lloyd's Rep. 37 at p.44."

51. The first edition of Halsbury under Part V suspension of right of action makes the following statement of law:

> "36. A simple agreement to refer a dispute to arbitration, as distinct from one which makes an arbitrator's award a condition precedent to an action, could not at common law be pleaded as a defence, and did not bar a plaintiff from bringing his action, if he chose to disregard the agreement. The Legislature has, however, interfered in order to give effect to such agreements; and now an action brought in defiance of such an agreement will be stayed unless there exists sufficient reason to the contrary."

Under the head, "Stay of Legal Proceedings", the following statement of law is made:

> "953. If a person who is a party to or bound by a submission contained in a written agreement commences legal proceedings in respect of any matter agreed to be referred, the Court has power, subject to the conditions mentioned below, to stay such proceedings.
>
> A defendant in an action, who delivers a counterclaim, thereby commences legal proceedings against the plaintiff. If, therefore, the counterclaim is in respect of some matter which is comprised in a written submission to arbitration, the plaintiff can apply for a stay of the counterclaim.
>
> The power to stay legal proceedings commenced in

> respect of a matter agreed to be referred to arbitration can, it would seem, be exercised by any Court in which such proceedings are commenced."

52. In the case of P. Anand Gajapathi Raju v. P. V..G. Raju (died), AIR 2000 SC 1886, the Supreme Court was concerned with the question whether the Supreme Court as a court in appeal can refer the parties to arbitration under the Act of 1996 (new Act). While dealing with this aspect, the Supreme Court referred to Part I of the new Act, particularly sections 5 and 8 thereof and in para 8 of the report, held thus-

> "8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the Award. The Court to which the party shall have recourse to challenge the Award would be the Court as defined in clause (e) of Section 2 of the new Act and not the Court to which an application under Section 8 of the new Act is made.

> An application before a Court under Section 8 merely brings to the Court's notice that the subject matter of the action before it is the subject matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent Court within the meaning of Section 2(e) of the new Act."

53. The aforesaid legal position was reiterated by the Supreme Court in the case of Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503 wherein the Supreme Court said:

> "14. This court in the case of P. Anand Gajapathi Raju v. P.V.G. Raju has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in

> view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."

54. Thus, in the cases of P. Anand Gajapathi Raju and Hindustan Petroleum Corporation Ltd., the Supreme Court held that once the parties are referred to the arbitration, nothing remains to be decided in the original action. The Supreme Court emphasized that once the court refers the parties to arbitration in terms of their agreement, there is no question of stay of proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. We are confronted with the question : whether the aforesaid observations made by the Supreme Court in the cases of P. Anand Gajapathi Raju and Hindustan Petroleum Corporation Ltd. can be applied to the admiralty action in rem or retention of security.

55. That there is no clear cut statutory provision dealing with such situation in India is not in dispute. In the circumstances, International conventions may be of guidance. Article VII of 1952 of Arrest Convention implies that where the parties have agreed to submit the dispute to arbitration, then, provided that the plaintiff brings proceedings before the Arbitral Tribunal within the time allowed by the court of arrest, the security will not be released but will remain in the court of arrest to satisfy any award in the arbitration proceedings.

56. Article VII of the International Convention on Arrest of

Ships, 1999 (Arrest Convention) provides as follows:

> "Jurisdiction on the merits of the case
>
> 1. The courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.
>
> 2. Notwithstanding the provisions of paragraph 1 of this article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.
>
> 3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:
>
> a. does not have jurisdiction to determine the case upon its merits; or
>
> b. has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article,
>
> such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent court or arbitral tribunal.
>
> 4. If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security

> provided shall, upon request, be ordered to be released.
>
> 5. If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release on condition that:
>
> a. the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and
>
> b. such recognition is not against public policy.
>
> 6. Nothing contained in the provisions of paragraph 5 of this article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

57. In different countries different law and procedure have been provided by law makers. Section 11 of the Arbitration Act, 1996 applicable in England provides that where the admiralty proceedings are stayed on the ground that the dispute must be referred to the arbitration, the court may order that the property arrested be retained as security for the satisfaction of any award given in the arbitration or order that the set of those proceedings must be conditional on the provisions of equivalent security for the satisfaction of any such award.

58. In USA, section 8 of the Federal Arbitration Act (Title `US Code') provides that; “If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.”

Section 3 of the enactment provides: “.....the court shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.....”

59. South Africa has an Admiralty Jurisdiction Regulation. Section 5(3)(a) thereto provides: “As court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings”.

60. It is, thus, seen that there are express statutory provisions now in place in UK, US and South Africa for retention of security.

