# M.V.A.L. Quamar vs Tsavliris Salvage (International) ... on 17 August, 2000

## Equivalent citations: AIR 2000 SUPREME COURT 2826, 2000 (8) SCC 278, 2000 AIR SCW 3101, 2000 (8) SRJ 405, (2000) 9 JT 184 (SC), 2000 (5) SCALE 618, 2000 (3) LRI 886, (2000) 3 SCJ 464, (2000) 5 ANDHLD 97, (2000) 5 SUPREME 688, (2000) 4 RECCIVR 212, (2000) 5 SCALE 618, (2001) 1 CIVLJ 879, (2000) 3 CURCC 294

## Author: Umesh C. Banerjee

## Bench: Umesh C. Banerjee

PETITIONER:
M.V.A.L. QUAMAR

Vs.

RESPONDENT:
TSAVLIRIS SALVAGE (INTERNATIONAL) LTD. & ORS.

DATE OF JUDGMENT: 17/08/2000

BENCH:
S.B. Majumdar J. & Umesh C. Banerjee J.

JUDGMENT:

BANERJEE, J.

L....I.....T.....T.....T.....T.....T.....T..J Leave granted in both the SLPs.

By consent of learned Senior Advocates of the parties, the appeals were heard finally and are being disposed of by this common judgment.

Assumption of Admiralty jurisdiction by Andhra Pradesh High Court and passing of an order of arrest in execution of a judgment and decree of the High Court of Justice Queens Bench Division, Admiralty Court in London in case No. 1994 Folio No. 1693 dated 9.11.1988, is the key issue for discussion in these appeals by the grant of special leave.

Adverting to a brief reference to the factual aspect of the matter at this juncture it appears that an Execution Petition was filed before the learned Single Judge of the Andhra Pradesh High Court in

terms of Section 15 of the Admiralty Courts Act and Section 44A read with Order XXI Rule 10 of the Code of Civil Procedure for executing the decree issued by the High Court of Justice Queens Bench Division Admiralty Court in an action by the first respondent against the second respondent herein claiming damages for repudiation of an L.O.F. salvage contract. Needless to record that the second respondent was said to be the owners of the vessel M.V.AL QUAMAR ex AL TABITH.

The factual score depicts that pending the Execution Petition, the decree holder prayed for an Interlocutory Order to issue a warrant of arrest against the vessel together with Hull: tackle: Engines: Machinery equipments stores etc. The learned Single Judge of the Andhra Pradesh High Court on 15th September, 1999 granted an interim order as prayed for on a prima facie view of the matter that the Execution Petition can be filed in the High Court which is otherwise having original admiralty jurisdiction. The records depict that the appellant herein filed a petition to vacate the interim order principally on the ground that the ownership of the ship having been transferred bona fide and for valuable consideration to Quamar Shipping Ltd., the ship as attached in terms of the order of 15th September, 1999, cannot possibly be kept under attachment in execution of the decree against the original owner being the respondent No.2 herein. The appellant contended that in any event, the latter being, not a party to the judgment, question of execution on the basis thereof would otherwise be a total miscarriage of justice.

Incidentally, the learned Single Judge in his judgment has been pleased to record that the matter in issue involves eminently an arguable case as regards the maintainability of the Execution Petition and the proper course should therefore be, as the learned Judge pointed out to hear the Execution Petition itself at a date early and to continue interim order during the interegnum.

The records depict that the appellant herein subsequent to the order as above moved the Appellate Forum and the Appellate Court while dismissing the appeal observed as below:-

> In our view, the opinion expressed by the learned single Judge that the execution petitioner (first respondent herein) has an arguable case as regards the maintainability of the E.P. and that the contentious issues ought to be dealt with more appropriately at the hearing of the E.P. instead of entering into a discussion at the interlocutory stage, cannot be faulted. The E.P. itself has been posted for hearing and the hearing would have been concluded by now, but for this intervening appeal. Equally, the other reason given by the learned Judge that vacation of the interim order would have the potential effect of making the execution petition infructous and, therefore, the interim order ought not be vacated before the disposal of the E.P. also appeals to us. Considerations of prima facie case and balance of convenience were rightly taken into account by the learned single Judge.
>
> We see no valid ground to suspend the interim order.
>
> The contention of the learned counsel for the appellant that continuance of interim order should be made conditional upon furnishing of security or at least insisting on an undertaking to indemnify the loss, does not merit acceptance. Incidentally, it may

be mentioned that the counsel for the appellant did not express any doubts about the solvency and financial capacity of the first respondent company.

However, the grievance of the appellant that on account of the interim order, the appellant is incurring substantial expenditure day to day, has to be suitably redressed. To this limited extent, we are inclined to safeguard the interest of the appellant by directing the first respondent to furnish an undertaking to the satisfaction of the Registrar (Judicial) of this Court to pay a maximum amount of Rs.600 U.S. Dollars per day from 19.11.1999 (date of hearing this appeal) onwards till the date of disposal of E.P. and also to pay crews wages subject to the proof of actual expenditure being furnished by the appellant to the first respondent in respect of all the items.

The O.S.A. is dismissed subject to the above direction. No costs.

We consider it a fit to be heard by Division Bench.

In terms of the order as above, the Execution Petition itself was placed before the Bench of the learned Chief Justice wherein upon recording concurrence as regards the maintainability of the petition it was observed that the execution petition be heard on merits and hence the Special Leave Petition before this Court under Article 136 of the Constitution being SLP No.4410 of 2000. Incidentally, be it noted that there is in the record of this Court another SLP being SLP No.18616 of 1999 against the judgment of the Division Bench of the High Court as passed earlier and as noticed above, but since both the matters pertain to self same subject matter, this Bench deemed it fit to hear both the appeals together and deal with the same in one judgment. Before adverting to the most illuminating and lucid submissions of the learned Senior Advocates Shri P. Chidambaram, for the appellant and Shri Ashok H. Desai, for the respondent No.1, a brief backdrop of the admiralty jurisdiction of the country may be a useful introduction:

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, 1891, the admiralty jurisdiction on the three High Courts noticed above can be fairly traced. This special Admiralty jurisdiction was saved by the Government of India Act, 1915 as also that of 1935 and subsequently protected in terms of Article 225 of the Constitution.

