

**Appellant Vs. Respondent**

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**SooperKanoon Citation :** [sooperkanoon.com/1085414](http://sooperkanoon.com/1085414)

**Court :** Kolkata

**Decided On :** Sep-24-2013

**Judge :** Biswanath Somadder

**Appellant :** Appellant

**Respondent :** Respondent

**Judgement :**

IN THE HIGH COURT AT CALCUTTA ADMIRALTY JURISDICTION ORIGINAL SIDE Present: THE HONBLE Mr.JUSTICE BISWANATH SOMADDER A.S.No.1 of 2012 PORTO MAINA MARITIME SA -VERSUS- OWNERS & PARTIES INTERSTED IN THE VESSEL M.V.GATI MAJESTIC For the Plaintiff: Mr.Ratnanko Banerjee, Advocate Mr.Sotarup Banerjee, Advocate Mr.Subhojit Roy, Advocate Mr.Soubhagya Sen, Senior Advocate For Defendant: Mr.Tilok Bose, Senior Advocate Mr.Asit Kumar De, Advocate Judgment on:

24. 09/2013 BISWANATH SOMADDER, J.

- This Court had, suo motu, raised a preliminary issue with regard to exercise of its Admiralty Jurisdiction in respect of the concerned vessel, which carries an Indian flag and is registered under the Indian laws.

Plaintiff was directed to serve notice upon the defendant.

After notice was issued, the defendant entered appearance.

It was submitted by the learned counsel for the plaintiff that the plaintiff has a cause of action against the defendant vessel, M.V.Gati Majestic (hereinafter referred to as the vessel) arising out of damages of collision.

The act of collision had taken place at Haldia Docks between the vessel and the vessel owned by the plaintiff, i.e., M.V.Porto Maina.

The claim is for damages to the vessel, M.V.Porto Maina for a sum of Rs.36,66,000/-.

He submitted that an Admiralty Suit is maintainable in this Court against the Indian vessel for a claim on account of damages arising out of a case of collision against the defendant vessel.

The learned counsel for the plaintiff has taken this Court through the provisions of the Colonial Courts of Admiralty Act, 1890, as well as the Colonial Courts of Admiralty (India) Act, 1891.

He submitted that the Admiralty Court Act, 1861, provides the scope of Admiralty jurisdiction to be exercised by the Admiralty Courts in India.

He also submitted that the extent of Admiralty jurisdiction to be exercised by Admiralty Courts has been further extended by the interpretation given by the Honble Supreme Court in the case of M.V.Elisabeth and Others versus Harwan Investment and Trading Co.and Another reported in AIR 199.SC 101.= 1993 Supp (2) SCC 43.(hereinafter referred to as M.V.Elisabeth).According to him, the Admiralty jurisdiction under the Admiralty Court Act, 1861, does not prohibit or restrict any claim as against an Indian vessel.

In this context, he referred to section 7 of the said Act of 1861, which permits the High Court of Admiralty to have jurisdiction over any claim for damages done by any ship.

He further submitted that the Letters Patent, 1865, continuing the jurisdiction of the High Court, provides in clause 32 that the High Court shall have and exercise Maritime jurisdiction.

According to the learned counsel, the scope of Admiralty jurisdiction given in the Brussels Convention of 1952 or the Administration of Justice Act, 1956, in England, which jurisdiction has been held to be exercised by the Indian Courts of Admiralty jurisdiction by the Supreme Court in the case of M.V.Elizabeth (supra) does not, in any manner restrict or prohibit arrest of an Indian vessel under Admiralty jurisdiction by the Admiralty Courts in India.

He also referred to the judgment of Bombay High Court in the case of Crown Maritime Co.(I) LTD.Vs Barge Salina II and ORS.reported in 2008 (1) Bom.

CR 14.to support his contention that the Admiralty jurisdiction of this Court can be invoked in respect of an Indian flag flying vessel.

The other judgments he referred to in order to buttress his submissions are as follows:

1.

Jayaswal Shipping Company versus The owners and parties interested in Steamship S.S.Leelavati.

reported in AIR 195.Calcutta 415 (Vol.41, C.N.142) 2.

Liverpool and London S.P.and I Asson.

LTD.versus M.V.Sea Success I and Anr.

reported in (2004) 9 SCC 512.

3. Epoch Enterrepots versus M.V.WON FU reported in (2003) 1 SCC 305.

4. Chhatrapat Singh Singh Dugar versus Kharag Singh Lachmiram and Others reported in 44 Indian Appeals page 11.

5. Mt.

Sharbati Devi versus Kali Pershad reported in AIR 194.Lah 119.