61. In India, there is no such express statutory provision for retention of security. The Supreme Court in the case of m.v. Elisabeth observed that where statutes were silent and remedy has to be sought by recourse to basic principles, it was the duty of the court to device procedural rules by analogy and expediency. It was further observed that the High Courts in India are superior courts of record having original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers.

62. In m.v. Al Quamar, (2000)8 SCC 278, in para 43, the Supreme Court said that the court has to approach the modern problems with some amount of flexibility as are now being faced in the modern business trend. Flexibility is the virtue of the law courts. The pedantic approach of the law courts is no longer existing by reason of the global change of outlook in trade and commerce.

63. In Liverpool & London S.P. & I Association Ltd. v. m.v. Sea Success I (2004)9 SCC 512, the Supreme Court observed that where no statutory law operates in the field, interpretive changes must be

made having regard to everchanging global scenario. If the 1952 Convention had been applied though India was not signatory to it, there is no reason why 1999 Arrest Convention should not be applied.

64. The counsel for the plaintiffs submitted that prior to the enactment of section 26 of the Civil Jurisdiction and Judgments Act, 1982, there was no specific legal provision in England which permitted the English Court to order that a vessel arrested be retained as a security for the satisfaction of the arbitral award. Keeping in view the factual need, in Rena K, it was held that even if the suit was liable to be stayed in view of the arbitration clause between the parties, the arrested vessel or security furnished in lieu thereof shall not be liable to be released unconditionally. It was held that the cause of action in rem, being of a different character from a cause of action in personam, does not merge in a judgment in personam, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied. The submission of the counsel for the plaintiffs was that the principle evolved in Rena K did not accord with the scheme of the Indian Arbitration and Conciliation Act, 1996 and in any event, the application of that principle in India is unnecessary in view of the fact that the Arrest Convention, 1952 and the Arrest Convention, 1999 are as much part of statute as held in m.v. Elisabeth and m.v. Sea Success-I. He would submit that Article VII of the Arrest Convention, 1999 would permit the institution of a in rem action only for security in aid of the pending arbitral proceedings in which the merits of the dispute would be finally adjudicated. He

submitted that this position is fortified by Article 2(3) of the Arrest Convention, 1999 which reads:

> "A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State."

65. The counsel for the defendants, on the other hand, submitted that the suit itself filed by the plaintiffs was not maintainable before this court for want of jurisdiction in view of the arbitration clause in the charter party. He submitted that the suit simplicitor for security pending arbitration in foreign country is also not maintainable. Reference in this connection was made to section 45 of the Act of 1996 and also to the Division Bench judgment in the case of m.v. Indurva Valley wherein m.v. Mehrab was considered. The counsel for the defendants also relied upon the judgment of the Supreme Court in the case of P. Anand Gajapati Raju wherein it was held that once, the dispute is referred to arbitration, nothing remains to be decided in the original action and such proceeding are required to be terminated by passing orders of disposal of such action/suit. The reliance was also placed on the decision of the Supreme Court in Bhatia International.

66. Mr. V.C. Kotwal, the senior counsel who intervened in the

matter submitted that the very purpose of New York Convention is to facilitate on an international level the enforcement of arbitral awards. It would, therefore, be ironic that in seeking to uphold the convention and interpreting the state statute, the decision of the court should in fact achieve the opposite effect if it is held that the court's jurisdiction to in rem action is barred or that court must unconditionally dismiss the action already initiated or that the court cannot grant a stay pending arbitration. The very enforcement of the award would be hindered or rendered useless if assets are dissipated because of a court's inability to grant a maritime arrest or attachment or the action is required to be dismissed rather than stayed. He would submit that section 45 should be so interpreted which enables the court to exercise jurisdiction in accord with the Convention. He would submit that section 45 is silent as to whether in rem action should be stayed or dismissed and the non-obstante clause occurring in section 45 cannot be read to override the provisions of Letters Patent (clause 32) and the Colonial Courts of Admiralty Act and Admiralty Jurisdiction Act, 1861; it only overrides the provisions of Part I and the Civil Procedure code. Mr. Kotwal submitted that the court can exercise its jurisdiction in such matter on general principles or on the basis of Article VII of the Arrest Convention; the Arrest Convention being part of our common law. The senior counsel submitted that the power to release the arrested vessel is a distinct matter governed by Admiralty Law and the Arbitration Act cannot curtail that power. He submitted that m.v. Mehrab has considered all the relevant aspects and rightly held that the court in its admiralty jurisdiction has power to arrest the

ship to secure a claim in future or pending arbitration. Relying on the judgment of the Supreme Court in the case of Sukanya Holdings Pvt.Ltd. v. Jayesh H. Pandya and another, AIR 2003 SC 2252, the senior counsel drew the analogy that the Act of 1996 does not oust the jurisdiction of the Admiralty Court altogether. He referred to UK and US statutes and practices and by relying upon m.v. Elisabeth, he submitted that the court is entitled to take into consideration the practice of other signatory State and the decisions of the courts in these countries to decide which is the proper course to be adopted. His submission was that the very basis of exercising the maritime claim would be wholly frustrated if the statute is so interpreted as to deprive a maritime claimant, the rights which he hitherto enjoyed and enjoys in other countries although there is an arbitration agreement which he admits is not void and has not become inoperative.

