Epoch Enterrepots vs M.V. Won Fu on 29 October, 2002

Equivalent citations: AIR 2003 SUPREME COURT 24, 2002 AIR SCW 4409, 2002 (3) ARBI LR 683, 2002 (8) SCALE 224, (2002) 8 JT 546 (SC), 2002 (8) JT 546, 2002 (10) SRJ 360, 2002 (6) SLT 258, 2003 (1) SCC 305, (2003) 1 WLC(SC)CVL 153, (2002) 3 ARBILR 683, (2002) 7 SUPREME 415, (2003) 1 RECCIVR 65, (2002) 8 SCALE 224

Author: Umesh C. Banerjee

Bench: Umesh C. Banerjee

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           CASE NO.:
Appeal (civil)  7039 of 2002

PETITIONER:
Epoch Enterrepots

RESPONDENT:
M.V. WON FU

DATE OF JUDGMENT: 29/10/2002

BENCH:
Umesh C. Banerjee & Y.K. Sabharwal.

JUDGMENT:
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JUDGMENT BANERJEE,J.

Leave granted.

Issuance of warrant for the arrest of the vessel M.V. WON FU berthed at Madras Port has been the principal controversy before the Madras High Court in its Admiralty Jurisdiction.

The plaintiff being the appellant herein instituted a suit for recovery of damages of 11 lakhs for breach of contract with interest at the rate of 24% per annum by reason of loss and damages suffered and caused by breach of contract by the defendant vessel. The factual element we will refer shortly here after but presently be it noted that against the refusal to entertain the suit and the consequent dismissal of the same before the learned trial judge, the plaintiff moved the appellate forum in the High Court but having failed to obtain the relief the petition for special leave under Article 136 has been moved before this Court and this Court at the admission stage itself upon issuance of notice and upon the grant of leave as appears herein before proceeded to deal with the issue without much of procedural formalities. Turning attention to a brief reference on to the factual score it appears that the plaintiff being a sole proprietor concern stands involved in the business of

export of mines and minerals especially in Feldspar. In the usual course of events plaintiff entered into an agreement with M/s. SAN I. Mining Company at Taiwan to export Feldspar and to complete the agreement between the parties the plaintiff entered into an agreement with said to be defendant's ship disponent owner, to export the cargo of Feldspar from Tuticorin harbour to Taiwan. The agreement is stated to be evidenced in a fixture note dated 20.10.1995. The relevant extract whereof are as below:

> "It is this day mutually agreed between Taiyo Senpaku Kaisha, Ltd. Tokyo as disponent owners and Epoch Entrrepots. Madras as charterers on the following terms and conditions
>
> - Vessel: X/Y WONFU AS DESCRIBED.
>
> - Cargo: XIN 8.000 MI IN IF BLS FELDSPAR UPTO VSLS FULL CAPA CHOP
>
> - L/D Port: 1SB SP Tuticorin India/1-SB 1 SP TAICHUNG, TAIWAN
>
> -Laycan: 25th Oct-5th Nov.1995
>
> -L/D Rate: 1.200 XT PWDSSEX BIU/1.500MT PWDSEEX W IUARC
>
> -Freight: VSD 25.00 PWI FIOST BSS 1/1
>
> -Payment: 100 pet frt payable w/I 5 banking days acol S/BLS/L FET prepaid
>
> -Full frt TB deexed earned by ovrs CH is discountless non-returnable whether CGO/VSL Lost or not lost.
>
> -CGO TB loaded in unobstructed main hold only
>
> -Demurrage: USS 4000.00/DHD Vis be
>
> -Agents Owners Agents be ..
>
> ```
> Disponent owners                                    Charterers
> TAIYO Senpaku Kaisha Ltd.                    Manager
> M. Takahashi, Managing                 EPOCH Entrepots
>           Director                                  Suguna Apartments
>                                                  12-A, Lloyds Road,
>                                                   Madras  600 014"
> ```

On the factual matrix the learned Senior Advocate Mr. ATM Sampath rather emphatically contended that the contract stands completed by the signing of the fixture note and the plaintiff has also acted in terms therewith by exporting stock

8400 MT of Feldspar to Taiwan through the defendant's vessel on 26.10.1995. It has been the contention that the defendant's ship has failed to act in terms of the fixture note by reason wherefor the plaintiff has not been able to send the cargo to the purchaser as per the schedule thus exposing the plaintiff to suffer a loss of 11 lakhs by reason of a deliberate act of default to ship the cargo on the vessel. As detailed above the learned single Judge dismissed the suit and recorded inter alia the following:

"The plaintiff sought for the claim of arrest of the vessel and for damages. The arrest of the vessel can be sought for only under the Admiralty Jurisdiction. Nothing was performed with regard to loading of cargo in the ship. The plaintiff states that since the contract for export of goods was dropped, the vessel must be arrested. Since no shipment of the cargo has taken place, the Admiralty Jurisdiction of this Court cannot be invoked. The fixture note Ex.P1 is between the plaintiff and Taiyo Senpaku Kaisha Ltd. No contract has been entered into between the plaintiff and the defendant, the owner of the vessel WON FU. Absolutely there is no disponent to link the defendant with the alleged contract and that there was a concluded contract between the plaintiff and the defendant. In the absence of any specific evidence to prove that there was a contract between the plaintiff and the defendant. I am quite unable to accept the case of the plaintiff. I hold that there is no privity of contract between the plaintiff and defendant. If at all there was breach of contract, the plaintiff has to seek their remedy under the proper forum for breach of contract. Since no shipment had taken place and as the ship is not involved for the breach of contract by the disponent owner or any other party the Admiralty Jurisdiction of this Court cannot be involved and arrest of vessel cannot be sought for. The facts and circumstances of the case do not come under the Admiralty Jurisdiction of this Court. Further, the suit is also not filed against the proper party. The name of the owner of this ship is not mentioned in the short cause title. It is not clear from the plaint as to against whom the plaintiff sought the relief. The suit has not been properly framed."

It is this conclusion and the finding of the learned Single Judge stands accepted by the Division Bench without however much elucidation on the same and as such we refrain ourselves from recording herein any further save that the appeal by the plaintiffs stands rejected and the present appeal before this Court by reason therefor.

Without however going to the issue of privity of contract which has been one of the basic reasons for the learned single judge to come to the conclusion, be it noted that the suit has been framed for the arrest of the vessel MV WON FU in the Admiralty Jurisdiction of the High Court at Madras. At this juncture however a brief historical perspective of the Admiralty Jurisdiction in the country may be adverted. The three erstwhile Presidency High Courts (in common and popular parlance Chartered High Courts), namely, Calcutta, Bombay and Madras were having the Letters Patent for the conferment of the ordinary original civil jurisdiction and by reason of the provisions contained therein read with the Admiralty Court Act, 1861 and subsequent enactment of Colonial Courts of Admiralty Act, 1890 and Colonial Courts of Admiralty (India) Act.

The High Courts of these three Presidency towns were conferred with the same jurisdiction as was vested in the High Court of England and the High Courts were declared to be otherwise competent to regulate their procedure and practice as would be deemed necessary corresponding to the Indian perspective in exercise of the admiralty jurisdiction by way of rules framed in that regard. There is no manner of doubt that there existed or is existing any fetter in regard to the exercise of admiralty jurisdiction in so far as the three High Courts at Calcutta, Bombay and Madras are concerned. It is in this context observations of this Court in M.V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd., Goa [AIR 1993 SC 1014] seem to be of some assistance. This Court in paragraph 26 of the report observed:

> "Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. what the Act of 1890 did was, as stated earlier, not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. As the Admiralty jurisdiction of the English High Courts expanded with the progress of legislation and with the repeal of the earlier statues, including in substance the Admiralty Court Acts of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts a corresponding growth and expansion of admiralty jurisdiction during the pre-independence era. But a restrictive view was taken on the question in the decision of the High Courts cited above."

Turning attention on to the appeal presently before us the cardinal issue arises for consideration stands out to be the applicability of the concept of Maritime Lien on the basis of the fixture note as above stated and alternatively as to whether the fixture note by itself would give rise to a right in rem thereby enabling the plaintiff to initiate proceedings under Admiralty Jurisdiction of the High Court at Madras.

Before embarking on to the discussions apropos above, certain notions as regards the constituents of Maritime Liens ought to be noticed:

> the Encyclopedia Britannica has the following to state as regards Maritime Lien and the same reads as below:
>
> "Maritime liens: although admiralty actions are frequently brought in personam, against individual or corporate defendants only, the most distinctive feature of admiralty practice is the proceeding in rem, against maritime property, that is, a vessel, a cargo, or "freight", which in shipping means the compensation to which a carrier is entitled for the carriage of cargo.

