SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Mr. Justice Mushir Alam
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Munib Akhtar

CIVIL PETITION NO.661-K OF 2015
(On appeal from the judgment dated 17.10.2015 passed by the High Court of Sindh at Karachi in Admiralty Appeal No.5/2006)

Bourbon Maritime (Pvt) Ltd. … Petitioner (s)

vs

m.v. Salaj and others … Respondent (s)

For the Petitioner	Mr. Agha Zafar Ahmed, ASC.
For the Respondent No. 2	Mr. Qamar-ul-Islam, ASC. Mr. K.A.Wahab, AOR.
Amicus curiae	Mr. Shaiq Usmani, Sr.ASC.
Date of hearing	15.8.2018

JUDGMENT

Munib Akhtar, J.: This leave petition (which is being disposed off as an appeal; see below) is directed against the judgment of a learned Division Bench of the High Court in Adm. Appeal 5/2006 dated 17.09.2015. That appeal, filed by the present petitioner, was dismissed. It was directed against judgment and decree of a learned Single Judge of the High Court dated 16.10.2006 whereby a number of Admiralty suits, including one filed by the petitioner, were disposed off in the manner set out below. (The judgments of the learned Division Bench and the learned Single Judge are reported, respectively, as *Bourbon Maritime (Pvt) Ltd. v. M.V. Salaj and others* PLD 2016 Sindh 124 and *Port Qasim Authority and others v. Official Assignee of Karachi and others* 2007 CLD 143.) Both here and in the High Court the contesting party, as relevant for present purposes, was and is the Port Qasim Authority ("PQA") (respondent No. 2 herein), a port authority created by and operating under the Port Qasim Authority Act, 1973 ("PQA Act").

2. The petitioner filed a suit *in rem* against the m.v. *Salaj* ("Vessel"), being Adm. Suit 14/1998, under the Admiralty jurisdiction of the High Court, conferred upon it by the Admiralty Jurisdiction of High Courts Ordinance, 1980 ("1980 Ordinance"). The claim was for the supply of bunker. It appears that four other suits *in rem* under the Admiralty jurisdiction were also filed against the Vessel

over the period 1997-1999 (the Vessel having arrived at the anchorage of the PQA's port facilities on or about 11.07.1997). Two of those suits were for the supply of bunker and/or necessaries, and two were in respect of claims regarding damage to cargo. In one of these suits (for present purposes it does not matter which) an order was made for the arrest of the Vessel. It was then ordered by the High Court to be sold under its Admiralty jurisdiction, and was so sold on or about 12.01.2000 for a Court approved sum of Rs. 17,700,786/-, which was paid into Court by the buyer on or about 25.01.2000. The sale proceeds were, as ordered by the Court, invested by the Official Assignee in a profit bearing scheme. Delivery of the Vessel was subsequently handed over to the purchaser.

3. It appears that after the arrest of the Vessel, and while proceedings for its sale were underway, PQA wrote to the Official Assignee, on or about 05.01.2000, intimating him of its claims, as the port authority, of certain dues etc. payable in respect of and/ofr by the Vessel under the PQA Act. The amount of the claim (in obviously rounded terms) was set out therein although it was stated that there were certain charges of a recurring nature that would continue to mount. According to learned counsel for PQA, the Official Assignee advised the port authority to file its own suit in respect of its claim, although it appears that he simply asked PQA to "file your claim in Court". Be that as it may, PQA thereafter instituted Adm. Suit 7/2000, which as per the title of the plaint, was filed for "port dues under Admiralty Ordinance 1980 and other laws". It may be noted that it appears that after the Vessel had been ordered delivered to the purchaser, PQA refused to release it, presumably on account of its own claim. It ultimately took a Court order, and the issuance of a show cause notice to the Chairman of the port authority, before the Vessel was delivered to the purchaser.

4. Thus, eventually there were six suits pending in respect of the Vessel, five by claimants of various sorts (including the petitioner) and one by PQA. These suits were ultimately decided by the learned Single Judge by means of the aforementioned judgment and decree. The two suits for claim of damage to cargo were dismissed. The other four suits were decreed. It may be noted, and the relevance of this will emerge subsequently, that in all these four suits there was a claim for markup, in each case at the rate of 18%. The learned Single Judge held that PQA's suit came within the scope of the 1980 Ordinance in terms of s. 3(2)(m) read with s. 4(4) thereof, although s. 23 of the PQA Act was also alluded to. Secondly, the learned Single Judge held, in effect, that PQA's claim took priority over the claims in the other three suits. The four suits that were decreed were disposed off in the following manner (emphasis supplied):

> "From the above discussion it is evident that though the claimants in Suits Nos.1254 of 1997, 14 of 1998 and 35 of 1999 have also established their respective claims against the ship to the extent stated above, however, as the Port Qasim Authority's has succeeded in establishing its claim to the extent of Rs.18,159,873.00, which claim is more than the recovered amount and *as this claim is to be preferred over the claims of the rest of the claimants, no amount shall be left to satisfy the decrees passed in Suits Nos.1254 of 1997, 14 of 1998 and 35 of 1999.*
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> In the circumstances, Suit No.7 of 2000 is decreed in a sum of Rs.18,159,873.00. The decretal amount being more than Rs. 17,700,786.00 realized from the sale of the ship M.V. "Salaj" and as the Port Qasim Authority's claim enjoy priority over other claims made in five connected suits i.e. Suits Nos.1254 of 1997, 1292 of 1997, 1293 of 1997, 14 of 1998 and 35 of 1999. The Official Assignee is directed to release entire amount of Rs. 17,700,786.00 *along with accrued profit earned thereon in favour of Port Qasim Authority*."

