AIR 2002 GUJARAT 229
GUJARAT HIGH COURT
K. M. MEHTA , J.

Admiralty Suit No. 12 with Misc. Civil Appln. No. 35 of 2000, D/- 26 - 9 - 2000

Shipbuilding and General Repairsco Vestalco Ltd., Greece Petitioner v. MV River Ex-MV Smart 1 Ex-MV Global Sky Ex-Aleksandr-K, India Respondent

Letters Patent, Cl.32 - Admiralty suit - Application for interim order - Suit for recovery of amount based on repair of vessel - Found to be barred by time - Defendant, a purchaser of vessel purchasing vessel without any encumbrance - Defendant thus making out prima facie case - Business of defendant-purchaser would suffer if arrest of ship is continued and if ship is released plaintiff will not suffer any injury - Undertaking given by defendant that if suit is decreed, defendant would pay amount claimed by plaintiff - Order for release of vessel passed.

AIR 1996 SC 516, Foll.
(Paras9 9.1)

Cases Referred	Chronological Paras
Elinoit Hellonil Petroleum Co., S.A. v. M. V. Anny, AIR 2000 Bom 6	7.20
World Tanker Carrier Corporation v. S. N. P. Shipping Services Pvt. Ltd., AIR 1998 SC 2330 : 1998 AIR SCW 2244	7.19
VSNL v. M. V. Kapitan Kud, AIR 1996 SC 516 : 1995 AIR SCW 4415	6.3 , 7.20 , 9.1
Isha Marbles v. Bihar State Electricity Board, (1995) 2 SCC 648 : (1995) 2 JT 626	7.14
M. V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd., Goa, AIR 1993 SC 1014 : 1993 AIR SCW 177	6.5 , 8.8 , 9.1
Algemene Bank Nederland NV v. Satish Dayalal Choksi, AIR 1990 Bom 170	7.10
In the matter of Despina, (1982) 2 Lloyds Report 558	7.18 , 8.6
Shah Babulal Khimji v. Dayaben D. Kaniya, AIR 1981 SC 1786 : (1981) 4 SCC 8	7.5

Cases Referred	Chronological Paras
Gopal Singh v. Punjab National Bank, AIR 1976 Del 115	6.1
Smt. Satya v. Teja Singh, AIR 1975 SC 105 : 1975 Cri LJ 52	7.8
Roshanlal Nuthiala v. R. B. Mohan Singh, AIR 1975 SC 824	6.1
Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur, AIR 1971 SC 1201	7.15
Janak Raj v. Gurdilal Singh, AIR 1967 SC 608	7.15
Maganlal Bechardas v. Shah Keshrimal Dalichand, 1961 Guj LR 625	8.7
Schwarz and Co. (Grain) Ltd. v. St. Elepterio, 1957 Probate Division 179	6.3 , 6.5
Bank of India v. John Bowman, AIR 1955 Bom 305 : (1955) 57 Bom LR 345	8.7
Setabganj Sugar Mills v. Benozir Ahmed, AIR 1952 Cal 116	6.1

Cases Referred	Chronological Paras
Brijlal Ramjidar v. Govindram Gordhandas Seksaria, AIR 1947 PC 192	6.1
Brijlal Ramjidas v. Govindram Gordhandas, AIR 1943 Bom 20	6.1
Arunachalam Chettiar v. Mohd. Salihu, AIR 1928 Mad 133	7.11
Mohd. Kassim and Co. v. Seeni Pakir, AIR 1927 Mad 265 (FB)	7.11

M. J. Thakore, Sr. Counsel with Y. N. Ravani, for Petitioner; K. S. Nanavati, Sr. Counsel with Bharat T. Rao and Shaktisinh Gohil, for Respondent.

Judgement

1. ORDER :-Ship Building and General Repairs Co., Vestalco Ltd.-plaintiff having its office and works at Piraeus in Greece, has filed this admirality suit under Cl. 32 of the Letters Patent for obtaining decree in the sum of US Dolloar 6,84,653 equivalent to Rs.2,94,39,000/- in favour of the plaintiff and against the defendant and also arrest of MV RIVER EX-MV SMART i EX MV GLOBAL SKY EX-ALEKSANDR defendant's vessel together with her engines, machineries, boats and others for the due satisfiaction of the decree passed under the suit. The plaintiff has also filed Miscellaneous Civil Application No. 35 of 2000 for interim orders. In support of the contentions, the plaintiff has also filed written submissions.

FACTS :

1. The plaintiff is carrying on business of ship building and general repairs. It was stated in the plaint that the plaintiff carried out repairs of MV River ex-MV Smart ex-MV Global Sky ex-Aleksandr Ognivtsev Ex-Athina K.-defendant vessel at Piraeus during the period 28-5-1994 to 5-7-1994. For the said repairs the plaintiff raised an invoice in the sum of US $ 6,17,750.