> Under American maritime law the ship is personified to the extent that it may sometimes be held responsible under no liability. The classic example of personification is the "compulsory pilotage" case. Some State statutes impose a penalty on a ship owner whose vessel fails to take a pilot when entering or leaving the waters of the State. Since the pilotage is thus compulsory, the pilot's negligence is not imputed to the ship owner. Nevertheless, the vessel itself is charged with the pilot's fault and is immediately impressed with an inchoate maritime lien that is enforceable in Court.
>
> Maritime liens can arise not only when the personified ship is charged with a maritime tort, such as a negligent collision or time tort, such as a negligent collision or personal injury, but also for salvage services, for general average contributions and for breach of certain maritime contracts."

Incidentally, be it noted that this concept of maritime lien did come for judicial scrutiny before the Courts often and it is Sir John Jervis who probably for the first time in The Bold Buccleugh (1851 (7) Moo P.C. 267) defined the maritime lien as below :

> ".a maritime lien is well defined .. to mean a claim or privilege upon a thing to be carried into effect by legal process . that process to be a proceeding in rem. This claim or privilege travels with the thing into whosoevers possession it may come. It is incohate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached."

While the definition provided by Sir John Jervis, as above, stands accepted in various other decisions of the English Courts, the definition by Atkin L.J. in The Tervaete (1922 (P) 259) became subject matter of criticism by reason of its failure to distinguish a maritime lien and its maritime right of action in rem. Atkin L.J., however, in The Tervaete defined the maritime lien as below :

> " of the right by legal proceedings in an appropriate form to have the ship seized by the officers of the Court and made available by sale if not released on bail."

In M.V. AL Quamar v. Tsavliris Salvage (International) Ltd. & Ors. (2000 (8) SCC 278: AIR 2000 SC 2826) this Court upon reference to Elisabeth's case (supra) has the following to state as regards the attributes of maritime lien. This Court observed in paragraphs 33 to 36 as below:

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

damage to others or to their property and thus must itself make good that loss. (See in this context 'Maritime Law' by Christopher Hill, 2nd Edn.)

34. As regards the concept of proceeding in rem and proceeding in personam, it should be understood as actions being related to the same subject-matter and are alternative methods pertaining to the same claim and can stand side by side.

35. In this context, reference may also be made to the observations of this Court in M.V. Elisabeth's case, (AIR 1993 SC 1014) (supra), as stated below :-

"47. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs, regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship travelling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

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

36. In Halsbury's Laws of England, the nature of action in rem and the nature of action in personam is stated to be as below:

> 310. Nature of actions in rem and actions in personam. An action in rem is an action against the ship itself, but the view that if the owners of the vessel do not enter an appearance to the suit in order to defend their property no personal liability can be established against them has recently been questioned. It has been stated that, if the defendant enters an appearance, an action in rem becomes, or continues also as, an action in personam; but the Admiralty jurisdiction of the High Court may now in all cases be invoked by an action in personam, although this is subject to certain restrictions in the case of collision and similar cases, except where the defendant submits or agrees to submit to the jurisdiction of the Court.

The foundation of an action in rem is the lien resulting from the personal liability of the owner of the res. Thus an action in rem cannot be brought to recover damages for injury caused to a ship by the malicious act of the master of the defendant's ship, or for damage done at a time when the ship was in the control of third parties by reason of compulsory requisition. On the other hand, in several cases, ships allowed by their owners to be in the possession and control of charterers have been successfully proceeded against to enforce liens which arose whilst the ships were in control of such third parties.

The defendant in an Admiralty action in personam is liable, as in other actions in the High Court, for the full amount of the plaintiff's proved claim. Equally in an action in rem a defendant who appears is now liable for the full amount of the judgment even though it exceeds the vale of the res or of the bail provided. The right to recovery of damages may however be affected by the right of the defendant to the benefit of statutory provisions relating to limitation of liability."