5. So, although its suit was decreed, the petitioner got nothing. It filed the aforementioned Admiralty Appeal, which was dismissed by means of the impugned judgment. The learned Division Bench affirmed the findings of the learned Single Judge, both as to how PQA's suit came within the Admiralty jurisdiction of the High Court, and that its claim took priority over the other claimants. Being aggrieved by this affirmation, the petitioner has filed the present leave petition. Before proceeding further it may be noted that subsequent to the dismissal of the petitioner's appeal, PQA's claim, and hence the decree in its favor, was corrected such that the amount of the claim decreed stood at Rs. 19,512,422/-. Furthermore, the sale proceeds lying with the Official Assignee and the profit accrued thereon was not released to PQA till after the dismissal of the petitioner's Admiralty Appeal. The total amount finally released (as per the Official Assignee's certificate dated 09.08.2016) came to Rs. 46,386,000/-.

6. Before us, learned counsel for the petitioner unilaterally made a concession, namely that PQA's actual claim for port dues etc. (i.e., for Rs. 19,512,422/-) took precedence over the petitioner's claim, and had to be settled first. On the basis of this concession learned counsel submitted that insofar as the actual sale proceeds of the Vessel, i.e., the Rs. 17,700,786/-, were concerned that was rightly paid over to the PQA. However, insofar as the profit accrued thereon was concerned that had to be dealt with differently. As we understood it, according to learned counsel the learned Single Judge had not awarded any markup at all in decreeing PQA's suit. Therefore, all that the latter was entitled to was the principal claim of Rs. 19,512,422/-. The whole of the profits accrued thereon remained available for settling the claims (as decreed) of the other decree holders. But, even assuming that the learned Single Judge had decreed PQA's suit with markup, it was submitted that that did not mean that the whole of the accrued profits had to be granted to it. Learned counsel submitted that the other decree holders, including the petitioner, could not be deprived of their decretal amounts

and any markup thereon, and that the learned Single Judge had in any case not specified the rate at which markup was awarded to PQA. It was also submitted that it was settled law that priorities were to be determined on the basis of equitable principles, depending on the facts and circumstances of each case. Here, the equities demanded (at the very least) that the other decree holders, for purposes of satisfying their decrees, not be deprived of the benefit of the profits that had accrued on the sale proceeds. Thus, learned counsel took issue with the decree of the learned Single Judge, as affirmed by the learned Division Bench, to the extent that it failed to allow the petitioner any share in, or benefit of, the accrued profits. For his submissions, learned counsel relied on certain decisions of our jurisdiction, including in particular a judgment of this Court reported as *Hong Leong Finance Ltd. v m.v. Asian Queen* PLD 1991 SC 1021, as well as certain English decisions and an extract from a treatise on Admiralty law. It was prayed that leave be granted and the appeal allowed in the foregoing terms.

7. The learned amicus submitted that the claim of a port authority took precedence over all other claims. The port authority invariably had its own independent statutory power to detain and sell the ship for unpaid claims and dues as such. That was undoubtedly the case here, and reference was made to s. 21 of the PQA Act. Where the ship in question was sold under orders of the Court in exercise of its Admiralty jurisdiction, then the port authority's claim was transferred to, and lay against, the sale proceeds obtained from the sale. The learned amicus submitted that in respect of its claim the port authority was entitled to enjoy the benefit of any accretion to the sale proceeds by way, e.g., of profit accrued thereon. The port authority's priority was preserved over the whole of the fund as available from time to time. However, the port authority's entitlement was only limited to its actual claim. It was not entitled, as such and in and of itself, to any markup/interest on its claim. Such entitlement could only come about if the port authority filed its own suit, and that suit was decreed with profit/markup. However, as we understood him, the learned amicus expressed certain doubts whether markup could at all (or at any rate ought to) be awarded to a port authority on a suit filed by it in respect of its statutory claim. But even if markup were to be awarded by the Court, it was only that portion of the decree that represented the actual claim that would be entitled to priority. The position adopted by the learned amicus therefore seemed to be that any markup awarded would by subject to priorities in the normal course. In the facts and circumstances of the present case, it seems that the learned amicus doubted whether any markup had been decreed in favor of PQA. Thus, once its claim as such was settled (and that had to be in priority over the other claims) the rest of the fund would be available to the other decree holders, as per the priorities among them, if any. The learned amicus referred to various decisions, including Indian case law.

8. Learned counsel for PQA took strong issue with the submissions by learned counsel for the petitioner and the learned amicus. It was submitted that both the learned Single Judge and the learned Division Bench had reached the correct conclusions in law and on the facts and circumstances of the case. The priority enjoyed by PQA's claim was emphasized. It was submitted that that extended to any markup that might be awarded by the Court in any suit filed by the port authority. It had been properly decreed that the sale proceeds plus the whole of the profit accrued thereon were to go to the PQA, to the complete exclusion of the other decree holders. The petition was liable to be dismissed. Learned counsel also relied on various authorities, from our own jurisdiction as well as England and India. Reliance was also placed on certain treatises.