2. As defendants failed to make payment of the said amount and, therefore, the plaintiff was entitled to recover the said amount being the cost of repairs and overhaul. The plaintiff stated in or around May, 1998 that the defendant vessel arrived at Port of Suez, Egypt. At that time, the plaintiff through their power of attorney moved the President of Suex Court of first instance for preventive attachment/arrest of the vessel M.V. Global Sky flying the flag of St. Vincent and Grenadines and lying in the Port and Harbour of Suez for security in the sum of US $ 6,17,750 being the cost of repairs. The President of the Court of first instance imposed a preventive attachment/arrest on the defendant vessel on 24-5-1998 vide Preventive Attachment Order No. 45 for security in the sum of US $ 6,17,750 for the maritime debt of the plaintiff. The said order was validly served on 26-5-2000.

3. Thereafter the plaintiff on 1-6-1998 within eight days of the attachment/arrest being served on the captain filed an action being law Suit No. 36 of 1998 in the Court of first instance for recovery of their claim of US $ 6,17,750 (Six lakh seventeen thousand seven hundred and fifty) with interest. The plaintiff sought confirmation of the order of attachment/arrest passed earlier and for sale of the vessel by public auction fixing the conditions for such sale in view of the aforesaid order dated 24-5-1998 continued to operate pursuant to the filing of the suit. On 10-5-2000 the competent judicial Court of Suez passed judgment in law Suit No.36 of 1998 holding that the preventive attachment/ arrest ordered on 24-5-1998 being No. 45 of 1998 on the Vessel MV Global Sky was correct and further holding that the first and second defendant to pay to the US $ 6,17,750 plus legal interest from the date of the suit, i.e. 1-6-1998.

4. It was further stated that during the pendency of the aforesaid proceedings on 22-12-1999 the Red Sea Port Authorities have administratively sold the vessel in the sum of LE 1,04,000 (One lakh four thousand). It was stated that the defendant applied to the Court for permission to carry out sea trial of the defendant vessel. The said permission was granted by the Court and

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during that period defendant vessel escaped from the Egyptian territorial sea waters on 1-4-2000.

5. It was stated that in the plaint and ultimately at the time of hearing that the defendant-vessel has arrived at the Port of Alang Ship breaking yard (Dist. Bhavnagar) and is lying in the territorial waters of India near the Alang Ship breaking yard. Therefore, the plaintiff filed the present suit for recovery of US $ 684653 equal to Rs. 2,94,39,000/- as well as the arrest of the ship. When the matter came up for hearing before this Court on 5-7-2000, this Court passed an order of arrest of the ship. Thereafter, the defendants have appeared and filed their reply to the interim injunction application and the plaintiff has also filed rejoinder and ultimately the matter was heard at great length.

6. On behalf of the plaintiff-Mr. M. J. Thakore, learned Senior Counsel with Mr. Yogesh Ravani, learned Advocate appeared. He has stated that the plaintiff under Law of Egypt applied for arrest/conservatory attachment of the vessel vide application No. 45 of 1998 on 24-5-1998. The said order of arrest/conservatory attachment was served on 26-5-1998 on the vessel and amongst others, the Red Sea Port Authorities. It was further submitted that Red Sea Port Authorities (the Auctioneer) had sold the vessel on 22-12-1999 when the vessel was under arrest and in the custody of the Court in an action in rem initiated against the vessel by the plaintiff bearing arrest Order No. 45 of 1998 followed by Suit No. 36 of 1998. Therefore, such sale was effected without permission of the Court of First Instance at Egypt in whose custody the vessel was. Such sale cannot give any title to the purchaser.

6.1. It was further stated that the purchaser's title is subject to the charge on the vessel created by the Court of first instance and the charge of the Court is attached to the vessel, irrespective of where the vessel is and irrespective of in whose hands the vessel is. The sale effected by Red Sea Port Authority cannot be compared with a sale by an Admiralty Marshal. It was further stated that the plaintiff has to file a second suit based on the judgment obtained in the foreign Court treating the judgment as conclusive under S. 13 of the C.P.C. It was stated that since the suit is against the respondent, namely, vessel which is lying within the territorial waters of India abutting the State of Gujarat, therefore, the present admiralty suit has been filed. In support of the same, the learned senior counsel Mr. Mihir Thakore has relied on the decision in the case of Brijlal Ramjidas v. Govindram Gordhandas Seksaria, reported in AIR 1947 192. The Privy Council after referring to the judgment in the case of AIR 1943 Bom 201, in para 8, has observed as under :-

"Some difficulty has been occasioned in the interpretation of S. 13, by the definition of 'judgment' contained in S. 2. Notwithstanding this definition, their Lordships agree with the learned Chief Justice that the expression 'foreign judgment' in S. 13 must be understood to mean "an adjudication by a foreign Court upon the matter before it." The Chief Justice pointed out that "it would be quite impracticable to hold that a 'foreign judgment' means a statement by a foreign Judge of the reasons for his order," since 'if that were the meaning of "judgment" the other section (viz. S. 13) would not apply to an order where no reasons were given."