By and under the provisions of Colonial Courts of Admiralty Act 1890, 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 thus 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.

The other introductory aspect pertains to the conferment of admiralty jurisdiction on to the Andhra Pradesh High Court. In terms of provisions of Andhra State Act of 1953 (Act 30 of 1953) certain territories from erstwhile State of Madras were included in the State of Andhra Pradesh and the Court at Andhra Pradesh was re-designated as the High Court of Andhra Pradesh when the State was so named under the States Re-organisation Act, 1956. The Andhra Pradesh High Court being the successor of the High Court of Madras [presently Tamilnadu] has thus the similar jurisdiction as was so vested in the Madras High Court prior to the transfer. Needless to say that since Visakhapatnam is also included in the State of Andhra Pradesh, the port of Visakhapatnam falls within the admiralty jurisdiction of the High Court of Andhra Pradesh. It is in this context observations of this Court in M.V. Elisabeth & Others 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 statutes, 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 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.

There is thus no scope to conclude that the Admiralty jurisdiction of the Andhra Pradesh High Court stands frozen or atrophied in any way whatsoever.

The discussion above pertaining to the admiralty jurisdiction of the Andhra Pradesh High Court in our view is rather pertinent more so by reason of the submissions that the matter in issue pertains to maritime claim. English legislations after the Admiralty Courts Act, 1890 are galore in the matter of widening the scope and ambit

of the jurisdiction of the Admiralty Courts: We however need not go into that aspect of the matter any further, suffice however, to record our concurrence that jurisdiction of the Indian Courts also has not been atrophied in any way whatsoever. [vide MV Elisabeth (supra)].

The cardinal issue pertains to the invocation of Section 44A of the Code in the matter under consideration, for enforcement of a foreign judgment in the Andhra Pradesh High Court stands contradicted by Mr. Chidambaram on two specific counts. The same being on the first count: the Civil Procedure Code cannot possibly be made applicable to any matter of criminal or admiralty or vice admiralty jurisdiction. The basis of the submission however, was laid on Section 112 of the Code. The ouster provision (Section 112) may thus be noted herein below for its true scope and purport:

12. (1) Nothing contained in this Code shall be deemed

(a) to affect the powers of the Supreme Court under article 136 or any other provision of the Constitution, or

(b) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to that Court, or their conduct before that Court.

(1) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Incidentally, Section 112(1)(a) and (b) stand substituted by the Adaptation of Laws Order 1950 and as a matter of fact, the state of affairs prevailing in the pre-Independence period has been set right by the legislation of 1950 (Adaptation of Laws Order). A look at the provisions of two Parallel Codes of Civil Procedure 1882 and 1908 together with the moderation after Independence will obviously clarify the situation. The Parallel Codes and the present Section 112 thus runs:

L.....T.....T.....T.....T.....T.....T.....T..J Code of 1882 Code of 1908 Present Section 112

616. Nothing herein 112.(1) Nothing 112.(1) Nothing contained shall be contained in this contained in understood- Code shall be this Code shall deemed- be deemed-

(a) to bar the full (a) to bar the (a) to affect and unqualified full and unquali- the powers of exercise of Her fied exercise of the Supreme Majesty's pleasure His Majesty's Court under art- in receiving or pleasure in rece- icle 136 or any rejecting appeals iving appeals to other provision to Her Majesty in His Majesty in of the Constitut- Council, or Council, or other ion, or otherwise howsoever, -wise howsoever, or or

(b) to interfere with (b) to interfere (b)to interfere any rules made by the with any rules with any rules Judicial Committee of made by the Judi- made by the Privy Council, and cial Committee of Supreme Court, for the time Being in the Privy Council, and for the time force, for the present- and for the time being in force, ation of appeals to being in force, for the present- Her Majesty in Council for the presenta- ation of appeals or their conduct before tion of appeals to to that Court, the said Judicial His Majesty in Cou- or their conduct Committee. ncil, or their before that Conduct before the Court.

said Judicial Committee.

[And] nothing in this (2)Nothing herein (2)Nothing Chapter apples to any contained applies herein contai matter of criminal to any matter of -ned applies to or admiralty or vice- criminal or admir any matter of admiralty jurisdiction. -alty or vice- criminal or or to appeals from admiralty jurisdi- admiralty or orders and decrees ction, or to vice-admiralty of Prize Courts. appeals from orders jurisdiction, and decrees of or to appeals Prize Courts. from orders and decrees of Prize Courts.

This comparative analysis of the provisions of the Code as amended from time to time unmistakably goes to show that as regards Section 112(a) and (b) in the post-Independence period, the powers of this Court under Article 136 stand substituted in place and stead of His Majesty in Council and the Judicial Committee of the Privy Council. The Adaptation of Laws Order however, did not in fact, add to or alter sub-section (2) of Section 112 which also finds place in Section 616 of the 1882 Code in identical language. The non exclusion of sub-section (2) howsoever surprising it may be in independent India, but the fact remains that the 1950 legislation has chosen not to omit it from the Statute Book and as such a meaning shall have to be attributed thereto. It is significant to note that sub-section (2) of Section 112 even after the Adaptation of Laws Order 1950 speaks of decrees of Prize Courts. In Halsburys Laws of England (4th Edn. Vol.- I ) paragraph 309, the following has been stated to be the jurisdiction of the Prize Courts:

> 309. Assignment to Admiralty Court. The whole jurisdiction of the High Court belongs to all the divisions alike, and all the judges of that court have equal power, authority and jurisdiction. However, every action to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships or the carrying out or omission to carry out a manoeuvre by one or more of two or more ships or non-compliance with the collision regulations is assigned to the Queenss Bench Division and taken by the Admiralty Court. The same applies to every limitation action, and generally to causes and matters involving the exercise of the High Courts admiralty jurisdiction, or its jurisdiction as a prize court.

The word Prize has also been dealt with in Halsburys Laws of England (4th Edn. Vol. I ) in paragraph 352 which reads as below:

> 352. Prize. The High Court is a prize court within the meaning of the Naval prize Acts 1864 to 1916, as amended by any subsequent enactment, and has all such jurisdiction on the high seas and throughout Her Majestys dominions and in every place where

> Her Majesty has jurisdiction as, under any Act relating to naval prize or otherwise, the High Court of Admiralty possessed when acting as a prize court. The Admiralty Court takes causes and matters involving the exercise of the High Courts jurisdiction as a prize court.