9. Both the learned counsel for the contesting parties and the learned amicus filed written synopses and we would like to express our appreciation for the assistance so given to the Court. In particular, we would like to acknowledge the submissions made by the learned amicus, who is not only a Senior Advocate of this Court but is recognized as an authority in respect of matters relating to Admiralty law.

10. We have heard learned counsel and the learned amicus as above, and considered the record and the judgments and other material placed before us. We begin by setting out the relevant provisions of the PQA Act:

> "**21. Power to distrain vessels for non-payment of rates, etc.-** (1) If the master of any vessel in respect of which any tolls, dues, rates, charges or penalties shall be payable under this Act, or any bye-laws made there under, refuses or neglects to pay the same or any part thereof on demand, it shall be lawful for the Board to distrain or arrest of its own authority such vessels, and the tackle, apparel or furniture belonging thereto, or any part thereof and detain the same until the amount so due shall be paid.
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> (2) In case any part of the said rates or penalties, or of the costs of the distress or arrest or of the keeping of the same, shall remain unpaid for a period of fifteen days next after any such distress or arrest shall have been so made the Board may cause the vessel, or other thing so distrained or arrested, to be sold, and with the proceeds of such sale may satisfy such tolls, dues, rates, charges or penalties and cost of sale remaining unpaid, rendering the surplus, if any, to the master of such vessel on demand."
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> "**23. Alternative remedy by suit.-** Notwithstanding anything contained in sections 15, 16, 17, 18, 19, 20, 21 and 22, the Board may recover by suit any tolls, dues, rates, charges, damages, expenses, costs, or in case of sale the balance thereof, when the proceeds of sale are insufficient or any penalties or fines payable to or recoverable by the Board under this Act or under any bye-laws made there under."

It may be noted that these provisions are *in pari materia* (indeed, virtually identical to) ss. 52 and 53-A respectively of the Karachi Port Trust Act, 1886 ("KPT Act"). It will be recalled that the KPT Act, in its inception, was an act of the Bombay Governor in Council, and s. 53-A was added thereto (by a Bombay Act) in 1902. However, in the Indian Ports Act, 1908 that was enacted a few years later by the Governor General in Council (and which, in amended form, is still in force both in Pakistan and India), while there is a provision equivalent to s. 21 (being s. 42 thereof) there appears to be no section similar to s. 23. In India there has also been enacted the Major Port Trusts Act, 1963 ("Indian Act"). Section 64 of this statute has been considered in the Indian decisions that were cited before us. This provision is equivalent to s. 21. Additionally, this statute also has a provision similar to s. 23, being s. 131 thereof.

11. Having considered the matter, in our view a proper disposal of the present matter requires consideration of the following questions of law:

a. What was the priority, if any, to be accorded to PQA's claim for amounts due and payable as such under the PQA Act, i.e., those recoverable in terms of s. 21?

b. What was the nature of Adm. Suit 7/2000 filed by PQA, especially in light of s. 23?

c. If any priority was to be accorded to PQA's claim, what was the effect thereon of Adm. Suit 7/2000 having been filed and decreed, and the fact that PQA claims under such decree?

d. If PQA's suit was decreed with markup, what the position of the markup so awarded?

12. Before proceeding with these questions, it will be convenient to take a look at the English and Indian decisions to which we were referred. (The Pakistani decisions will be taken up subsequently.) We begin with the English case law, and start with the decision of the Court of Appeal in *The Emilie Millon* [1905] 2 KB 817. The statutory provision there involved was s. 253 of the Mersey Dock Acts Consolidation Act, 1858 (reproduced at pp. 818-9). This was a provision similar to s. 21 save that it gave the port authority only the power to detain the ship and not to effect its sale. A suit *in rem*, in exercise of Admiralty jurisdiction, was brought against the *Emilie Millon* (for wages). The ship was ordered arrested and then directed to be sold for recovery of the claim, which was decreed. The appellant port authority also had certain claims against the ship

under their Act. It had not however exercised its power under s. 253. An order was made for the sale of the ship to be confirmed and for it to be transferred to the buyer free from all claims and demands. It was also ordered that the right of the port authority to be paid "their charges in priority to other claimants which they may be entitled to under their Acts of Parliament be preserved as against the fund in court" (pg. 818). The port authority appealed and the Court of Appeal set aside the order. Romer, LJ held as follows (pg. 821, emphasis supplied):

> "… The Mersey Docks and Harbour Board have a right by statute to detain the vessel until the dock tonnage rates and harbour rates are paid. That is an express statutory right, and the board have nothing to do with any sale of the vessel to a purchaser. That is a matter which only concerns those who are interested in the vessel. It does not concern the board. *The board are entitled to detain the vessel, whoever is the owner, until the rates are paid. The order appealed against deprives them of that right, and without their consent purports to give them an option to try and make some claim to a lien upon or right against the fund in priority to other claimants. The board have no such lien or right. If this vessel had been allowed to leave the dock, the board would have been left to make a futile claim against the fund in court*…"

It will be seen that in this case the only right of the port authority was to detain the ship, and that right was held not transferable as a lien or other right against any fund representing the ship (i.e., the sale proceeds). It was for this reason that it was observed that any claim by the port authority against the fund in court would be "futile". Collins MR and Mathew, LJ gave judgments to similar effect. However, as we will see, the subsequent case law dealt with provisions where there was also a power to sell the ship, i.e., provisions equivalent to s. 21 of the PQA Act.