6. M/S.Crescent Petroleums LTD.versus m.v.MONCHEGORSK.

& another reported in AIR 200.Bom 161.

On the other hand, the learned counsel appearing on behalf of the defendant has sought to distinguish the submissions made by the learned counsel for the plaintiff by also referring to the judgment of the Supreme Court in M.V.Elisabeths case (supra).He submitted that the Supreme Court was dealing with arrest of a foreign ship in respect of outward cargo, i.e., cargo carried from India to places abroad.

He further submitted that the Supreme Court noted that section 6 of the Admiralty Act, 1861 is confined to inward cargo i.e., goods carried from places abroad to England and Wales.

(to be substituted for India).The Supreme Court traced the development of law in England prior to 1947 and held that by virtue of development of law in England prior to 1947 including enactment of statutes, subsequent to Admiralty Courts Act, 1861, English Courts could arrest vessels both for inward and outward cargo.

By virtue of Article 225 and 372 of the Constitution of India, whatever developments took place in England prior to 1947, should apply with equal force so far as India is concerned and therefore, Indian Courts should also be entitled to exercise jurisdiction to arrest foreign ships, both for inward and outward cargo.

He, however, referred to paragraph 36 of M.V.Elisabeths judgment to highlight the point that the admiralty jurisdiction was not available if at the time of institution of the proceeding, any owner or part owner of the ship was domiciled in England (to be read as India in the context of the present matter).He further submitted that the Administration of Justice Act, 1956, became a statute in England subsequent to Indias independence and therefore, by virtue of Articles 225 and 372 of the Constitution of India, it can have no manner of application.

He also referred to section 1 (4) of the said Act of 1956, which removed restriction based on ownership of the ship and jurisdiction applied to all ships or aircrafts, whether British or not and whether registered or not and wherever the residence or domicile of their owner may be and in relation to all claims.wheresover arising.

He submitted that, unfortunately, there was no such similar provision in any Indian statute, as contained under section 1 (4) of the Administration of Justice Act, 1956.

In the absence of such provision similar to section 1 (4) of the Administration of Justice Act, 1956, the statutes in England prior to 1947, will apply so far as India is concerned, by virtue of Articles 225 and 372 of the Constitution of India.

Further referring to paragraph 36 of M.V. Elisabeths judgment, he submitted that it makes it amply clear that prior to independence, the admiralty jurisdiction of English Courts even for damages done by ship was not available, if at the time of institution of proceedings, any owner or part owner of ship was domiciled in England.

He further submitted that by reason of the observations made by the Supreme Court in paragraph 36 of M.V. Elisabeths judgment and in view of Articles 225 and 372 of the Constitution of India, the admiralty law in India would be governed by the English statutes which were in force prior to 1947 and which do not allow exercise of Admiralty jurisdiction in respect of Indian vessels.

He also submitted that Indian ships have been defined in section 21 of the Merchant Shipping Act, 1958, to include ships wholly owned by a citizen of India or a company which has place of business in India (which is applicable to the defendant herein). He submitted that there is no fundamental difference between an action in rem or in personam so far as Indian vessels were concerned.

He referred to Deichland, reported in 1989 (2) Lloyds Law Report 113 at page 116 and submitted that in that judgment, the purpose of admiralty action in rem has been summarized and the Court of Appeal held that the whole purpose of admiralty action in rem was procedural in nature, whereby the property of a defendant was arrested as means of compelling his appearance and bail or of providing fund for securing compliance with the judgment.

Once the defendant had appeared in the action, it could then proceed in personam.

He submitted that in the facts and circumstances of the instant case, the defendant has already entered appearance, pursuant to the notice issued by the order dated 15th May, 2012.

He further submitted that in respect of an Indian vessel, procedural benefit by institution of action in rem is meaningless since an Indian company can easily be served and there is no need for arrest of any property to compel the appearance of such defendant nor is there any necessity by any India company to provide fund for securing compliance with the judgment.

He submitted that such requirement would be wholly contrary to the underlined principles laid down under Order 38 Rule 5, Code of Civil Procedure, 1908.

He submitted that the fact that Civil Procedure Code applies even in respect of Admiralty suits is now well recognized.

The Admiralty Rules for the High Court at Calcutta have statutory force and were framed under section 7 of the Colonial Court Act, 1890.

Rule 51 of the Admiralty Rules for the High Court at Calcutta provides, inter alia, that where no other provision is made by these Rules, proceedings in suits brought in the Court in exercise of its jurisdiction under Colonial Court Act, 1890, shall be regulated by rules and practice of the Courts in suits brought in it in the exercise of its ordinary original civil jurisdiction.