The issue arises as to whether we have after Independence, available in this country, the decrees of the Prize Courts or there is even any existence thereof. Admiralty jurisdiction of the courts as noticed hereinbefore has been by reason of the Letters Patent and certain other legislations saved by the provisions of the Constitution apart therefrom, question of ascribing any independent admiralty court as prize court in the country presently, would not arise: Be that as it may, we do not wish to express any definite opinion in regard thereto by reason of the fact that the same is not called for in the contextual facts of the matter under consideration, suffice it to note that a doubt persists as to the applicability to sub-section 2 of Section 112. In any event, if the intent of the legislation was to do away with the applicability of provisions of the CP Code, in terms of Section 112 (2) of the Code then and in that event, question of continuance of Section 140 of the Code would not have arisen. Incidentally, Section 140 (1) and (2) is a repetition of Section 645(a) of the 1882 Code. For convenience sake, Two Parallel Codes of 1882 and 1908 and the present Section 140 which is in identical language as that of the 1908, Code, is set out herein below:

> Code of 1882.
>
> 645-A, In any Admiralty or Vice- Admiralty cause of salvage, towage or collision, the Court whether it be exercising its original or its appeallate jurisdiction, may, if it thinks fit, and upon request of either party to such cause shall, summon to its assistance, in such manner as the Court may [by rule, from time to time,] direct, two competent assessors, and such assessors shall attend and assist accordingly.
>
> Every such assessor shall receive such fees for his attendance as [the Court by rule prescribes, Such fees] shall be paid by such of the parties as the Court [in each case] may direct.
>
> Code of 1908/Code of 1976
>
> ----------
>
> 140.(1) In any Admiralty ir vice-Admiralty cause of salvage, towage or collision, the court whether it be exercising its original or its appellate jurisdiction, may, if it thinks fits, and shall, upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be Prescribed.

It is in this context a rather old decision of the Bombay High Court seem to be apposite. The learned Single@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ Judge of the High Court in the case of The Bombay and Persia@@ JJJJJJJJJJJJJJJJ Steam Navigation Company Ltd. v. Shepherd and Haji Ismail Hossein (ILR (1888) XII Bombay 237) was pleased to state as below:

> The rules regulating Admiralty practice provide that a suit shall be commenced by a plaint according to the provisions of the Code of Civil Procedure. They were framed when the Code of 1859 was in force, and when the power of the Court to regulate its procedure was more extended than it is at present. The rules subsequent to the one above referred to, provide for the taking out of a warrant of arrest when the suit is in rem, and make no special provision when the suit is in personam ; but Rule 54 directs that proceedings not provided for by the rules shall be regulated by the rules and practice of the High Court in suits brought in it in the exercise of its ordinary original civil jurisdiction. Though these rules do not apparently contemplate a suit in rem and in personam being combined, they do not expressly or by necessary implication forbid it. The Code of Civil Procedure of 1882 applies to proceedings on the Admiralty side of the High Court ; section 645-A shows that this is so.
>
> Needless to record here that in accordance with the salutary principle of interpretation and one of the golden canon of statutory interpretation being that the latter provision shall prevail over the earlier and in the event, the Adaptation of Laws Order deemed it expedient to exclude applicability of the Civil Procedure Code in terms of Section 112 (2) as is being contended by Mr. Chidambaram, question of incorporating Section 140 or continuing therewith and in any event in the 1976 Code would not have arisen. The learned Single Judge in our view has rightly decided the applicability of the Code of Civil Procedure even in Admiralty jurisdiction. Reliance was placed in support of the exclusion of the Code pertaining to Admiralty jurisdiction in the decision of the Calcutta High Court in the case of State of Ukraine v. Elitarious Ltd. (wherein I was a party). A mere perusal of the judgment of the High Court, however, negates the contention in support of the Appellant. As a matter of fact, Mr. Ashok H. Desai, appearing for the Respondents relies on the judgment as a judgment in sub- silencio and we feel it rightly so, since the judgment dealt with the various provision of C.P.Code vis-a-vis. the Admiralty actions and the ratio decendi of the decision being Admiralty jurisdiction is not a ordinary original civil jurisdiction and thus not a suit within the meaning of Section 86 of the Code. In paragraph 37 of the decision in State of Ukraine v. Elitarious Ltd. (supra), the High Court upon reference to the Jolly Varghese case (Jolly George Varghese and another v. The Bank of Cochin :
>
> AIR 1980 SC 470) observed as below:
>
> 37. In this connection reference may be made to decision of the Supreme Court in (17) Jolly George Varghese and another v. The Bank of Cochin reported in AIR 1980 SC page 470. While considering Article 11 of the International Covenant on Civil and

Political right to which India is a signatory, the Apex Court in paragraph 6 of the Judgment inter alia made the following observations:-

...India is now a signatory to this covenant and Article 51(c) of the Constitution obligates the state to foster respect for International Law and treaty obligations in the dealings of organised peoples with one another. Even so until the Municipal Law is changed to accommodate the covenant what binds the Court is the former, not the latter. A.H. Robertson in Human Rights in National and International Law rightly points out that International Conventional Law must go through the process of transformation into the Municipal Law before the international treaty can become an internal Law..

In view of the aforesaid decision of the Supreme Court, in our opinion, even if a suit appears from the statement in the plaint to be barred by any International Law the plaint cannot be rejected unless such International Law has gone through the process of transformation into Municipal Law. Thus, we conclude that in order to bring a case within the mischief of Order 7 Rule 11(d) of the Code of Civil Procedure, the suit must appear from the statement made in the plaint to be barred by any state- made law including any ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law. As the word has not been defined in the Code of Civil Procedure, in arriving at the aforesaid conclusion, we have thought it profitable to take aid of Article 13 (3) (a) of the Constitution of India. Thus, we find no force in the second contention of Mr. Mukherji.