In M.V. AL Quamar (supra) this Court spoke of two attributes of maritime lien as noticed herein before. The International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages at Brussels in 1967 defined the maritime lien to be as below :

> a. wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;
>
> b. port, canal and other waterways and pilotage dues; c. claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel; d. claims against the owner based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water in direct connection with the operation of the vessel;
>
> e. claims for salvage, wreck removal and contribution in general average.
>
> Incidentally, the Admiralty Court Act, 1861, read with the International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 1926 read with Brussels Arrest (Of Seagoing Ships) Convention 1952 and Brussels Maritime Liens Convention 1967 clearly indicate that a claim arising out of an

agreement relating to the use and/or hire of the ship although a maritime claim would not be liable to be classified as maritime lien. (See in this context Thomas on Maritime Liens).

Mr. Sampath, learned Senior Advocate with all the emphasis in his command contended that the breach of the agreement in the facts of the matter under consideration cannot but be ascribed to be a maritime lien, whereas Mr. Sundaram, learned Senior Advocate appearing for the respondents rather strongly refuted the same and contended that even assuming that there was in fact an agreement in existence between the respondent and the disponent owner, question of there being a maritime lien by reason of the breach of such an agreement does not and cannot arise We have in this judgment herein before dealt with the attributes of maritime lien. But simply stated maritime lien can be said to exist or restricted to in the event of (a) damage done by a ship; (b) salvage; (c) seamen's and master's wages; (d) master's disbursement; and (e) bottomry; and in the event a maritime lien exists in the aforesaid five circumstances, a right in rem is said to exist. Otherwise, a right in personam exists for any claim that may arise out of a contract.

Mr. Sampath did place very strong reliance on to the fixture note and contended that the document itself cannot but be termed to be a concluded contract relying upon the maritime lien. Upon reliance thereon, Mr. Sampath contended that the fixture note contains all the particulars and has been issued after the completion of negotiations and upon acceptance of the terms and conditions, by reason whereof the fixture note is final and the same binds not only the parties to the agreement but also the vessel. Incidentally, the fixture note stands issued by the Japanese Company (Taiyo Senpaku Kaisha Ltd.) through its agent in Malaysia, M/s Oriental Shipping Corporation.

Further on the issue, we find Thomas on Maritime Liens stated it to represent a small cluster of claims which arise either out of services rendered to a maritime res or from damage done to a res and listed five several heads of maritime liens as under :

(a) Damage done by a ship

(b) Salvage

(c) Seamen's wages

(d) Master's wages and disbursements

(e) Bottomry and Respondentia The limited applicability of such a lien thus well illustrates that not every kind of service or every kind of damage which arises in connection with a ship gives rise to a maritime lien. We, however, hasten to add that this is apart from the statutory enactments which may further list out various other forms of maritime liens. In the Ripon City [(1897) P. 226, 246], Gorrel Barnes, J. upon appreciation of this facet of a maritime lien and also, in part, to the surrounding policy considerations observed :

> ". A maritime lien travels with the vessel into whosoever possession it comes, so that an innocent purchaser of a ship may find his property subject to claims which exist prior to the date of his purchase, unless the lien is lost by laches or the claim is one which is barred by the Statutes of Limitation. This rule is stated in The Bold Buccleugh to be deduced from the civil law, and, although it may be hard on an innocent purchaser, if it did not exist a person who was owner at the time a lien attached could defeat the lien by transfer if he pleased."

As regards the issue of relationship between a maritime lien and personal liability of a res owner, Thomas has the following further to state :

> "The issue as to the relationship between a maritime lien and the personal liability of a res owner is therefore one which may fall to be answered differently as between individuals maritime liens. It is clear that the various maritime liens do not, in this regard, display common characteristics. The fact that there exists this disparity may in turn be a symptom of the absence of any clearly defined theoretical framework in the development of the law relating to maritime liens. It is also note-worthy that the emphasis on personal liability is most clearly established in relation to the damage and disbursement maritime liens which were the last in point of time to be established."

As regards the merits of the matter presently, Mr. A.T.M. Sampath, commented that the factum of contract between the parties was clearly admitted by the agent of the respondent vessel in its counter dated 24.6.1996 in Application No. 1147 of 1996. The admission of the Vessel is as follows:-

> "As per the contract between the plaintiff and the respondent dated 20.10.95 there is absolutely no provision for payment of 24% interest in the case of any delayed shipment".