He, thereafter, referred to the case of Raman Tech.

& Process Engg.

Co.and another versus Solanki Traders reported in 2008 (8) SCC page 302 wherein it has been held in paragraph 4 that merely having just and valid claim of prima facie case will not entitle the plaintiff to any order of attachment before judgment, unless it is established that the defendants action is an attempt to remove or dispose of its assets with intention of defeating the decree that may be passed.

He also submitted that it has also been held that the purpose of Order 38 Rule 5 is not to convert unsecured debt into a secured debt and that such power should be used sparingly and strictly in accordance with rule.

The provisions contained under Order 38 Rule 5, as interpreted by the Supreme Court in Raman Tech.

& Process Engg.

Co. and Another (supra) makes it clear that for Indian vessels, Order 38 Rule 5 principles have to be observed.

In an action for a suit in rem, only the vessel is a party defendant, i.e., the plaintiffs only recover against the property of the owner.

The strict language of Order 38 Rule 5 will militate against property of Indian defendant being proceeded with, without first establishing a prima facie case in personam against the Indian defendant.

After considering the submissions made by the learned counsel for the parties and before deciding on the issue of jurisdiction, it may be worthwhile to dwell briefly on the advent and evolution of Admiralty law.

The expression admiralty law., used in many countries with Anglo Saxon legal traditions adds to the terminology debate.

Admiralty law refers to the body of law including procedural rules developed by the English Courts of Admiralty in their exercise of jurisdiction over matters pertaining to the sea.

This jurisdiction was distinctively different from that of the common law courts.

Admiralty law thus originally encompassed those subject matters over which the admiralty courts possessed inherent jurisdiction imbued through a process of evolution.

Subsequently, these subject matters which bore a maritime character, were codified and enumerated by statute.

Interestingly enough, while in the English language the word admiralty

originates in the office of the Lord Admiral, its root meaning is derived from Arabic.

The term shipping law is used to describe the law relating to ships and shipping.

It is mostly used interchangeably with the term maritime law and encompasses all aspects of ships, shipping and maritime transportation.

It is both private and regulatory in scope and includes commercial maritime law, maritime safety, pollution prevention and labour law as well as admiralty law in common law jurisdictions, but does not extend to the public international law of the sea.

In common law jurisdictions, admiralty law often connotes the maritime law relating to wet

matters i.e., those involving ships when they are at sea, as distinguished from dry

matters also involving ships but pertaining only to commercial aspects that are essentially land-based issues.

While maritime law consists of two broad elements, dividing it into two neat compartments and labelling them public

and private, is rather an oversimplification.

The shipping industry is involved in many matters of general law and non-maritime legal transactions which are not part of the *lex maritima*.

It is well acknowledged that many aspects of commercial maritime law are in fact derived from the *lex mercatoria*.

The bifurcation may be attributable to perceptions that are politically tinged.

As professor Gold states - the new law of the sea has in the past decade addressed itself to almost all areas of ocean use except the one that since before the dawn of history, has been preeminent - the use of the ocean as a means to transport people and their goods from place to place on this planet, so much more of which is water than is land.

Marine transport has been discussed in an almost abstract manner, as if it did not really fit or belong within the public domain but needed to be confined to the more private.

region of international commerce, which was considered to be outside the scope of the law of the sea.

By contrast, writing in 1930, Professor Sanborn had this to say - The words maritime law., as commonly used today, denote that part of the whole law which deals chiefly with the legal relations arising from the use of ships.

But in the earlier period, of which this work treats, the law maritime had a considerably wider scope.

It dealt not merely with the modern Admiralty law, but also with the primitive ancestors of some branches of our modern commercial law, dealt, too, with the germs of that public law which we today style international law.

(Source: - Maritime Law and Admiralty Jurisdiction: Historical Evolution and Emerging Trends by Dr.

Proshanto K.

Mukherjee).The Supreme Court, while rendering its decision in M.V.Elisabeth, had delved deeply into the scope and jurisdiction of High Courts in India in respect of Admiralty matters.The elaborate discussion traces the advent and evolution of its Admiralty jurisdiction right from the time when the Chartered High Courts came into existence, till the early 1990s.

However, to avoid prolixity, this Court refrains from dwelling at length upon the observations made by the Supreme Court in M.V.Elisabeth, except to the extent it

is imperative for the purpose of deciding the present issue.

Now, coming back to the issue in hand, it may not be necessary to consider all the judgments referred to and relied on by the learned counsel for the parties barring two, which have been rendered in the factual backdrop of Indian flag flying vessels.

In *S.S.Leelavati*, the concerned vessel was an Indian flag flying vessel registered under the Indian laws.