13. The next case is *The Charger* [1966] 3 All ER 117, [1968] 1 WLR 1707. The relevant provision was s. 44 of the Harbours, Docks and Piers Clauses Act, 1847. It was equivalent to s. 21 inasmuch as it gave the port authority the right both to detain and to sell the ship. However, the port authority did not exercise its statutory power at all. It simply issued a writ (i.e., filed a civil suit) for recovery of its dues and claims. The vessels in question having been sold under order of the court, the port authority claimed priority (for its claims under the statute for dock dues and charges) over other claimants in respect of the sale proceeds. The claimed priority failed. It was expressly noted that the power available under s. 44 was not exercised (p. 118). A plea taken on behalf of the port authority, that "they had acted in a sensible and business like way" in not exercising the statutory power was not accepted. It was held that the exercise of the statutory power was not within the ambit of priorities to be settled in respect of maritime liens and suchlike claims. "Priorities are first considered after any reimbursement has taken place, and operate in relation to the residue, if any, paid into court to the ultimate

benefit of claimants who have sufficient priority" (pg. 119). In our view, what this case decides is that had the port authority exercised its statutory power, its position *vis-à-vis* the sale proceeds might have been different. But since the said power was not exercised, and the port authority simply filed a suit for its claim, it could not obtain the benefit of the statutory power, or claim any priority for itself.

14. The next case to consider is *The Queen of the South* [1968] 1 All ER 1163, [1968] 2 WLR 973, [1968] 1 Lloyd's Rep 182. The relevant provision was s. 75 of the Port of London (Consolidation) Act, 1920 (to be found at pg. 1169), which was equivalent to s. 21, i.e., conferred the power both to detain and sell the ship. The ship was ordered arrested in an action under Admiralty jurisdiction and thereafter ordered to be appraised and sold. It was only thereafter that the port authority exercised its statutory power, purporting to arrest the ship and thereafter also intervening in the pending action. Among the questions that arose was whether the statutory power could at all be exercised once the ship had been arrested and was under the custody of the marshal, and if so could it only be exercised in respect of the port authority's claims up to that date or even thereafter. A further question was as to how the port authority's claim would be decided. The learned Judge (Brandon, J.) was referred to various English and Scottish authorities. As to the first question, the learned Judge observed (at pg. 1170) that "I do not see why the interveners should not exercise their statutory right of detention even while the ship is under arrest provided they do not interfere with the marshal's custody, which it is not suggested that they have done". As to the second question, it was held that the port authority could exercise its power even in respect of claims yet to accrue. As to the third question, i.e., the position of the port authority's claim when the ship was under court-ordered arrest and sale, and how to deal with such a claim, the learned Judge observed as follows (pg. 1172):

> "The right of a dock or harbour authority under its private Acts to detain a ship for rates is a statutory possessory lien: per Lord Birkenhead LC in *Mersey Docks & Harbour Board v Hay, the Countess* [1923] AC 354, HL. The right of such an authority to sell a ship in order to reimburse itself for rates out of the proceeds may be compared with a mortgagee's right of sale usually given to him by contract and in any case by section 35 of the Merchant Shipping Act 1894. It is well established that, in an action in rem against a ship, the court has power to sell her free of both a repairer's common law possessory lien and a mortgagee's contractual or statutory right of sale. It does so on the basis that the rights of which the ship is freed by the sale, together with any priority over other rights to which they may be entitled, are transferred to, and preserved against, the proceeds of sale in court.
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> If the matter were free from authority, I should have thought in principle that the court should be able to deal with the statutory possessory lien of a dock or harbour authority in the same way as it deals with the common law possessory lien of a repairer and with the statutory right of

> sale of such an authority in the same way as it deals with the contractual or statutory right of sale of a mortgagee. That is to say, I should have thought that the court should have power, in an action in rem against a ship, to sell her free of both rights, while transferring equivalent rights with equivalent priority to the proceeds of sale in court, and further should have power to do this whether the dock or harbour authority consents or not. If the court does not have such power it is extremely inconvenient, for it means that, in any case where a dock or harbour authority has a right of detention or sale, the court cannot transfer the ship to a purchaser free of encumbrances, with all the disadvantages arising from such a situation discussed by Hewson J in *The Acrux* [1962] 1 Lloyd's Rep 405."

The learned Judge then considered the various authorities, both English and Scottish, and observed that the question before him was "a highly disputable question of law" on which he preferred to express "no final opinion unless it were essential to do so". It was not so essential, since it seemed to him that "there is another and perhaps simpler solution to the problem" (pg. 1173). It was then held as follows (pp. 1173-4; emphasis supplied):

> "Recent decisions of this court show that, where it is for the benefit of all those interested in a ship that the marshal should incur expenditure on her in order to enable him to sell her to advantage, the court may authorise him to incur such expenditure…. applying the principle of those decisions to the present case, *it seems to me that the court has power, if it thinks that it is for the benefit of all those interested in the Queen of the South, in order that she may be sold to advantage, that the marshal should pay off the claim of the interveners for rates which had accrued due before the arrest, to authorise him to do so, and to include the expenditure in his expenses of sale. It further appears to me that, so far as rates which have accrued due to the interveners since the arrest are concerned, the court can also authorise the marshal to include these in his expenses*. Indeed it would, I think, be in accordance with the usual practice for him to do this, even without any special authorisation from the court. In my judgment, on the facts of this case, it would be for the benefit of all those interested in the Queen of the South that the interveners' claim for rates should be paid off, so that the marshal can sell the vessel free of the interveners' rights of detention and sale, whether already exercised or capable of being exercised hereafter. If the marshal cannot sell the ship free of such rights, he may be unable either to find a purchaser at all, or at any rate to find one willing to pay a proper price. If the interveners are to be paid off in this way, however, it must be on the basis that they give a written undertaking to the court not to exercise their rights of detention or sale in respect of the rates concerned.