In para 10 of the judgment, the Privy Council has further observed as follows :

"This argument was disposed of satifactorily by both Chagla, J. and the appellate Court who rightly pointed out that the question whether a foreign Court is the "proper Court" to deal with a particular matter according to the law of the foreign country is a question for the Courts of that country. There is no doubt that some Court in Indore was "a Court of competent jurisdiction." It was for the High Court of Indore to interpret its own law and rules of procedure, and its decision that the High Court was the "proper" Court must be regarded as conclusive. It may be added that the appellants appear to have consented to the transfer of the proceedings from the District Judge's Court to the High Court."

He has further relied on the decision of the Supreme Court in the case of Roshanlal Nuthiala v. R. B. Mohan Singh, AIR 1975 SC 824. In para 26 the Supreme Court has held thus :-

". . . . . .Normally, a money claim due under a foreign decree can be enforced on the original side by a suit under Ss. 9, 13 and 26 of C.P.C. in the appropriate Court and the executing Court has no jursidiction

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to straightway levy execution under O. 21, C.P.C. An exception is provided in this regard by the Governor General's order and a special forum viz. the High Court is indicated, when the decree to be executed is of the Supreme Court of Pakistan. All this pertains to jurisdiction and in the Associated Hotel's case this Court negatived executability solely on grounds jurisdictional or quasi-jurisdictional. Section 14 thus comes to the rescue of the defendant in this suit (sic)."

The learned counsel for the plaintiff has further relied on the following decisions :

1. Gopalsingh Hirasingh v. Punjab National Bank, AIR 1976 Delhi 115

2. Setabganj Sugar Mills v.Benozir Ahmed, AIR 1952 Cal 116

6.2. It was further submitted that as the plaintiff suit is for arrest of the 'res' based on the judgment in foreign Court and, therefore, an action in rem can lie only in the Gujarat High Court which has Admiralty jurisdiction. It was further stated that the foreign judgment of the Court of First Instance at Suez dated 10-5-2000 in an action in rem against the vessel is a judgment in rem. It was further stated that it shall be conclusive as to the matters directly adjudicated upon between the plaintiff and the vessel, since (i) it has been pronounced by a competent Court, (2) it has been given on the merits of the case (3) it appears that on the face of the proceedings to be founded on the Arrest Convention 1952 which is the correct international law applicable to Greece, India and Egypt (4) it is not opposed to natural justice since in an action in rem if the owner opts not to appear and leave the respondent for condemnation there is no question of the judgment becoming opposed to natural justice (5) it has not been obtained by fraud, the defendants are not able to establish any fraud and (6) it is not based on a claim founded on a breach of any law in India.

6.3. It was further stated that the suit is filed for the purpose of obtaining a decree on the basis of a judgment of a foreign Court dated 10-5-2000 and is within the period of limitation prescribed under Art. 101 of the Limitation Act. It was further stated by the plaintiff that this Court at this stage may not hold that the suit is not maintainable much less in absence of pleadings or declare the hopelessness of the plaintiff's case. All the aforesaid issues are complex issues of law on which no opinion should be expressed at the interlocutory stage. He has further stated that in view of the judgment in case of Schwarz

and Co. (Grain) Ltd. v. St. Eleterio, 1957 Probate Division 179 which has been approved by the Hon'ble Supreme Court in the case of VSNL v. M. V. Kapitan Kud, AIR 1996 SC 516 if the vessel is released there will be no scope for the plaintiff to get any relief at the end of the trial. He has further stated that the Court should only stay the action on the ground when the hopelessness of the plaintiff's claim is beyond doubt. It is not beyond doubt but on the contrary the plaintiff has been arguable, even though difficult case even in law the action would be allowed to proceed to trial. The Supreme Court also observed that the ship is a foreign ship and if it leaves the shore of Indian territorial waters, it is difficult to get hold of it and it may not return to the jurisdiction of Indian Court, the claim thereby even if successful would remain unexecutable or land in trouble in private international law in its enforcement.

6.4. The plaintiff has filed this suit for claiming US $ 6,84,653. The plaintiff has prayed for a decree in favour of the plaintiff and against the defendant in the principal sum of US $ 617750 with interest US $ 66903 in all US $ 684653 equivalent to Rs. 2,94,39,000/- with further interest at such rate the Court orders and the defendant to furnish security in the sum of US $ 684653 for due satisfaction of the judgment passed against the defendant and for arrest of the ship. For that purpose the plaintiff has relied on the judgment passed by the competent Court in favour of the plaintiff on 10-5-2000.

6.5. The learned counsel for the plaintiff has relied on the decision of the Supreme Court in the case of M. V. Elisabeth v. Harwan Investment and Trading Pvt.Ltd., Goa, reported in AIR 1993 SC 1014 and stated that in view of this judgment, this Court has jurisdiction to order arrest of vessel

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which is under the jurisdictional territorial water of this Court. He also relied on Vol. 1(i) admiralty at page 382, para 304 regarding foreign aspect of Admiralty jurisdiction and para 345 regarding extent of jurisdiction and contended that this Court has jurisdiction to order arrest of the vessel. He has also relied on the judgment of (1957) Probate Division 179 in the case of Schwarz and Co. (Grain) Ltd. v. St. Elefterio Ex-Arion (Owners) and contended that foreign jurisdiction binding on them.