On the wake of the aforesaid, we are unable to record our concurrence pertaining to the exclusion of the Code in Admiralty jurisdiction. Significantly, the Admiralty Rules of the High Court at Madras, which stand adopted by the Andhra Pradesh High Court in no uncertain terms also negate the submission in support of the appeal. The relevant Admiralty Rules are however set out herein below:

2. 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 variation 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.

29. An attorney instituting a suit against any property in respect of which a Caveat has been entered in the register of Admiralty suits shall forthwith serve a copy of the plaint upon the party on whose behalf the Caveat has been entered or upon his attorney.

32. If when the suit comes before the Court it is satisfied that the claim is well founded, it may pronounce for the amount which appears to be due and may enforce the payment thereof by order and attachment against the party on whose behalf the

> Caveat has been entered and by the arrest of the property if it then be or thereafter come within the jurisdiction of the Court.
>
> 34. Every sale under decree of the Court, shall, unless the Judge shall otherwise order, be made by the Sheriff in like manner as a sale of movable property in execution of a decree in an ordinary civil suit.
>
> 50. Where no other provision is made by these rules, proceedings in suits brought in the Court in the exercise of its Admiralty Jurisdiction shall be regulated by the Rules and Practice of the Court in suits brought in it in the exercise of its Ordinary Original Civil Jurisdiction These rules having co-relation with the ordinary civil jurisdiction thus cannot but be said to be subscribing to a view contra to that canvassed before us by the Appellant.

In any event Section 112 is in Part VII of the Code dealing with the provisions pertaining to appeals: whereas Sections 96 108 in Part VII of the Code deal with appeals from original decrees, Section 109 112 deal with appeals to the Supreme Court. The specific words used in sub-section (2) of Section 112 to wit: Nothing herein contained (emphasis supplied) cannot possibly negate the Code in its entirety. The word herein as emphasised above has a specific connotation and will have to be given a definite meaning which goes alongwith the entire legislation. In the event the legislature intended a complete ban, then and in that event the words used in sub-section (1) in the normal course of events would have been used since sub-section (1)used the expression nothing contained in this Code- Sub- section (1) pertains to the powers of the Supreme Court and the legislature is specific enough to record the same. In the event of there being similar intent, legislature would have used the similar language and not herein as noticed above. The word herein thus cannot possibly be meant to include the entirety of the Code but to the group of provisions in which it appear. Section 112 thus evidently have two different areas of operation whereas sub- section (1) is wider in its amplitude, sub-section (2) is limited in scope and restrictive in its applicability. This is more so by reason of the discussion hereinbefore in this judgment pertaining to Section 140 of the Code and the insertion thereof in the Code is clear and unambiguous to the effect that Section 112(2) does not render the Code completely inapplicable to admiralty cases. The Bombay High Court in 1888 ILR 12 Bombay (supra) has thus came to the conclusion that the Code of Civil Procedure of 1882 applies to proceedings on the admiralty side of the High Court and Section 645-A (presently Section 140) shows the same. We record our concurrence with the observation of the Bombay High Court in 12 Bombay (supra) and approve the same in that regard. A recent decision of this Court in the case of Videsh Sanchar Nigam Limited (Videsh Sanchar Nigam Ltd. v. M.P.Kapitan Kud and Others (1996 (7) SCC 127) also lends concurrence to the applicability of the Code of Civil Procedure in admiralty action as well since Section 140 has been taken recourse to in the matter of appointment of assessors to give their estimate of the anchoring position and the probable involvement of the first Respondent (in the case under reference) in breakage of the cable. The applicability of the Code in the admiralty action, as a matter of fact, was not doubted, on the contrary Section 140 was taken recourse to for the purposes of assessment of the situation.

Needless to record that exclusion of jurisdiction cannot be inferred readily unless of course there are cogent materials in regard thereto. In the matters under consideration the submissions of Mr. Chidambaram, however, completely overlooks the provisions as contained in Section 4 of the Code. We need not dilate on this issue suffice it to record that Section 4 being a general provision which excludes the operation of the CP Code in specific instances as mentioned therein and since exclusion of admiralty jurisdiction is not specifically mentioned, we are unable to sustain the submissions of Mr. Chidambram, in any event, since there is no such general exclusion.

In that view of the matter, question of having any concurrence with the submissions of Mr. Chidambaram as regards the bar of applicability of the Code of Civil Procedure in Admiralty action does not and cannot arise, though I must frankly confess that the submissions of Mr. Chidambaram at the first blush was very attractive but a closer scrutiny of the provisions as noticed above, with respect, rendered the same totally insignificant.

Adverting now to the second count of submissions of Mr. Chidambaram to the effect that the judgment of the English Court cannot but be termed to be the judgment in personam and the Execution Petition for the arrest of the vessel and subsequent order thereon thus is not maintainable: Mr. Chidambaram found fault with the Bench decision of the High Court affirming the maintainability of the Execution Petition since arrest of a ship according to his contentions, operates in rem and not in personam and it is on this score, strong reliance was placed on the decision of the Court of Appeal in the case of The City of Mecca (1881 (6) P.D. 106). Jessel M.R. in the decision under reference stated as below:

> There is no suggestion from beginning to end that the ship is liable; there is no declaration that the ship is liable, and it does not appear on the proceedings that the ship was even within the jurisdiction at the time the action was commenced against the owners. An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship, but there is no suggestion that they intended anything of the kind, and, in fact, the law does not allow it. An action against a ship, as it is called, is not allowed by the law of Portugal. You may in England and in most countries proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action in rem, and it is perfectly well understood that the judgment is against the ship. In the present case the judgment does not affect the ship at all, unless the ship should afterwards come within the jurisdiction of the Portuguese Court, and then it can be made a proceeding by which you can afterwards arrest the ship and get it condemned. Therefore, it seems to me to be plain that this is a personal action as distinguished from an action in rem, and it is nothing more or less; and any attempt to make it out something else (because the law of Portugal does not allow actions in rem) is really to change the real nature of the action to meet the exigencies of those who want to make the judgment of the Court of Portugal go further than it really does.