15. It appears that the approach taken by Brandon, J. is now considered the applicable practice. Reference in this regard may be made to *The "Freightline One"* [1986] 1 Lloyd's Rep 266, where the learned Judge (Sheen, J.) observed as follows (pg. 271):

> "I unhesitatingly agree with everything said by Mr. Justice Brandon in *The Queen of the South*…. It is in the interests of litigants that the Admiralty Court should be able to sell a ship free of all liens and rights of seizure and detention provided that the priority of all interested parties is preserved."

The English practice appears also to have been adopted in New Zealand: see *Hill v The Ship James Cook* [1997] 3 NZLR 752.

16. Turning now to the Indian decisions, we start with *Ashoke Arya v M.V. "Kapitan Mitsos" and others* AIR 1988 Bombay 329. The statutory provision involved was s. 64 of the Indian Act. The ship was arrested in an action *in rem* under the Admiralty jurisdiction. The ship was thereafter arrested by the port authority under s. 64, with notice that it would be sold—though with the permission of the court, since it was already under arrest as just noted. However, the port authority did inform the court official that the purchaser would not be allowed to remove the ship unless its charges were paid. Subsequent thereto, the court ordered the ship to be sold in the Admiralty action. (There appear, as here, to have been multiple suits against the ship, but nothing turns on that.) The High Court, after considering some of the English authorities herein above noticed, held as follows (pp. 333-4):

> "20. The B.P.T. [i.e., Bombay Port Trust] was honour bound not to contend with the Sheriff but to surrender the said vessel to him as the representative of the Court and to let him sell her under the Court's directions. It was then the duty of the Court to protect the interests of the B.P.T. and to put it in the same position as if it had sold the said vessel itself under its powers under the Act. In permitting the said vessel to be sold by the Sheriff, the B.P.T. did not forgo its lien thereon or its right to have the sale proceeds applied towards the satisfaction of its dues in priority to all other claims thereon.
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> 21. The B.P.T., in acting as it did, followed an established Admiralty practice which is of immense advantage to all those who have claims upon a vessel, for it ensures a sale thereof, at a fair price, by and under the direction of the Admiralty Court."

17. The judgment of the Bombay High Court was considered by the Supreme Court of India in the subsequent case of *Board of Trustees, Port of Mumbai v Indian Oil Corporation and another* AIR 1998 SC 1878, (1998) 4 SCC 302. Again, the provision involved was s. 64 of the Indian Act. The ship was arrested by the port authority under the said section and then notice was issued for its sale. This action was challenged by the owner of the ship, an Indian company. Thereafter, the company was ordered to be wound up (on account of its insolvency) and an Official Liquidator appointed. In the winding up proceedings it was ordered that the ship be sold jointly by the Official Liquidator and the port authority, with the proceeds to be deposited with the former. A question of priorities also arose, i.e., whether the port authority's claim would have preference over those who would otherwise take precedence in the winding up of an insolvent company. It was in this context that the port authority (the appellant before the Supreme Court) challenged the very power of the Official Liquidator to sell the ship as an asset of the company in liquidation, claiming that its power

under s. 64 took precedence. The Indian Supreme Court considered a number of authorities (including some of the English decisions herein above cited). The decision of the Bombay High Court was referred to with approval and it was held as follows (pg. 1882):

> "18. In the present case the appellant is objecting to the directions given by the court in winding up directing the Official Liquidator to sell the vessel along with the appellant and to bring the sale proceeds into court. The appellant has a supervening priority in respect of its claims against the vessel. It has a right to sell that vessel and realise the sale proceeds. The appellant cannot be divested of this statutory right without its consent or be subjected to other priorities under the Companies Act…. The sale proceeds are not likely to cover even the full statutory charges of the appellant. The appellant has also objected to its being equated to other secured creditors in winding up.
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> 19. Looking to the overriding priority statutorily given to the appellant, the impugned order passed by the High Court is set aside. The appellant shall be entitled to sell the vessel by auction in accordance with the procedure prescribed by its rules and regulations….
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> 20. The appellant shall be entitled to realise its statutory dues as per law from the sale proceeds of the said vessel and the balance, if any, of the sale proceeds shall be deposited by the appellant with the Official Liquidator in winding up. The appellant shall also file an account of its dues and the realisation of the same from the sale proceeds of the vessel in the winding up proceedings before the Official Liquidator. The appellant has no objection to doing so. In respect of any shortfall in the realisation of dues, the appellant may file its claim for the balance in winding up proceedings in accordance with law."