7. Mr. K. S. Nanavati, learned Sr. Counsel with Mr. B. T. Rao, learned counsel has made the following submissions. He has also filed written submissions. It was stated by the defendant in the reply that the suit of the plaintiffis based on the repair of the ship which was done in 1994 and, therefore, the present suit is completely time-barred. It was further stated that the suit of the plaintiff is based on the judgment delivered by Sues Court in Law Suit No. 36 of 1998. The judgment passed in the Egyptian Court is not judgment in rem and in persona judgment and, therefore, also the present suit is not maintainable. It was further stated that the defendant-vessel had been sold by the Red Sea Port Authority under authority and lawful statutory sales and the said sale was made on 22-12-1999. The effect of such sale is to confer upon the purchaser complete title to the vessel free from all lien and encumbrances It was stated that Sannal Aly Fouda, on behalf of Open Sea Company, was the purchaser of the vessel at the said statutory sale. Full consideration L.E. 697949.80 (only Six lakh ninety seven thousand nine hundred forty nine Egyptian Pounds and eighty piasters) was paid for acquisition of the vessel free from all lien and encumbrances, at the auction held by the Port Authorities (defendant No. 4 to the said suit). It is further stated that under Egyptian Law upon such an auction sale, under the provisions of the relevant Egyptian statute the ownership of the vessel stood validly transferred to the purchaser and all prior claims

thereon stood extinguished. Whatever claim that any person may have had against the vessel could only now lie against the sale proceeds. Pursuant to the sale on 22-12-1999, the new owner deposited with Port authorities the consideration of LE 6,97,949.80 on 18-1-2000.

7.1. He has stated that it is the case of the plaintiff that the Court of first instance exercised its jurisdiction under the Maritime Trade Law. The plaintiff has chosen to produce only few provisions of the said law. They relied on the entire text of the provisions of the said law in this behalf being Law No. 8/90. It was further submitted that since the jurisdiction is exercised under the aforesaid law, the question would be whether the Egyptian Court could have entertained an action in rem against the ship in question. It was also submitted that Art. 6 of the Maritime Trade Law provides that every Egyptian ship shall fly the flag of Arab Republic of Egypt. Article 10 reads as under :

"Article 10 - The Court of first instance within the jurisdiction of which is located the office at which the ship flying the flag of the Arab Republic of Egypt is registered shall be concerned with examining the Actio in Rem (Real Action) connected with that ship, unless otherwise prescribed in the law."

7.2. Now the said action was heard by the Court of Suez on 30-5-2000, when after reading pleadings and perusing papers, the Court has pleased to issue a judgment nullifying the seizure of the defendant-vessel and accepted the claim of the present owners of the defendant-vessel and directed the persons who had claim against the defendant-vessel, to agitate the same against her sale proceeds. A copy of the said judgment, letter dated 18-1-2000, from the new owners to the Port Authorities enclosing payment and copy of the certificate issued by the Port Authorities confirming the sale are filed in separate compilation of documents. It was further stated that in view of the said judgment, the judgment dated 10-5-2000 no longer survives and has no effect and no legal sanction. The said judgment has been really set aside.

7.3. It was further submitted that the Court of First Instance of Suez would entertain action in rem only in respect of the ship flying the flag of the Arab Republic of Egypt. There is no other provisions in the Act conferring jurisdiction on the Court of First Instance to entertain any 'action in rem'. It is not shown that the Court of First Instance at Suez had any jurisdiction, independent of Art. 12 to entertain an action in rem against any foreign vessel. It is an admitted position that the ship in question is a foreign ship flying the flag of St. Vincent and Grenadines and not the flag of Arab Republic of Egypt. The Court of First Instance at Suez, therefore, would have no jurisdiction to entertain an action in rem against the ship in question. The judgment of the Suez Court, therefore, is not a judgment in rem.

7.4. It was further submitted that

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Article 60 provides for preventive attachment for settlement of a marine debt which inter alia includes debt in respect of repairs. However, the Egyptian Court has not passed an order of preventive attachment under Art. 60 of the Maritime Trade Law and therefore it was further submitted that the claim made by the plaintiff is not a maritime claim and according to them only three claims fall within the category of maritime lien in any country and claim for reports is not one of them. It was submitted that the claim for repairs is not a maritime claim.

7.5. It is further submitted that in any case even if Maritime Trade Law No. 8/98 were to be applied, the maximum period available under the Act for enforcing the claim is three years from the date it arose. It was further submitted that judgment

of the Court of First Instance at Suez is not a judgment as defined in Section 2(9) of the C. P. Code which reads thus :-

"Sec. 2(9). judgment means the statement given by the Judge of the grounds of a decree or order."

7.5(a).. It was submitted that the term 'judgment' occurring in Section 13 of the C.P.C. will have to be understood as defined in Section 2(9) of the C.P.C. To be a judgment within the meaning of Section 2(9) read with Section 13, the proceedings should have terminated and have culminated in 'decree' or 'order'. Section 2(2) defines the term 'decree' as under :

"Section 2(2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

7.5(b). . It has been submitted that from the operative portion of the document purporting to be judgment, the proceedings before the Suex Court of First Instance is not concluded.