In the similar vein, Lush, J. in The City of Mecca (supra) also observed:

Now upon the face of this judgment, there is not a word about a claim against the ship from beginning to end. It is well known that the owner of a vessel that has suffered by collision with another has two remedies. He may bring an action against the captain or owner of the other vessel and recover damages, or he may sue in the Court of Admiralty and make the ship pay. It has been stated before us that the Court of Admiralty has been abolished in Portugal and the jurisdiction is transferred to a Court of Commerce, and that there is no power now in that country to institute what are called actions in rem. That is what I collect from these proceedings. Whether there is or is not, seems to me immaterial. There certainly is a proceeding by which a vessel can be laid under embargo, that is arrested, if an action is brought against the captain, in order to secure payment, by lien perhaps, of ultimate damages; but whether that can be carried out to proceedings in rem I do not know, nor does it strike me to be material. But what is material in considering an action of the nature claiming damages alone is that there is nothing about the ship from the beginning to the end, as I have said.

I do not see how it was possible for them to carry and execute a maritime lien when they had not possession of the thing. The vessel was out of their jurisdiction, it was an English vessel, and it naturally left the Portuguese coast; and under the decree of that Court, if a purchaser had to prove his title he could not quote a single word of this judgment or any judgment at all that would justify a sale of that ship. It is a judgment purporting to be a judgment against the persons of the captain and owners, and if they ever find them within their jurisdiction they may execute according to the process they have at their command the judgment against them individually. But as to any judgment against the ship, I doubt if the ship were found there now that they could seize it. But even if they found the ship there, and they could without further process seize the ship and sell it in satisfaction, that would not make this a judgment in rem which any Court in this country could be called on to execute.

The decision in The City of Mecca (supra) was, lately followed in the Alletta (1974 1 Llyods Law Reports 40) and Sylt (1991 1 Llyods Law Reports 240). The decision of the Queens Bench Division (Admiralty Court) in the Despina G.K., [1983 1 All ER 1] has also been very strongly relied in support of the contention that Admiralty jurisdiction is available by a proceeding in rem and not in personam.

Mr. Chidambaram, has also placed strong reliance on the Brussels Convention, being the international convention relating to the arrest of seagoing ships of 1952: while it is true that India has not adapted the same, but its relevance however cannot be doubted in any way in the perspective of maritime lien. On this score, however we can usefully note the observations of this Court in MV Elisabeth (supra) which reads as below:

Indian legislation has not, however, progressed, notwithstanding the Brussels Protocol of 1968 adopting the Visby Rules or the United Nations Convention on the Carriage of Goods by Sea,1978 adopting the Hamburg Rules. The Hamburg Rules prescribe the minimum liabilities of the carrier far more justly and equitably than the Hague Rules so as to correct the tilt in the latter in favour of the carriers. The Hamburg Rules are acclaimed to be a great improvement on the Hague Rules and far more beneficial from the point of view of the cargo owners. India has also not adopted the International Convention relating to the Arrest of Sea-going Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.

Mr. Chidambaram in continuation of his submissions rather emphatically contended that the High Court has significantly overlooked the fact that it is only when a decree in rem is passed that a vessel may be arrested for obtaining satisfaction of the claim or the execution of a decree in rem especially in a maritime action having maritime lien. Mr. Chidambaram contended that in the event however, the proceedings are in personam as in the present case then and in that event, exercise of such a power by a foreign litigant would not arise. The appellant contended that the decree holder has to proceed only against the judgment debtor and not against the vessel and it is on this count a strong criticism has been levelled against the judgment of the High Court to the effect that there has been a total confusion as regards exercise of admiralty power in execution of a judgment in rem and judgment in personam. Admittedly the decree of the English Court is in personam, and against respondent No.2 and not the appellant- petitioner herein. It is on this score further reliance was placed on the decision of this Court in the case World Tanker Carrier Corporation vs. SNP Shipping Services Pvt. Ltd. & Anr. [1998 (5) SCC 310] wherein this Court had the following to observe:

20. Under principles of Private International Law, a court cannot entertain an action against a foreigner resident outside the country or a foreigner not carrying on business within the country, unless he submits to the jurisdiction of the court here. This principle applies to actions in personam.

Mr. Chidambaram very strongly commented against the judgment of the High Court for lack of appreciation so far as the English decree is concerned and contended that the entire claim was in regard to the damages on the ground of a breach of contract in the matter of performance of salvage operations, which in fact was never performed and as such question of any maritime claim acquired

therefrom would not arise. It is on this score that the learned Chief Justice speaking for the Bench of the Andhra Pradesh High Court in the judgment impugned has the following to state:-

> In India there is not much distinction in civil law system between maritime law and other branches of law. The Courts administer them alike. A perspective of the law further emerges from the reading of the said judgment that where the statutes are silent the remedy has to be sought by reference to the basic principle. It is the duty of the Court to devise procedural rules by analogy and expedience. It was observed the action in rem as seen above were resorted by the Court as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons and for furnishing security for the release of the res or any action proceeded against the res itself by entering a decree and executing the same by sale of the res. This practical procedural device developed by the Courts with a view to render justice in accordance with the substantive law not only in the cases of collision and salvage but also in case of other maritime liens and claims arising by reason of breach of contract for hire of vessel etc. etc. By reading of the judgment reported in 1993 SC 1014 we are of the considered view that the vessel is a juridical person; a maritime claim can be enforced against the vessel; there is no substantive distinction between the Admiralty Courts jurisdiction and the jurisdiction under the common law for execution of a decree of a foreign origin in view of the provisions of Section 44-A of the Code. Apart from this, the High Court has jurisdiction being a repository of the power to reach its arm to do justice. By reading of the judgment we are unable to agree with the contention of the learned counsel for the respondent that the Supreme Court has laid down any law that a ship can be arrested only for securing a maritime claim and not in execution of satisfaction of a judgment especially in view of the statutory provisions of Section 44-A of the Code.
>
> Mr. Ashok H. Desai for the respondent No.1 and being the decree holder, however, in no uncertain terms contended that as a matter of fact it is of no significance at all if the judgment be termed to be the judgment in rem or judgment in personam especially in the facts of the matter under consideration having due regard to the domestic law and in particular Section 44A of the Code of Civil Procedure. Before however, dealing with the same, a passage from encyclopedia Britannica (Transportation Law) may be of some significance. Learned authors thereof while referring the components of maritime law had the following to state pertaining the maritime liens: a word of caution at this juncture ought to be introduced by reason of the confusion in populas between a maritime claim and maritime lien whereas claim cannot but be termed to be a genus-lien is a particular species arising out of the genus and the two terms namely, claim and lien cannot be identified with each other so as to accord same meaning. Let us, however, address ourselves on maritime lien as is available in the encyclopedia 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 shipowner whose vessel fails to take a pilot when entering or leaving the waters of the state. Since the pilotage is thus compulsory, the pilots negligence is not imputed to the shipowner. Nevertheless, the vessel itself is charged with the pilots fault and is immediately impressed with an inchoate maritime lien that is enforcible in court.