18. The last Indian decision to be considered is *ICICI Ltd. v Board of Trustees, Port of Calcutta* (2005) 10 SCC 284. It was again s. 64 was that involved. A mortgagee of the ship filed an action *in rem* in the Bombay High Curt, which was ordered to be arrested. However, in violation of the said order, the ship was taken to another Indian port (Haldia, in West Bengal) and there abandoned. Thereafter, multiple suits *in rem* were filed in the Calcutta High Court by various parties, including the ship's crew, the mortgagee and others. Suits were also filed against a sister ship. The Bombay port authority also intervened in these actions. The sister ship was lying at Calcutta port and the port authority there had a claim against it. The Bombay High Court had ordered the sale in the earlier action, and the sister ship was ordered to be sold by the Calcutta High Court. The ships were sold and possession delivered to the purchasers. The usual question, i.e., as to the priorities of the port authorities (of both Bombay and Calcutta) arose. One question that also arose was the effect of inaction on the part of the port authority, i.e., what was the position when it did not exercise the statutory power under s. 64? The Indian Supreme Court considered a number of authorities, including its own aforementioned decision and the judgment of the Bombay High Court cited above. It was noted that the former had approved the latter. The earlier decision was affirmed. On the question as to whether the port authority had given

up its priority by failing to exercise the statutory power, the Court was referred to *The Charger* (cited above). The Indian Supreme Court held as follows (pp. 288-9):

> "15. It was, however, submitted that both, in the case before the Bombay High Court as well as in the abovementioned authority [i.e., the earlier decision of the Supreme Court], the right of the Port Trust was upheld because they had already arrested the ship. It was submitted that if the ship had not been arrested and/or if the Port Trust allows the ship to be sold then on the principle laid down in *Charger case* the Port Trust would have lost its remedy and rights under Section 64.
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> 16. We are unable to accept this submission. On the facts of this case it cannot be said that the Port Trust had given up their right under Section 64. As has been pointed out hereinabove, the Port Trust had intervened in the admiralty suit in Calcutta and had sought leave to exercise their rights under Section 64(2) of the Major Port Trusts Act. This showed that the Port Trust had not given up their rights and were insisting on their rights. They had merely permitted sale and delivery of vessel in pursuance of the established admiralty practice. Merely because they did not enter into a conflict with the Court and surrendered the vessel to the representative of the Court did not mean that they lost their right. It then becomes duty of the Court to protect the interest of the Port Trust and to put it in the same position as if they had sold the vehicle themselves under their powers."

19. Having concluded our review of the foreign authorities, we are now in a position to attend to the questions identified in para 11 above. Before proceeding further, we may note that in this judgment we are only concerned with such of the claims of the port authority as would or could come within the ambit of s. 21, and not otherwise. Anything said herein, even in relation to s. 23, must be so understood. We turn now to the first question. It may be noted that in considering this question, we are concerned only with the situation where s. 21 is (or could be) applicable. The position that may emerge if the port authority files a suit (whether in terms of s. 23 or otherwise) is considered when we come to the second and third questions. The present discussion must be understood in this context. In our view, but subject to what is further stated below, the following statement of the law to be found in *Halsbury's Laws of England* (4th ed., Vol. 43 (Shipping and Navigation)) correctly reflects the position also in this jurisdiction (internal citations omitted; emphasis supplied):

> "**1142. Priority of liens generally.** It would seem that the determination of the priority of liens over one another rests on no rigid application of any rules but on the principle that equity must be done to the parties in the circumstances of each particular case. However, there is a general order priority, and there are certain general rules which in the absence of special circumstances, the court tends to apply. *As to the general order of priority, the right of a dock and harbour authority exercising its powers under the provisions of the Harbours, Docks, and Piers Clauses Act 1847, or under the similar provisions of its special Act, to detain a ship in respect of damage to dock works, or to detain and sell a ship in respect of dock and harbour dues, or to take possession of and sell a wreck in respect of conservancy charges, overrides all maritime liens*.

> Next in order of priority are maritime liens; these usually rank above mortgages and statutory liens. A mortgage generally has precedence over a statutory lien. A possessory lien ranks after all liens which have attached before, and before all liens which attach after, the possessory lien holder has taken possession of the ship."

The first sentence of this para in effect already stands affirmed by the judgment of this Court in *Hong Leong Finance Ltd. v m.v. Asian Queen* PLD 1991 SC 1021, where it is stated as follows at pg. 1029: "The ranking of rival claims are determined with reference to consideration of equity, public policy and commercial expediency with the object of justly settling the claims". However, what is stated specifically with reference to the position of a port authority (in the portion emphasized) is also applicable insofar as our jurisdiction is concerned, though we reiterate that in this judgment we are only concerned with claims as are (or could or would) be within the ambit of s. 21. The acceptance of the foregoing italicized portion should, at any rate at present, be understood only in such terms and to this extent.