57. Mr. Prashant Pratap also intervened in the matter. He submitted that merely because the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not ipso facto preclude one of them from bringing the action in the High Court and procure the arrest of the ship or otherwise proceed with the action. He would submit that the Civil Court jurisdiction is not ousted even in a case where there is an arbitration agreement. He exhaustively referred to Rena K principle and Article VII of the Arrest Convention, 1999 and submitted that by process of interpretative changes a procedure needs to be devised by which the security obtained by the arrest of a ship in an action in rem

is retained to satisfy the judgment or award of another court or arbitral tribunal. This, according to him, is necessary not only to do substantive justice to the claimant but also to ensure that the in rem remedy available to a claimant is not defeated by the fact that the claimant may have agreed to refer the disputes to the arbitration. He gave the following suggestions:

> (a) Apply the Rena K principle as applied by the English courts which were faced with a situation similar to what is prevalent in India today and retain security in the action notwithstanding the fact that the parties are referred to arbitration, if the plaintiff is able to show to the court prima facie that the defendant is unlikely to be able to satisfy the award or have the discretion to retain security in the action without further investigating whether the defendant is in a position to satisfy the award or not. In such an event, the security will be retained in the action and the plaintiff, after obtaining the award, can proceed with the action in rem and use the unsatisfied arbitration award for the purpose of an issue estoppel and obtain a judgment in his favour for which the security would then be available; or
>
> (b) The court can straightaway apply the principles set out in the Arrest Convention, 1999 and use the retention method described therein by retaining the security provided and recognizing any final decision that may be given in the arbitration, subject to the provisions of Part II of the Arbitration and Conciliation Act, 1996. This necessarily means that if the award is held to be enforceable under Part II of the said Act as a decree of the Court, then the security retained by the court in the action in rem would be available in satisfaction of the decree.

58. The English courts initially did not accept the action in rem for the sole purpose of obtaining security for arbitration proceedings. As a matter of fact, the Court of Appeal in the Vasso ruled that even though a writ in rem had been issued and the warrant for the arrest of the vessel was available, the continued arrest of the vessel would be an abuse of process to pursue both arbitration and an action in rem. However, Rena K principle was evolved by Brandon, J. that even if a suit is liable to be stayed in view of the arbitration clause between the parties, the arrested vessel or security furnished in lieu thereof was not liable to be released unconditionally. In UK, however, in the year 1982, Civil Jurisdiction on Judgments Act, 1982 was enacted and section 26 thereof substantially altered the aforenoticed legal position in as much as it gave the court the power to retain or order alternative security when court proceedings were stayed because of an arbitration agreement. Thus, the statutory sanction has been given to the court in England now to retain or alter the alternative security when court proceedings were stayed because of an arbitration agreement. Section 26 gives the court power to retain or order security for arbitration proceedings if the vessel had already been arrested or some other form of security has been put up before the court ordered a stay of proceedings.

59. Section 45 of the Act of 1996 requires the Judicial Authority to refer parties to the arbitration when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44 unless the Judicial Authority finds that the said agreement

is null and void, inoperative or incapable of being performed.

60. In the case of Shin-Etsu Chemical Co.Ltd. v. Aksh Optifibre Ltd. And another, 2005(7) SCC 234, the Supreme Court while dealing with section 45 by majority took the view that while section 8 leaves no discretion in the court in the matter of referring parties to arbitration, section 45 empowers the court to refuse the reference to arbitration if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed though such finding shall be prima facie and does not require final determinative finding by the court.

61. Obviously, if on prima facie view, the Judicial Authority finds that the arbitration agreement is valid, operative and capable of being performed, such authority shall have no discretion but to refer the parties to arbitration agreement. Section 45, though starts with non-obstante clause by overriding Part I and the provisions of Civil Procedure Code, cannot be read to exclude the admiralty jurisdiction in rem exercised by the High Court by virtue of Letters Patent clause 32, the Colonial Courts of Admiralty Act, 1890 and Admiralty Court Jurisdiction Act, 1861.

62. We find considerable force in the argument of the counsel for the plaintiffs that it is unnecessary to apply Rena K principle in view of the Arrest Convention, 1999 which is as much part of our law and the statute in view of the decisions of the Supreme Court in m.v.