Maritime liens can arise not only when the personified ship is charged with a maritime 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.

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 this must itself make good that loss. (See in this context Maritime Law Christopher Hill,2nd Edn).

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 the same claim and can stand side by side.

In this context, reference may also be made to the observations of this Court in M.V.Elizabeths case (supra) as stated below:

48. 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 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.

49. 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 byHill, Soehring, Hosoi and Helmer, 1985).

In Halsburys 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 defendants 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 person is liable, as in other actions in the High Court, for the full amount of the plaintiffs 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 value 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.

The discussion above has shown us the Anglo-American jurisprudence pertaining to the admiralty matters and the distinction between the action in rem and action in personam being within a very narrow margin but before embarking on to a fuller analysis of the same, let us for the time being transfer our attention to the domestic law in the matter in issue. As regards the domestic law Section 44A of the Civil Procedure Code may be considered as one of the basic elements of domestic law viz.a.viz. foreign judgments. Section 44A of the Code as noted above reads as below:

> Section 44-A. (1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court (2) together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.
>
> (3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13.

It is on the basis of the above provision that the Respondent No.1 moved the High Court upon having the decree registered in this country for execution of the English Court decree and it is on this score that Mr. Chidambaram contended that Section 44A cannot possibly be said to be of any assistance to the English decree holder.

Incidentally, a plain reading of Section 44A would depict the following components:

> (i) The decree must be of a superior court of a reciprocating territory;
>
> (ii) the decree is to be filed in a District Court;
>
> (iii) The decree may be executed in India as if it had been passed by the District Court;
>
> (iv) Provisions of Section 47 of the CPC shall apply, subject to the exceptions specified in clauses (a) to (f) of Section 13;

> (v) Decree means any decree under which a sum of money is payable. (See Explanation II).

Section 44A thus indicates an independent right, conferred on to a foreign decree holder for enforcement of its decree in India. It is a fresh cause of action and has no co-relation with jurisdictional issues. The factum of the passing of the decree and the assumption of jurisdiction pertaining thereto, do not really obstruct the full play of the provisions of Section 44A. It gives a new cause of action irrespective of its original character and as such it cannot be termed to be emanating from the admiralty jurisdiction as such. The enforcement claimed is of an English decree and the question is whether it comes within the ambit of Section 44A or not. The decree itself need not and does not say that the same pertains to an admiralty matter neither it is required under Section 44A of the Code. Though however in the facts of the matter under consideration, the decree has been passed by the High Court of England (a Superior Court) in its Admiralty jurisdiction. Registration in this country, as a decree of a superior foreign Court having reciprocity with this country would by itself be sufficient to bring it within the ambit of Section 44A. The conferment of jurisdiction in terms of Section 44A, cannot be attributed to any specific jurisdiction but an independent and an enabling provision being made available to a foreigner in the matter of enforcement of a foreign decree.

It is in this context that Mr. Desai placed strong reliance on a decision of the Commonwealth of Australia 1980@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ (144) CLR 565: Hunt v. B.P. Exploration Co.(Libya) Ltd.@@ JJJJJJJJJJJJJJ and since the summary of the judgment as is available in the report would sub-serve our purpose we need not go in for longish narration in regard thereto. The summary provides:

> A judgment creditor registered a judgment of the High Court of Justice in England under Section 5 of the Reciprocal Enforcement of Judgments Act, 1959(Q). The judgment debtor had assets in Queensland but he was not present within the jurisdiction and there was no other fact or circumstance to connect him with the State. He did not submit to the jurisdiction of the Supreme Court. Section 6 (1) (c ) of the Act enabled Rules of Court to be made providing for the service or a judgment debtor of notice of the registration of a judgment. No such rules had been made when the judgment was registered.

Held that the judgment had been validly registered. The Act was within the legislative competence of the Queensland Parliament because it provided for the registration of foreign judgments in a Court of the State and their enforcement within the State. The facts that the parties to the judgment had no connexion with the State was not relevant to the validity of the registration. Further the Act should not be construed as limited in its application to persons within the State.

The second decision again under the same cause title of the New Zealand Supreme Court at Aukland (Hunt v. B.P.Exploration Co.(Libra) Ltd.: 1980 1 NZLR 104) is also to the same effect. The principal issue in the New Zealands case was to the following effect:

(1). Does the Court have jurisdiction under the Act to register the English Judgment? If that issue is decided in favour of Mr. Hunt, then the injunction and the charging order fell to the ground.

The issue however, was answered by the New Zealand Supreme Court upon consideration of the Black-Clawsons case (Black Clawson International Ltd. v. Papierwerke Waldhof- Aschaffenburg: 1975 AC 591) as also the Australian judgment noticed hereinbefore in the manner following:

> The Act provided a new system for bringing a judgment debtor in foreign proceedings before the registering Court, whilst preserving his common law defences once he got there.
>
> I am left with a statute, clear and unambiguous in its references to judgment debtor and judgment of a superior Court of a country to which this Part of this Act applies. Mr. Hunt clearly comes within those references. The fact that the debtor is not within the jurisdiction of this Court was obviously not considered important. In practice, the Act would normally be applied to debtors with assets within the jurisdiction, although there do not need to be assets within the jurisdiction. See Hospital for Sick Children v. Walt Disney Productions Inc (1968) Ch 52, 69, 77; [1967] All ER 1005, 1011, 1016, which held that an injunction could issue against a corporation not within the Courts jurisdiction and which did not have assets there at the time of the order.
>
> I think that, fundamentally, my decision must come down to this: On the one hand, is the Mareva jurisdiction (for want of a better term) merely an instance of the exercise of the Courts general jurisdiction conferred in broad terms by s 16; or is {118} the Mareva jurisdiction to be regarded as legislating in an area which should be left to Parliament? The two opposing points of view are well set out in the various Mareva judgments I have cited on the one hand, and in the South Australian judgments on the other.
>
> I consider that this Court does have a Mareva jurisdiction. I do not accept the view that this jurisdiction is in the nature of legislating in an area forbidden to the Courts. I am not impressed by the assumption of fearful authority line of cases. There appears to have been an old English procedure of foreign attachment which provides a perfectly respectable ancestry for the procedure. The fact that this procedure accords with that in European countries is, for a New Zeeland Court, a matter of coincidence.
>
> The Court has to approach modern problems with the flexibility of modern business. In former times, as Lawton L.J. pointed out, it would have been more difficult for a foreign debtor to take his assets out of the country. Today, vast sums of money can be transferred from one country to another in a matter of seconds as a result of a phone call or a telex message. Reputable foreign debtors of course having nothing to fear; the facts of the reported Mareva cases indicate that the jurisdiction is wholesome; the

sheer number of Mareva injunctions granted in London indicates that the jurisdiction is fulfilling a need.

Lord Denning M.R. cited with approval in the Rasu Maritima case [1978] QB 644, 660-661; [1977] 3 All ER 324, 333-334, the following statement of practical reasons by Kerr J., a highly experienced commercial Judge:

"A plaintiff has what appears to be an indisputable claim against a defendant resident outside the jurisdiction, but with assets within the jurisdiction which he could easily remove, and which the court is satisfied are liable to be removed unless an injunction is granted. The plaintiff is then in the following difficulty. First, he needs leave to serve the defendant outside the jurisdiction, and the defendant is then given time to enter an appearance from the date when he is served, all of which usually takes several weeks or even months. Secondly, it is only then that the plaintiff can apply for summary judgment under Order 14 with a view to levying execution on the defendants assets here. Thirdly, however, on being apprised of the proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the Court. The defendant can then largely ignore the plaintiffs claim in the courts of this country and snap his fingers at any judgment which may be given against him. It has always been my understanding that the purpose and scope of the exercise of this jurisdiction is to deal with cases of this nature. To exercise it on an ex parte basis in such cases presents little danger or inconvenience to the defendant. He is at liberty to apply to have the injunction discharged at any time on short notice.

I, for one, do not always agree with the alleged judicial law-making of Lord Denning; on this occasion, I think that he has legitimately spelt out the jurisdiction of the Court and has up-dated old but useful procedures, aimed at enabling the law to deal with the commercial realities of modern business. Accordingly, I am of the view that the Mareva jurisdiction exists in New Zeeland. I find no cause to dissent from the view of Quilliam, J. in Mosen v. Donselaar that the Mareva jurisdiction exists in New Zeeland, which view was accepted without argument in the other New Zeeland decision.

The principal consideration is whether BP has given has some grounds for believing that there is a risk of Mr. IIunts New Zeeland assets being removed before the judgment or award is satisfied. Mr. Gatenby, in one of his affirmations, asserted that although the judgment debtor is reputedly an extremely wealthy and substantial businessman, searches and inquiries conducted by or on behalf of the judgment creditor reveal relatively few assets in countries where enforcement can be conducted expeditiously and economically through the use of reciprocal enforcement legislation from which the judgment debtor benefits other than only indirectly through the medium of American- based companies or trusts. He opined that it was apparent that Mr. Hunt has the means and the capability to organise his business affairs in a

sophisticated manner. This statement is riddled with hearsay and does not state, as required by R 185 of the Code, the grounds for the deponents belief. I therefore feel that I can take limited account of this statement. My concern at such a hearsay statement is similar to that expressed by Lawton L.J. in the passage cited, although, in its terms, the statement appears to have followed some of Lawton L.J's guidelines.

All in all, I infer that there is a danger that the assets will be taken out of New Zealand. The situation is different from the usual Mareva type of case where there is not even a judgment but merely the issue of proceedings. Here, there is a judgment, albeit one subject to an appeal; a judgment obtained after a lengthy defended hearing and one subject to being set aside under the provisions of the Act.

All things considered, I am of the view on the authorities, that there was sufficient justification for the issue of the Mareva injunction which will therefore stand as varied, with liberty to apply reserved to both parties to vary its terms further. I prefer Lawton L.Js formulations of the criteria, although read in context, Bridge L.J in the Montechhi case was not purporting to lay down a narrower test. I am of the view also that B.P. is in a stronger position than the average Mareva applicant in that it has a judgment capable of being registered as a Judgment of this Court whereas normally, all the applicant has is a prima facie case. I bear in mind Lawton L.Js statement that if nothing is known about a defendant, that may be enough; whilst in one sense, much is known about Mr. Hunt, nothing concrete is known about his willingness to pay the English Judgment if his appeal fails. Had there been some credible statement to this effect, in even one of the various Courts involved thus far, I might not have found enough to justify the Mareva injunction. However, his silence on the point, added to all the other factors, persuades me to sustain the injunction.

The two decisions noted above in our view deal with the situation amply after having considered more or less the entire gamut of judicial precedents. Barker, Js judgment in the New Zealand case very lucidly sets out that the court has to approach the modern problem with some amount of flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts as Rosco Pound puts it. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce. The observations of Barker, J. and the findings thereon in the New Zealands case with the longish narrations as above, depicts our inclination to concur with the same, but since issue is slightly different in the matter under consideration, we, however, leave the issue open, though the two decisions as above cannot be doubted in any way whatsoever and we feel it expedient to record that there exists sufficient reasons and justification in the submission of Mr. Desai as regards the invocation of jurisdiction under Section 44A of the Code upon reliance on the two decisions of the New Zealand and Australian Courts.

The observations of us, as above, do find some concurrence in Dicey and Moris on The Conflict of Laws Vol.I, 13th Ed. Page 538 which is to the following effect:

> There is no requirement that the judgment debtor be subject to the personal jurisdiction of the English court. Enforcement is by registration, and not by action, and the judgment debtor need have no connection with England....."

In the view as above, the appellants contention pertaining to Section 44A thus cannot be sustained. The@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ apprehension of there being a horrendous consequences on@@ JJJJJJJJJJJJJJJJJJJJJ the wake of the observations as above thus cannot but be stated to be totally unrealistic and with respect, a figment of imagination.