20. Proceeding further, it will be recalled that in the *The Emilie Millon* the statutory power was only to detain the ship, and it was in that context that the Court of Appeal held the right of the port authority did not stand transferred to, or operate as a lien or right against, any fund created by the sale of the ship under Admiralty jurisdiction. The position that emerges in the subsequent case law, where the statutory power included also the power to sell the ship (as is, of course, the case with s. 21), is different. In such a context there is, in our view, in principle no difficulty in accepting that the claim of the port authority can operate as a lien or right against any proceeds obtained by the Court-ordered sale of the ship in exercise of Admiralty jurisdiction, and for the authority's claim to have the priority identified in para 1142 reproduced above. In other words, the port authority's claim would stand transferred to, and operate against, the fund so created. Furthermore, as rightly submitted by the learned amicus, the port authority's claim (and the priority to be accorded to it) would benefit from, and lie against, any accretion to the sale proceeds by way, e.g., of any profits/markup earned thereon while they remain in Court pending disbursement. Also, since the purpose of both the port authority's statutory power and any Court-ordered sale of the ship is to generate proceeds from which claims can be settled, in our view it would be perfectly in order for the port authority to be involved in any Court-ordered sale so as to ensure that the best possible price can be obtained. In determining the modalities for the appraisement and/or sale of the ship the views of the port authority, if such be proffered, ought to be taken into consideration. Thus (to take but one example), if the Court orders sale by public auction, but the port authority is able to procure a serious buyer willing to offer a better price by

private treaty then, unless there are reasons to the contrary (which would have to be recorded in writing), the sale should be confirmed to the buyer so produced.

21. It is also clear from the case law cited above that since its priority is being maintained, the port authority's statutory power to detain, arrest or sell the ship would be subordinated to any orders made by the Court in exercise of its Admiralty jurisdiction, and this would be so whether the power is exercised before or after any orders of the Court or action taken by it. The port authority must give way to, and not interfere with, obstruct or otherwise impede the acts or functions of the court official acting under Court orders or as per the practice and procedure of the Court. It follows that in the present case the refusal of the PQA to allow the Vessel to be delivered to the buyer under the Court-sanctioned sale was contrary to law and the High Court rightly initiated action against the concerned officer. However, with respect, we cannot accept those observations in the case law which appear to suggest that in view of the statutory power, the Court can only take action, whether by way of sale of the ship or otherwise, if so "permitted", "allowed" or "accepted" by the port authority, or that the latter's "consent" (actual or tacit) has to be obtained or given. That is not the case. The claim of the port authority is fully protected. The legislative intent behind conferring the statutory power is not (unlike the situation where the power is limited only to detain) to allow the authority to continue to (indefinitely) hold on to the ship until its dues are cleared. Since the authority's claim is accorded the priority as noted, any Court-sanctioned sale can proceed in accordance with law in exercise of Admiralty jurisdiction, and as per the Court's practice and procedure, regardless of whether the port authority signals its consent or opposition, and no permission is required to be obtained. This is subject only to this rider that in case the port authority does register any opposition or objection, it must be given a proper opportunity of hearing and a reasoned order passed thereon—but the onus would definitely be on the port authority to show why the Court should not proceed with the sale of the ship.

22. The manner in which the port authority's claim is to be given its priority is, in our view, as established in *The Queen of the Sea*. To paraphrase from that judgment, it would clearly be for the benefit of all those interested in the ship, in order that it may be sold to advantage, that the Official Assignee should pay off the claim of the port authority for amounts that accrued due (whether before or after the arrest). Such payment would take precedence over all other claims. If it so proves necessary for the priority to be maintained, the claim may be regarded as being included in the expenditures of the sale. Thus, if the fund proves so inadequate that even the actual sale expenditures cannot be met in full, the port authority's claim would still have to be settled ratably with such expenditures.

One further point may be made here. As rightly pointed out by the learned amicus, s. 21 (or for that matter any other relevant provision of the PQA Act) does not itself contemplate the payment of any markup or equivalent in respect of the port authority's claim. In the context of the first question, which is here under consideration, the PQA cannot therefore make any such claim.

23. It must be clearly understood that for the port authority to obtain the benefit of its priority, it must have actually exercised the statutory power. The mere existence of the power is not sufficient in and of itself. Inaction may prove fatal. Now, as is clear from *The Queen of the Sea*, the power may be exercised even after the ship has been ordered arrested by the court in exercise of Admiralty jurisdiction. In the cited case the port authority purported to exercise its statutory power simply "by placing in a prominent position on the starboard side of the wheelhouse a notice of seizure" (pg. 1166). An objection was taken that this did not amount to an arrest within the meaning of the statutory power. Brandon, J had no hesitation in rejecting this submission, holding that "having regard to practical considerations, the placing of the notice was an overt act sufficient for the purpose for which it was intended" (pg. 1170). We have held that the authority's priority attaches to the fund (the sale proceeds plus any accretions thereto) representing the ship after its sale. The question can arise as to whether the authority can exercise its statutory power once the ship has been sold? In our view, the answer must be in the affirmative. The authority can lodge its claim with the Official Assignee. However, mere lodgment of a claim would not be sufficient. There must be some express indication therein that it is the statutory power that is being exercised. If so, then the lodgment of the claim would, given the practical considerations then prevailing, be "an overt act sufficient for the purpose for which it is intended". However, another point may be made here. If the ship has been sold and the port authority thereafter lodges its claim in the manner just indicated, but before that certain disbursements have been made by the Court, what would be the position *vis-à-vis* any amounts already paid out? In our view, in such a situation, the priority would be lost as regards the amounts that already stand disbursed. Now, on the record as available before us, it appears that the PQA did not expressly and specifically exercise its statutory power, either before or after the arrest of the Vessel or even after its sale. Thus, although a claim was lodged with the Official Assignee it did not as such refer to, or purport to be an exercise of, the statutory power. However, the PQA did file its action, Adm. Suit 7/2000. What was the effect of this action? This brings us to the second and third questions, to which we now turn.