7.5(c). It was submitted that proceedings of the Egyptian Court do not stand concluded inasmuch as the 'judgment and decree' or 'order' produced before this Court does not purport to dispose of the proceedings finally and conclusively by the Suez Court of First Instance. The document produced with the list dated 29-8-2000 cannot be treated as a 'judgment' within the meaning of Section 2(9) and Section 13 of the C.P.C. The learned counsel for the defendant therefore submitted and relied on the judgment of the Supreme Court in the case of Shah Bahulal Khimji v. Dayaben D. Kaniya, reported in (1981) 4 SCC 8 : (AIR 1981 SC 1786) wherein the Hon'ble Court held that every order passed by a trial Judge would not amount to a judgment. It has been further held that the word 'judgment' has undoubtedly a concept of finality in a broader sense and it should decide all questions or issues in controversy so far as the trial Judge is concerned and leave nothing else to be decided. It was further submitted that the Court was exercising civil jurisdiction for adjudicating of a commercial dispute and not exercising the admiralty jurisdiction.

7.6. It was further submitted that judgment of the Suez Court is not conclusive under Section 13 of the C.P.C. because it has not been directly adjudicated upon between the same parties, (ii) it is not shown to have been pronounced by a Court of competent jurisdiction; (iii) it is not being given on the merits of the case and (iv) it appears on the face of the proceedings to be founded on an incorrect view of international law.

7.7. It was further submitted that a perusal of the judgment shows that proceedings have been proceeded ex parte. There is no appearance on behalf of the contesting defendants namely, defendants Nos. 1 and 2. No defence has been filed. No issue has been raised. No evidence, oral or documentary, has been laid by the plaintiff. The Court has not examined the correctness or otherwise of the claim. There is no application of mind to either the pleadings or to the merits of the claim or to the law applicable to the subject. There is, thus, no adjudication of the claim on merits. This cannot be said to be a judgment given on the merits of the case. It is well settled that a judgment not given on the merits of the case is not conclusive as to any matter adjudicated upon between the parties.

7.8. The learned counsel has also relied on the judgment of the Supreme Court in the case of Smt. Satya v. Teja Singh, reported in AIR 1975 SC 105 where the Supreme Court has held that validity of a foreign judgment rendered in a civil proceeding must be determined in India on the terms of Section 13. The relevant observations

of the Hon'ble Supreme Court at para 49 are as under :-

"If the judgment falls under any of the clauses (a) to (e) of

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Section 13, it will cease to be conclusive as to any matter thereby adjudicated upon. The judgment will then be open to collateral attack on the grounds mentioned in the five clauses of Section 13."

7.9. In view of the above observations of the Hon'ble Supreme Court if the judgment falls under any of the clauses of Section 13, it will cease to be conclusive as to any matter thereby adjudicated upon and will be open to collateral attack on the grounds mentioned in Section 13.

7.10. In this connection the learned Sr. counsel, Mr. K. S. Nanavati for the defendant has placed reliance on the decision of the Bombay High Court in the case of Algemene Bank Nederland NV v. Satish Dayalal Choksi, reported in AIR 1990 Bom 170. In para 29 the Court observed as follows :-

"In my view, in these circumstances, the case before me falls under the ratio laid down by the Privy Council in Keymer's case (AIR 1916 PC 121). The decision of the Hong Kong Court is not given on examination of the points at controversy between the parties. It seems to have been given ex parte on the basis of the plaintiff's pleadings and documents tendered by the plaintiff without going into the controversy between the parties since the defendant did not appear at the time of hearing of the suit to defend the claim. The present judgment, therefore, is not a judgment on the merits of the case. Hence this is not a fit case where leave can be granted under Order 21, Rule 22 of the Code of Civil Procedure for the purpose of executing the decree here."

7.11. Similarly, the learned counsel for the defendant has also relied on the following decisions:

1. AIR 1927 Madras 265; 2. AIR 1928 Madras 133.

7.12. It was further submitted that the judgment on the face of it is founded on an incorrect view of international law. As pointed out earlier, the claim on account of repair does not fall in the category of maritime lien which can attach to the ship under the International Law. The Court is Suez has also not found that this claim gives rise to maritime lien according to the law prevailing in Greece. For that purpose reference has been made to the passage in Halsbury, Vol. I para 537 where it has been observed that claim on account of repairs do not give rise to maritime lien. The maximum period within which the claim for repair, assuming that it give to right a Maritime lien, has to be enforced within a period of three years, if the provisions of Maritime Trade Law (Art. 38) is applied. If International Law as mentioned in Halsbury's Law of England Vol. 1(1) paras 365 and 366 also contemplate that claim must be enforced within the period of limitation. The judgment therefore has been founded on an incorrect view of the International Law and therefore not conclusive under Section 13 of the C.P.C.