However, the issue in the suit was not whether admiralty jurisdiction could be attracted in respect of an Indian flag flying vessel, but on the point of construction of the words, domiciled in England and Wales.

appearing in section 5 of the Admiralty Court Act, 1861 and whether it could be dovetailed in the topography of India and when so does, what will be the scope and extent of the meaning of those words.

The Supreme Court, while overruling *S.S.Leelavati*, observed in *M.V.Elisabeth*, to the effect, that the judgment of the High Court was based on the reasoning that High Court as a Court of Admiralty was required to be treated as a separate entity exercising a distinct and specific or prescribed or limited jurisdiction.

The Supreme Court held, inter alia, that such reasoning was based on restrictive construction, which was not warranted by the provisions of the Constitution.

In *Crown Maritime Co.(I) LTD.(supra)* - which has been decided by the Bombay High Court in favour of its Admiralty jurisdiction being attracted in a case concerning an Indian flag flying vessel - it is noticed that the learned Single Judge had the occasion to refer to the Supreme Courts judgment rendered in *M.V.Elisabeth (supra)*.in extenso.

While relying on *M.V.Elisabeth* he observed, inter alia, in paragraph 33 as follows:- Merely because the observations have been made in the context of the power of arrest of a foreign vessel does not mean that this Court would lose its jurisdiction, merely because the vessel is flying India Flag.

I am of the opinion that all controversies on this aspect stand concluded as the last word is spoken by the Supreme Court.

The Supreme Court in para 66 of its decision very clearly holds that High Courts in India are superior courts of records, they have Original and Admiralty Jurisdiction, they have inherent and plenary powers and unless expressly or impliedly barred and subject to the Appellate or Discretionary Jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including jurisdiction to determine their own powers. Such being the Authority and the jurisdiction of this Court as enunciated in the decision of *M.V. Elisabeth* (supra), the Supreme Court naturally turned down the request before it to hold that the Andhra Pradesh High Court would have not jurisdiction..

In paragraph 35, while referring to paragraphs 90 and 91 of *M.V. Elisabeth*, the Court went on to observe as follows: - .The Supreme Court observes that all persons and things within the waters of the State shall fall within the Courts jurisdiction, unless specifically curtailed or regulated by Rules or International Law.

The observations of the Supreme Court cannot be read out of context.

The Supreme Court never meant that its observations should be construed so as to take away jurisdiction of the Admiralty Court to proceed against Indian Flag Vessel.

In paragraph 36, it has been categorically observed that after the authoritative pronouncement of the Supreme Court in *M.V. Elisabeth*, there should be no doubt about the jurisdiction of that Court (Bombay High Court). Thereafter, it was observed to the effect that in the absence of any express bar and in the light of clear pronouncement of the Supreme Court, there was no substance in the contention of the learned advocate for the defendant on the issue of jurisdiction of the Bombay High Court.

This Court, however, is in respectful disagreement with the view expressed by the learned Single Judge of the Bombay High Court in *Crown Maritime Co.(I) Ltd.s* case (supra). Although *M.V. Elisabeth* has been extensively referred to and relied

on by the learned Single Judge, a significant and categorical observation made by the Supreme Court in M.V.Elisabeth has not been taken notice of in the judgment.

In paragraph 83 of M.V.Elisabeth, the Supreme Court has clearly observed as follows:- The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship.

(emphasis supplied by this Court) The above observation of the Supreme Court makes it categorically clear that it is only the presence of a foreign ship.

in Indian waters which determines the attraction of Admiralty jurisdiction of the High Court.

It can, therefore, be held that the observations made by the Supreme Court in M.V.Elisabeth - as referred to by the Bombay High Court in Crown Maritime Co.(I) Ltd.s case (supra) - cannot be an authority for the proposition that a High Court, in its Admiralty jurisdiction, has the power to entertain, try and determine an action against an Indian flag flying vessel.

In view of the enunciation of the principle for attracting Admiralty jurisdiction of the High Court - as observed by the Supreme Court in paragraph 83 of its judgment rendered in M.V.Elisabeth, (quoted hereinbefore) - there remains no manner of doubt, whatsoever, that it was not open to the plaintiff to invoke the Admiralty jurisdiction of this Court in respect of an action against M.V.Gati Majestic, being an Indian flag flying vessel registered under the Indian Laws.

In such circumstances, the concerned department is directed to de-register the plaint together with all interlocutory applications, forthwith.

The plaintiff, however, is at liberty to approach a Court of competent Civil jurisdiction for instituting the suit, afresh.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis.

(Biswanath Somadder, J.)