Mr. Chidambaram by way of an alternative submission contended that assuming Section 44-A of the Code is applicable for the execution of a decree in personam obtained from an Admiralty Court in Britain but since Section 44-A is not a self- contained Code for execution of a decree, the same is not exhaustive and the same, as a matter of fact does not displace the common law and it has to be read alongwith the well settled principles of common law in matters relating to execution of decree for a sum of money. Strong reliance was placed on the foreign judgment (Reciprocal Enforcement) Act 1933 and it is on this context, reliance was placed on the decision in Black Clawsons case (supra). It has been contended that since Section 44-A was introduced by an amendment after the foreign judgment (Reciprocal Enforcement) Act, 1933 it is apparent that the legislature did not think it fit to include in Section 44A into the 1933 Act. Without dilating much on this score, in our view , the decisions of the New Zealand and the Australian Courts as noticed above, answer the same in no uncertain and unambiguous language. The views expressed by the English Courts in Black Clawsons case (supra) has been expressly dissented from in both the decisions noticed above and we do feel it expedient to reiterate the views expressed as above more so by reason of the fact that the 1933 Act on which Black Clawson was decided expressly saved the applicability of the common law though to a limited extent by and under Section 8(3) of the Act.

As noticed above Section 44A is an independent provision enabling a set of litigants whose litigation has come to an end by way of a foreign decree and who is desirous of enforcement of the same: It is an authorisation given to the foreign judgments and as noticed above, the Section is replete with various conditions and as such independently of any other common law rights, an enabling provision for a foreign decree holder to execute a foreign decree in this country, has been engrafted on to statute book to wit: Section 44A of the Code.

Mr. Chidambaram next contended that there are certain fundamental principles of execution in India and referred to a judgment of Sir Ashutosh Mukherji in the case of Begg Dunlop & Co. v. Jagannath Marvari (ILR 39 Calcutta 104). The fundamental principles as recorded therein and as strongly contended by Mr. Chidambaram runs as follows:

> i. A decree may be executed either by the Court which passed it or by the Court to which it has been sent for execution. (Sec.38 CPC) ii. A decree may be sent to another Court of competent jurisdiction; the Court shall be deemed to be a Court of competent jurisdiction, if such Court would have jurisdiction to try the suit where the decree was passed. (Section 39 (1) & (3) CPC).

iii. Even after sending the decree to another Court for execution, the original Court does not lose jurisdiction over the matter.

Mr. Chidambaram in suapport of his contention of Fundamental Principles has also taken us through the provisions of Sections 16, 17, 19 and 20 of the CP Code. Admittedly and without much dialation Section 20 overlaps Section 19 (see in this context Mullas Civil Procedure Code 15th Ed. Vol. I page 240). The submissions pertaining to the fundamental principles of execution does not, however warrant, in our view, a fuller and detailed discussion save to note that Section 44A is a departure from the scheme of execution of domestic decree. By virtue of Section 44A (3), all defences under Section 13 (a) to (f) which reads as under are available to a defendant.:

13. (S.14) A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

As a matter of fact this is a scheme alien to the scheme of domestic execution as is provided under Section 39 (3) of the Code. The scheme under the latter section is completely a different scheme wherein the transferee Court must be otherwise competent to assume jurisdiction and the general rule or the principle that one cannot go behind the decree is a permissible proposition of law having reference to Section 39 (3) of the Code. Section 44A however is having a in-built scheme of execution which is not in any comparable situation with the scheme in terms of Section 39 (3). One can thus from the above conclude that whereas the domestic law, execution scheme is available under Sections 37, 38, 39, 41 and 42, Section 44A depicts an altogether different scheme for enforcement of foreign judgments through Indian courts. Reference in this context may also be made to the provisions as contained in Order 21 Rule 22 of the Code which expressly provide that in the event of their being an application for execution and the same been taken out beyond a period of two years after the date of the decree, there is existing a mandatory obligation to serve a notice to show cause against the execution. Such a requirement of the decree being more than 2 years old is not mentioned as regards the provisions of execution of decree filed under Section 44A. This is a

new introduction in the 1976 Code and in our view substantiates the reasonings as above and supports the contention of Mr. Desai as regards two separate and independent Schemes for execution.

On the wake of the aforesaid, it can thus be safely concluded that while it is true that action in rem and in personam have lost much of significance in the present day world but in the facts of the matter under consideration, we are not really concerned therewith and as such we are not expressing any definite opinion in regard thereto suffice however, to record that we are inclined to lend our concurrence with the views expressed by the Australian and the New Zealand courts apropos judgment in personam and in rem as noticed above.

In fine, the legal fiction created by Section 44A makes the Andhra Pradesh High Court, the Court which passed the decree and as such competency of the High Court to entertain the execution proceeding cannot be doubted in any way.

In the premises above-said, we do not find any merit in the Appeals before us and thus the same are liable to be dismissed subject to the liberty reserved to the appellants as indicated herein below.

This order of dismissal however, would not preclude the appellant herein, to obtain release of the attached ship on furnishing a Bank guarantee of a nationalised Bank for suitable amount to the satisfaction of the Registrar (Judl.) of the Andhra Pradesh High Court, pending the execution proceedings. The amount of Bank Guarantee may be fixed by the Registrar (Judl.) after hearing the parties or their advocates. Furnishing of such Bank Guarantee will be in addition to the undertakings required to be furnished by the appellant pursuant to the order of the High Court which is subject matter of civil appeal arising out of SLP (C) No.18616 of 1999. Furnishing of such Bank Guarantee will also be without prejudice to the appellants rights and contentions regarding the merits of the decree-holders claim qua the arrested ship. Once such Bank Guarantee is furnished by the appellant and requisite undertakings as earlier ordered by the High Court are filed, the ship will be released from attachment and will be permitted to sail out of the port of Vishakhapatnam. In case the execution petition ultimately succeeds on merits against the appellant it will be open to Respondent No.1 decree-holder to encash the Bank Guarantee amount towards its claim in the execution proceedings. Subject to the aforesaid modification both the appeals stand dismissed with no order as to costs in each of them.