7.13. It was further submitted that in any case, conclusiveness attaches to any matter directly adjudicated upon between the parties. The Court of Suez has not adjudicated directly or otherwise the claim of the plaintiff and no decree for that amount has been passed.

7.14. It was further submitted that even under general principles as applicable in India, the auction purchaser for value without notice purchases the property free from all prior claims and encumbrances. In support of this proposition, the learned counsel for the

defendant has relied on the judgment of the Supreme Court in the case of Isha Marbles v. Bihar State Electricity Board, reported in (1995) 2 SCC 648. In para 56 of the judgment, the Supreme Court held as follows :-

"From the above it is clear that the High Court has chosen to construe Section 24 of the Electricity Act correctly. There is no charge over the property. Where that premises comes to be owned or occupied by the auction purchaser, when such purchaser seeks supply of electric energy he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the Board. The Board cannot seek the enforcement of contractual liability against the third party. Of course, the bona fides of the sale may not be relevant."

7.15. The learned counsel for the defendant has further relied on the following decisions:

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1. (1971) 1 SCC 757 : (AIR 1971 SC 1204); 2. AIR 1967 SC 608 (Paras 13 and 18).

7.16. The defendant further submitted that in view of the judgment dated 30-5-2000 which has been annexed with the Civil Application, all the rights on the ship came to an end and they get transferred to the sale proceeds. For that purpose, the defendant has relied on the certificates issued by the Red Sea Port Authority and the Ministry of Maritime Transport where it has been clearly certified; (i) that Open Sea Company for investment and tourism is the auction purchaser of the ship; (ii) possession of the ship has been handed over to them; (iii) the auction purchaser has purchased the ship free from all prior encumbrances; (iv) all the prior claims stand transferred to the sale proceeds. For that purpose they relied on the documents, namely, the certificates, issued from the Book of Deposits (Suez Court of First Instance Deposits Office), Certificate issued by Managing Director of Red Sea Port Authority, regarding sale of vessel, certificate issued by Department of Maritime Transport, certificate from General Authority of Red Sea Port General Department of Affairs, dated 2-8-2000, certificate issued by Ministry of Marine and Transport, International Convention on Maritime Liens and Mortgages 1993, copy of advertisement published in Egypt Newspaper for auction of Global Sky published by Suez Port Authority, xerox copy of documents in Arabic language and also affidavit in rejoinder on behalf of respondent No. 1 dated 1-8-2000. Further list of documentary produced on 9-8-2000, namely, certificate of Red Sea Port authority dated 6-8-2000 for M. V. Vessel. Statement issued by Ministry of Sea Transport dated 27-7-2000 regarding selling the vessel by Red Sea Port authority. Certificate issued by Ministry of Marine Transport of Suez dated 6-8-2000. Certificate issued by Ministry of Maritime Transport.

7.17. The defendant has filed reply dated 22-7-2000 and stated that the vessel has been sold by the Port Authority under administrative sale and the sale was made on 22-12-1999 conferring upon the purchaser complete title to the vessel free from all lien and encumbrance. It was submitted on behalf of the Open Sea Company that Mr. Sanaa Aly Fouda was the purchaser of the vessel at the said statutory sale. Full consideration L.E. 697999.80 was paid for acquisition of the vessel free from all lien and encumbrances, at the auction held by the Port Authorities. It was further submitted that under Egyptian Law upon such an auction sale, under the provisions of the relevant Egyptian statute the ownership of the vessel stood validly transferred to the purchaser and all prior claims thereon stood extinguished. Whatever claim that any person may have had against the vessel could only lie against the sale proceeds. It was further submitted that pursuant to the sale on

22-12-1999 the new owner deposited with Port Authorities the consideration of LE 6,97,949.80 on 18-1-2000. It was further stated that the said action was heard by the Court of Suez on 30-5-2000 when after the reading pleadings and perusing papers, the Court was pleased to issue a judgment nullifying the seizure of the Defendant vessel and accepted the claim of the present owners of the Defendant vessel and directed the persons who had claim against the Defendant vessel to agitate the same against her sale proceeds. A copy of the said judgment, letter dated 18-1-2000 from the new owners to the Port Authorities enclosing payment and copy of the Certificate issued by the Port Authorities confirming the sale were filed before the Court. It was further stated that in view of the said judgment, judgment dated 10-5-2000 no longer survives and has no effect and no legal sanction.

7.18. In view of the same it was further submitted that even under general principles as applicable in India, the auction purchaser for value without notice purchases the property free from all prior claims and encumbrances. It was further submitted that admittedly the present defendant is the second purchaser of the ship from the auction purchaser, who purchased the ship at the auction held by the Red Sea Port Authority. Applying the principle In the matter of Despina, reported in 1982 (2) Lloyd's report 558, it cannot be enforced against the auction purchaser.

7.19. The learned counsel for the defendant has also relied on a decision in the case of World Tanker Carrier Corporation v. SNP Shippling Services Pvt. Ltd., AIR 1998 SC 2330 and contended that this Court has no jurisdiction in view of the ratio laid down by the Supreme Court. As against that the

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plaintiff submitted that this was a suit filed under Merchant Shipping Act for limited action and therefore the said decision of the Supreme Court is not applicable to the facts of the case.