Elisabeth and m.v. Sea Success. As a matter of fact, Mr. Prashant Pratap also suggested and, in our view, rightly that the court can straightaway apply the principle set out in the Arrest Convention, 1999. The view of senior counsel Mr. V.C. Kotwal is also in line with the view of the counsel for the plaintiffs and Mr. Prashant Pratap in this regard.

63. The application of Article VII of 1999 Arrest Convention, in admiralty jurisdiction in our view, would be purposive and preferable. The applicability of Arrest Convention, 1999 in the absence of any domestic law or inconsistency with the domestic law would be more in regard to the international general principles and interaction between the arbitration agreement and in rem action. Such purposive interpretation would be in consonance with broadly accepted international procedure by which the security obtained by the arrest of the ship in the action in rem is retained to satisfy the judgment and award of arbitral tribunal. Such construction shall neither be in conflict with section 45 of the Act of 1996 nor the judgment of the Supreme Court in P. Anand Gajapati Raju and Hindustan Petroleum Corporation Ltd. In the cases of P. Anand Gajapati Raju and Hindustan Petroleum Corporation Ltd., the subject matter did not relate to an action in rem nor the Supreme court was concerned with the question of retention method, as provided in 1999 Arrest Convention. The observation made by the Supreme Court in P. Anand Gajapati Raju that once the dispute has been referred to arbitration, nothing remains to be decided by the court has to be read

to have been made in the context of section 8 of the Act of 1996 and cannot be construed as wide as to cover action in rem or the retention method as provided in 1999 Arrest Convention. Rather, the application of Arrest Convention, particularly Article VII is in accord and in conformity with the observations made by the Supreme court in m.v. Elisabeth and m.v. See Success I.

64. The course suggested by us is also in accord and consonance with the legal position that was highlighted by the Supreme Court in the case of Sukanya Holdings Pvt.Ltd. wherein with reference to the interpretation of section 5 and section 8 of the Act of 1996, the Supreme Court observed thus-

> "For interpretation of Section 8, section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except section 8 there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if- (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do

> not take appropriate steps as contemplated under sub-sections (1) and (2) of section 8 of the Act."

65. Looking at section 45 which is part of Part II of the Act of 1996, it would be seen that it overrides part I which includes section 5 and provides that the Judicial authority shall not intervene except where so provided in the part. Section 5, therefore, does not come in the way of section 45. 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 matter 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. There is no other provision in Chapter I in Part II which otherwise prohibits the court in entertaining in rem action in respect of which there is arbitration agreement between the parties and the arbitration tribunal has not been constituted. The position that Judicial Authority shall not refer the parties to the arbitration under Section 45 if the agreement is null and void, inoperative or incapable of being performed also suggests that validity of the agreement is open to the scrutiny by the Judicial Authority and, therefore, its jurisdiction is not ousted at threshold.

66. Take the present case where hypothetically speaking the

defendants would have given up the arbitration, in which event the suit shall be proceeded with and it cannot be said that the High Court has no jurisdiction to deal with such suit.

67. We are of the view, absent explicit legislation providing that action in rem may be used to obtain and retain security even though the merits of the dispute are to be determined in the arbitration proceedings and that subject matter of the dispute falls with admiralty jurisdiction, some procedure which is not prohibited and that is also not inconsistent with the law be devised which helps in advancing the cause of justice in accord with Article VII of Arrest Convention, 1999.

68. We shall, accordingly, articulate our conclusions thus:

(i) An application under section 9 of the Arbitration and Conciliation Act, 1996 is not maintainable for the arrest of the vessel for obtaining security of an Award that may be made in arbitration proceedings. The view to the contrary in m.v. Indurva Valley, to that extent is overruled.

(ii) An action in rem (in admiralty jurisdiction) for recovery of the claim and arrest of the vessel where the parties have agreed to submit the dispute to arbitration can be maintained and in such case if by way of an interim measure, the

vessel is arrested or the security provided to obtain the release of the vessel, matter shall proceed in accord with Article VII of the International Convention on Arrest of Ships, 1999.

(iii) If the proceedings are brought within the time so ordered by the Court before the arbitral tribunal, any final decision resulting therefrom shall be recognised and given effect with respect to the arrested ship or to the security provided in order to obtain its release provided that the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for defence and in accord with the provisions contained in Arbitration and Conciliation Act, 1996.

(iv) With regard to clauses (ii) and (iii), it is, however, clarified that retention of security shall remain a matter of discretion and it shall be for the court to pass appropriate order in that regard after taking into consideration all relevant circumstances.

Let the notices of motion No.2780 of 2005 and 3287 of

2005 be posted before the Admiralty Judge for disposal in the light of our answer to the reference.

(R.M.LODHA, J.)

(S.A.BOBDE, J.)

(S.J. VAZIFDAR, J.)