It is in this context it has been contended that the respondent vessel never disclosed the owner of the vessel in the written statement and reply statement and as a matter of fact till date the respondent vessel did not disclose who is actually contesting the case. For the first time in the cross examination they marked the "Lloyd's Maritime Directory" of the year 1998 and in which the owner of the vessel has been shown as one Pambridge Maritime Inc., Panama City. Only in the Additional Written Statement for the first time it has been stated that the owner is in Hongkong, but even the name of the owner was not disclosed. The records depict that the respondent vessel filed a power of attorney before the trial court. In which Skarrup Management of Hongkong gave power of attorney in favour of one PC Thilak and Venkatachalam. The above said Venkatachalam filed the counter in O.A. No. 1147 of 1996. But P.C. Thilak the other power of attorney subsequently filed a reply statement, in which he has stated that the admission made by the other power agent is without getting the instruction from the owner and without knowing the fact that they are not the parties to the document but yet the respondent vessel did not disclose as to the owner of the vessel.

Further reliance was placed on the decision of this Court in Nagindas Ramdas v. Dalpatram Ichharam alias Brijram & Ors. (1974 (1) SCC 242), wherein this Court in paragraph 27 stated as regards the admissions of pleading the following :

> "..Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

In continuation of his submission as regards the fixture note it has been the definite submission of Mr. Sampath that the Japanese Company cannot but be said to be the disponent owner of the vessel M.V. WON FU and, however, thus leads us to the next issue as regards the maintainability of the suit upon an assumption that the latter has been the disponent owner. Black's Law Dictionary (7th Edition) illustrates the meaning of 'dispone' being available in Scot's Law and means to grant or to convey. It is on this score, Order XLII Rule 2 of the Original Side Rules of the Madras High Court has been referred to, which reads as below :

> "A suit shall be instituted by a plaint drawn up, subscribed and verified according to the provisions of the code, save that if the suit is in rem, the defendants may, subject to such variations as the circumstances may require, be described as "the owners and parties interested in the vessel" or other property proceeded against instead of by name."

Mr. Sampath contended that the suit is filed under the admiralty jurisdiction in rem in the Original Side of the High Court of Judicature at Madras and not in personam since the respondent vessel as per the fixture note was bound to make itself available in Tuticorin Port and the laycan time was fixed as 25th October-5th November to load 8,000 MTs and the destination was Taiwan. The buyer of the cargo is San-I-Mining, Taiwan. The appellant informed the same to his buyer immediately after entering of the agreement with Taiyo in Ex.P.2 dated 26.10.1995. Further it has been stated that in order to avoid demurrage, the cargo was transported from the appellant's stockyard to the local clearing and forwarding agent M/s Lotus Marine Shipping Clearing and Forwarding Agent's stockyard near the Port and thus it is a duty incumbent of the Charterer to be ready with the cargo near the stockyard for immediate shipment. It has been contended that once the contract was entered between the parties and the ship is available for shipment of the cargo, it is the bounden duty and obligation under the contract for the owners and master of the vessel to make available of the ship as agreed in the contract and any breach, if occasioned, would entitle the Charterer to claim damages for the loss. In the present case the ship is within the territorial water of India. The ship is unloading iron cargo at Madras Port as per appellant's agent's information to the appellant. The appellant informed the same to his buyer in Taiwan in Ex.P2 on 26.10.1995. The appellant when waited for the ship to reach the Tuticorin Port to load his cargo, he received the message, the copy of fax message sent to the disponent owner from his agent in Malaysia in Ex.P.3 dated 27.10.1995

stating that the respondent vessel is dropping the business and it contains further information that if the vessel did not perform this contract it would result in serious consequences.

Mr. Sampath contended that the appellant immediately filed the suit on 30.10.95 under the admiralty jurisdiction in rem and the order of arrest was passed on 1.11.1995 and the ship was arrested on 2.11.1995. One Skarupp Management, Hongkong entered appearance through its counsel M/s King & Patridge. (But no affidavit of interest was filed as enumerated in the Original Side Rules and this came to the knowledge of the appellant only when the appellant filed a petition to peruse the records at the time of trial.) To release the vessel, a bank guarantee was given and the ship left the jurisdiction of India upon furnishing security for the release. It is on this score very strong emphasis has been laid on the decision of this Court in M.V. Elisabeth (supra). Special attention has been drawn to paragraph 44 of the Report in M.V. Elisabeth which reads as below :

> "The vital significance and distinguishing feature of an admiralty action in rem is that this jurisdiction can be assumed by the coastal authorities in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part."

In para 44 of M.V. Elisabeth (supra) it has been further observed as follows :

> ".. In admiralty the vessel has a juridical personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon the world, for admiralty in appropriate cases administers remedies in rem, i.e. against the party personally."