7.20. In view of the same, it was further submitted that it is well settled that interim relief can be granted only on a prima facie case being made out. As held in AIR 1996 SC 516 the Court would terminate the arrest if the plaintiff's case is hopeless or the claim is frivolous and vexatious. It was stated that case for arrest was not made out, the Bombay High Court in the judgment in case of Elinoil Hellenic Petroleum Company S.A. v. M. V. Anny L (Ex-Alexia 5) reported in AIR 2000 Bom 6 answered the issue against the plaintiff and terminated the arrest. In para 20 of the judgment the Court observed as under :-

"Since there is no legal support to the contentions of the plaintiffs that supply of necessaries constitutes maritime liens and since the plaintiffs have failed to prove that apart from Art. 4 of the International Convention on Maritime Liens and Mortgages, 1993, something more can be considered by the Court as constituting maritime liens, the issue is required to be answered in the negative and against the plaintiff."

7.21. It may be stated at this stage that a review application was filed and the same was also rejected which has also been produced before me by the learned counsel for the defendant.

7.22. If for every claim made in admiralty suit because the claim is made the ship is arrested and continued in arrest unless bailiff furnished. As a result, serious injustice will result to the defendant and will be coerced in conceding into the demands made by the plaintiff. It is submitted that for the reasons aforesaid, there is no maritime claim which can be attached to the ship for which it could arrest, the claim made is vexatious, frivolous and by way of abuse of process of law.

7.23. In view of the same, it would result into travesty of justice, if a foreign ship belonging to a foreign national is arrested and kept under arrest till the conclusion of the proceedings, when the cause of action is not alleged to have arisen within the territorial jurisdiction of this Court, no reliable proof in support of the claim has been produced, there is admittedly no privity of contract between the present owner of the ship and the plaintiff, the suit is based solely on a document which undisputedly, has no evidentiary value and no maritime lien is attached to the ship after it has been sold by public auction for recovery of statutory dues.

8. The plaintiff thereafter filed further written submissions on rejoinder against the defendant's submissions which were made earlier. In the said submissions, the following points were stated :

8.1. Article 10 talks of action in rem with respect to the flying the flag of Arab Republic of Egypt. Article 10 nowhere prohibits action in rem against foreign vessels.

8.2. Article 10 gave additional power to the Court of first instance to entertain an action in rem even against a vessel, the owner whereof has an office within the jurisdiction of Egyptian Court and the vessel is flying the flag of the Arab Republic of Egypt. In India, if the vessel is an Indian vessel action in rem is not entertainable in contradistinction of Article 10 the Court to entertain even on action of rem against the vessel despite it being owned by a person having an office in Egypt. Article 10 nowhere prohibits an action in rem being entertained by the Court of first instance at Suez and no other article also prohibits action in rem being entertained against the vessel. In fact, the action taken is an action in rem since it is taken in terms of a standard summons in an action in rem and is taken despite the owner not being in Egypt. The judgment therefore is also a judgment in rem.

8.3. It was submitted that the suit was maintainable in Egypt for a claim of repairs irrespective of whether it was a maritime claim or a maritime lien. It was further submitted that the order of arrest clearly refers to the Brussels Treaty of 1952 pertaining to attaching of marine ships by virtue of law No. 1 of 1955 which provides that it shall be unallowable to levy an attachment on a ship raising the flag of one of the contracting countries within the jurisdiction domain of another contracting country except pursuant to a maritime debt and Art. 1 of the said agreement provides that a maritime debt means a debt originating from the supply of products or equipment required to exploit the ship or its maintenance in any

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place. It is relying on these provisions that the attachment order on the vessel was passed. Copy of the attachment order was produced along with the submission and arrest order has been passed under the 1952 arrest convention and not 1993 convention.

8.4. . It was further submitted that the judgment is a foreign judgment and is conclusive for the following reasons:-

(i) It has been given by a competent Court.

(ii) It has been given on the merits of the case.

(iii) It has been given between the same parties (i.e. the plaintiff and the same vessel).

(iv) It is not found on incorrect view of an international law. International Law is not what is laid down by the Maritime Lien Convention of 1993 since the said Convention is not ratified by the minimum 10 countries as required by the Convention. The Arrest Convention of 1992, which is the International Law clearly contemplates the repair claim being one of the

maritime claim for which the vessel can be arrested.

(v) The judgment is not barred by limitation for the reasons given hereafter.

(vi) The action being an action in rem if the vessel owner does not file any appearance the vessel is required to be condemned and sold. In the circumstances such orders would always be ex parte but they are ex parte only because of the voluntary non-appearance by the owners.

8.5. It is further stated that a suit based on foreign judgment is entertainable under Section 13 of the C.P.C. by any competent Court. It is further stated that Admiralty Court is not different from any other Civil Court except that the Admiralty Court gets jurisdiction to entertain a suit because of the presence of the vessel in territorial waters of India.

8.6. It was further submitted that D.R. Thomas in his well known treatise on Maritime lien has clearly laid down that a beneficiary of a foreign judgment is in the same position on a maritime licence. It was further submitted that the distinction between Maritime Lien and Maritime claim is obliterated by the arrest Convention of 1952 which does not draw any distinction between a Maritime Claim and a Maritime Lien and therefore the vessel can be arrested for ship repairs and a judgment in such an action can be enforced in a foreign Court. The judgment in the case of Despina GK does not lay down the correct law. It also relied on the Supreme Court in the case of M. V. Elizabeth, AIR 1993 SC 1015 which also provides law of Maritime Lien.

8.7. It was further submitted that the argument of the defendant that the property has changed hands and therefore cannot be arrested is also ill-founded in view of the fact that the purported sale effected by the Red Sea Port Authorities is also not a valid sale which would give a proper title to the purchaser even against the plaintiff whose suit was pending when the sale was effected. The plaintiff has relied on the decision of this Court in the case of Maganlal Bechardas v. Shah Keshrimal Dalichand, 1961 Guj LR 625 wherein this Court has held that once a property is brought under attachment by an order of the Civil Court, the property is in custodia legis under Section 64A of Civil Procedure Code and Revenue Authority has no right or power to remove the property from the custody of the Court and to deal with that property. The Mamlatdar had no authority to have the property in question sold by public auction under Section 155 of the Bombay Land Revenue Code so long as the property was under attachment and therefore in the custody of the Court. It was also submitted that this judgment followed the Division Bench judgment of the Bombay High Court in the case of The Bank of India v. John Bowman, reported in (1955) 57 Bom LR 345 : (AIR 1955 Bom 305). It was submitted that a property which was arrested or attached cannot be sold by any other executive authority. The sale effected by Red Sea Port Authority of the vessel MV River is therefore void. It was further submitted that 1993 convention has not been ratified by the minimum number of countries, namely, 10 countries till today. In the circumstances, 1993 convention has not come into force as yet anywhere in the world. The said convention cannot be considered as common law of nations till the same is ratified and adopted by a minimum number of 10 countries. The said convention therefore has not come into force anywhere in the world, much less in India.

8.8. It was submitted that the judgment of the Bombay High Court and the review judgment are therefore completely erroneous

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and not good law and has to be ignored as it interprets para 76 of the decision of the Supreme Court in MV Elizabeth's case (AIR 1993 SC 1014) (supra). It was further submitted that Article 37 of the Maritime Trade Law has no application to the facts of the case since the mandatory sale contemplated therein is sale effected by a competent Court under Art. 70 and not sale by Port Authorities when the ship is under attachment of the Court. Reliance is placed on the strict procedure for mandatory sale laid down in Articles 70, 71, 72 and 73 of the said law.

9. After considering the rival submissions of plaintiff and the defendant at length and the authorities which have been cited by both the sides, in my view, the suit filed by the plaintiff regarding repairs is prima facie time barred suit. As regards, plaintiff's claim which is based on foreign judgment, the defendant has made submissions at length and therefore also the plaintiff has failed to make out a prima facie case in this behalf. The defendant has also been able to prove that the defendant has purchased the vessel without any incumbrance and therefore the ship cannot be arrested when the defendant has purchased the ship without any liability. Therefore, the defendant has been able to make out a prima facie case in this behalf.

9.1. As regards balance of convenience is concerned if the ship is arrested during the pendency of the suit, the defendant will suffer irreparable loss, injuries and hardship which cannot be compensated in terms of money to the def. It is no doubt, true that in view of the decision in the case of MV Elizabeth (AIR 1993 SC 1014) (supra) this Court has jurisdiction when the ship has entered the territorial water of Bhavnagar. The defendant has purchased the vessel in auction and his business will be suffered immensely if arrest of the ship is continued. On the other hand if the vessel is released, the plaintiff will not suffer any injury much less irreparable loss and hardship in this behalf. Keeping in mind the judgment of the Hon'ble Supreme Court in the case of Videsh Sanchar Nigam Ltd. v. M. V. Kapitan Kud, reported in AIR 1996 SC 516 where the defendant has given an undertaking that if ultimately the suit is decreed, the defendant will pay the amount which has been claimed by the plaintiff, I order the release of the vessel on following conditions.

The defendant MV River Ex MV Smart 1 Ex-MV Global Sky Ex-Aleksandr - K shall give an undertaking of US Dollars 684653 equivalent to Rs. 2,94,39.000/- that if the plaintiff ultimately succeeds the defendants will undertake to pay the said amount to the plaintiff.

After pronouncement of the judgment Mr. Darshan Parikh, learned advocate for the plaintiff has prayed that this order may be stayed and arrest order of the ship may be continued for some time. Mr. B. T. Rao, learned advocate, for the defendant has vehemently objected to the same. However, in this case, originally the arrest order was passed on 5-7-2000.

(sic) been continued till today. I, therefore, direct that the arrest order of the ship shall be continued till 3-10-2000. It is needless to say, that the undertaking given by the plaintiff shall continue up to 5-10-2000.

Order Accordingly .