It is submitted that in the present case the respondent vessel entered appearance through its counsel but the affidavit of interest by the owner of the vessel was not filed and the respondent vessel without disclosing its owner contested the case. Again emphasis should be made to the fact that Skarrup Management of Hongkong filed a power of attorney in favour of two persons jointly and severally. In the course of the cross-examination of the PW.1 for the first time the respondent vessel produced Lloyd's Maritime Directory Ex.D1 and claimed that one Pambridge Maritime Inc., of Panama City was the owner in the year 1998. But in the additional written statement filed by the respondent vessel on 30.7.1998 in para 2 it has been stated as follows :

> "It is submitted that the aforementioned counter affidavit was filed in reply to the plaintiff's applications for amendment when the Defendant's agents in Chennai did not have complete instructions from the defendant who is at Hongkong."

The additional written statement and the Lloyd"s Maritime Directory are of the same year 1998. But in the additional written statement there is no mentioning that the respondent is at Panama City. The Lloyd's Maritime Directory of the year 2000 did not contain the name of M.V. Won Fu. The book is published every year. Even the author of the book did not guarantee its authenticity.

The power of attorney of Skarupp Management after the disposal of the O.S.A. filed a petition seeking the permission of the High Court permitting the respondent's counsel to withdraw the amount, for the sole reason that the order of the High Court in C.S. No.1693 of 1995 is that the money, which is lying in the fixed deposit in the credit of the suit, should be refunded to the respondent vessel. As per the order of the High Court the money can be paid only in favour of Pambridge Maritime Inc. In the application seeking the permission of the Court to permit the respondent's counsel to withdraw the amount once again it has been stated that the owner is in Hongkong. Thus, the suit is contested without disclosing the ownership of the respondent vessel before the Lower Court as well as before this Court. Thus the suit is stated to be contested in rem and not in personam.

Mr. C.A. Sundaram, Senior Advocate, appearing for the respondent, on the other hand very strongly contended that even assuming that an agreement had come into effect between the owner and the disponent owner, but unless the charter was by demise, whereby the possession and control of the vessel has to be given to the disponent owner, question of enforcing the same in an action in rem and against the res would be rather futile. Incidentally, this aspect of the matter, namely, the action in personam and the action in rem has been rather elaborately dealt with in M.V. Elisabeth (supra) as also in M.V. AL Quamar (supra).

Even, however, assuming the agreement has in fact been entered into by the disponent owner, unless sufficient evidence is laid that the charter was by demise, whereby the possession and control of the vessel was given to the disponent owner, question of pursuing the cause of action against the vessel would not arise. Needless to add that charter parties are of three kinds; (a) Demise Charter; (b) Voyage Charter; and (c) Time Charter. Whereas in demise charter, the vessel is given to the charterer who thereafter takes complete control of the vessel including manning the same, in both voyage charter and time charter, master and crew are engaged by the owner who act under owner's instructions but under the charterer's directions. Simply put, voyage charter is making available the vessel for use of carriage for a particular voyage and the time charter correspondingly is where the vessel is made available for carriage of cargo for a fixed period of time. In the contextual facts, apart from the fixture note, no other documentary support is available as to whether ownership arose through a charter by demise and possession and control of the vessel has already been given to the disponent owner. The facts disclose that the disponent was an intending charterer of the vessel from the owner and it is on expectancy of such a contract, the fixture note was issued. There was as a matter of fact no charter party or agreement with the charterer and some eventuality in future is stated to be the basis of the cause of action. It is on this score we think it expedient to record that even upon assumption of the appellant's case at its highest, no credence can be attached thereto. The disponent owner was not a demise charterer but it is on the happening of such an event in futuro that such a fixture note has been issued. In our view there is no sufficient evidence available as regards the action in rem making the vessel liable in the contract said to have been entered into, as recorded in the fixture note. It is in the nature of a breach of contract and liability of the vessel would not arise, though however, we are not expressing any opinion as regards the maintainability of an action in personam or its eventual success. Inasmuch as the claim in the present case arises out of contract de hors a maritime lien, no action in rem is permissible, neither a suit in the original jurisdiction of the Madras High Court can be maintained against the vessel.

On the wake of the aforesaid, this appeal fails and is dismissed, without, however, any prejudice to initiate further action in personam. No costs.