24. It will be recalled that the learned Single Judge concluded that the PQA's claim came within the Admiralty jurisdiction of the High Court in terms of s.

3(2)(m) read with s. 4(4) of the 1980 Ordinance. The learned Division Bench affirmed, though it only referred to the first mentioned provision. Even if it is assumed, as we do here (though without finally deciding), that PQA's claim could be so regarded this presents an insuperable problem, at least insofar as the port authority is concerned. The reason is that we have concluded that the PQA did not expressly exercise its statutory power under s. 21 and, as noted, we have held that unless the power is so exercised any priority or precedence with regard to the claim is lost. If PQA's suit came within the scope of the provisions that found favor with the High Court, then it would have to be regarded as coming within the "general" Admiralty jurisdiction of the Court. In such a case, the rule enunciated in *The Charger*, which we endorse, would become applicable. The priority would be lost. This would obviously work to the manifest detriment of the port authority, and negate the precedence identified in para 19 above. However, in our view, there is an alternative approach available, and that is on the basis of s. 23. This section, as its marginal note attests, allows for an alternative remedy to be pursued by the PQA. The section opens with a non-obstante clause that includes s. 21, and allows PQA to recover any amount due under that section (and other provisions not here relevant) by the filing of a suit. What would be the nature of such a suit? More pertinently, what does s. 23 seek to achieve by providing specifically for an alternative by way of a suit, in the particular context of s. 21? If, as concluded by the High Court, PQA's claims under s. 21 fell in one or more of the clauses of s. 3(2) of the 1980 Ordinance, then to that extent s. 23 may be regarded as otiose: remedy by way of a suit already existed. What was the point of the "alternative" remedy specifically created by the PQA Act? In our view, the purpose of s. 23 is to ensure that if the port authority does proceed to the filing of a suit without invoking the statutory power under s. 21, then it should not be disadvantaged in any way. In other words, the intent is to ensure that the authority's position, as it would have emerged had it invoked the statutory power, is preserved. Now, it may be noted that s. 3(2) of the 1980 Ordinance, after listing the specific claims that would fall under its various clauses (a) to (r) concludes with a general paragraph that provides, *inter alia*, that the Admiralty jurisdiction includes also any jurisdiction that may be "conferred by or under any law". Given the nature of the port authority's claim under s. 21, which would be in respect of or against the ship itself, and the purpose of s. 23 as just identified, in our view, the alternative remedy expressly made available by the latter can be regarded as coming within the scope of the last paragraph of s. 3(2), i.e., is Admiralty jurisdiction conferred by or under the PQA Act. Thus, s. 23 serves a dual purpose. Firstly, it allows the port authority to invoke the Admiralty jurisdiction of the High Court. Secondly, since it is but an "alternative" to s. 21 and seeks to preserve the position that would have emerged if the statutory power had been invoked, the filing of a suit under s. 23 would, in and of itself, be deemed to constitute the overt act sufficient

to preserve the priority of the port authority's claim. Therefore, even if PQA does not expressly invoke the statutory power but nonetheless files a suit in respect of claims that come within the scope thereof, the suit should be regarded as being one filed under s. 23, which would have the double effect just noted. The port authority's position *vis-à-vis* the ship, or any fund representing the ship, would then be maintained in the same terms as already explained above. This would enable the authority, if it so desired, to act in a "sensible and business like way" and not invoke the statutory power, without fear of losing the priority or precedence for its claim. That, in our view, is what happened here. Adm. Suit 7/2000 ought to be regarded as a suit under s. 23. This suit both fell within the Admiralty jurisdiction and the filing of it constituted the overt act sufficient to maintain the priority of PQA's claim. Thus, in respect of the Vessel, and more pertinently the fund that subsequently came into existence, the PQA did retain its priority/precedence notwithstanding that it had not invoked s. 21 as such, the position of the said priority being as it would be had the PQA invoked the statutory power on the date the suit was filed. The second and third questions stand answered accordingly.

25. One point may however be made here. The foregoing analysis would apply only in respect of a claim by the port authority that could come within the scope of s. 21, and hence s. 23. If the port authority's suit includes claims that do otherwise come within any of the clauses of s. 3(2) (such as, e.g., clause (d)) but not s. 21, then they would not, only by virtue of anything said herein, be entitled to any priority or precedence. What priority, if any, such a claim would have must be regarded as a point left open. (It must be remembered that in para 19 above, while considering para 1142 from Vol. 43 of *Halsbury's*, we have expressly left such issues open for future consideration.)

26. This brings us to the last question. We have already noted, and agreed with, the submission made by the learned amicus that markup or any equivalent charge (interest etc) is not, as such, payable under s. 21. What would be the position where the port authority filed a suit? Once it is accepted that the authority can, and has, filed a suit, we can see no reason why, if the Court is so minded, markup ought not to be awarded. It will be recalled that in its Adm. Suit 7/2000, the PQA (like the other decree holders in their respective suits) did make a claim for markup. We can see no reason why such a claim ought not to be entertained. That is not the issue here. In our view (and we so hold), the port authority's suit (and by parity, the suits of the other three decree holders as well) ought to have been decreed with markup and must be so regarded. The real point to the fourth question is that if the port authority's suit is decreed with markup what, if any, is the priority to be accorded to it. Is it to be granted the same precedence as to the

claim that has been decreed? In our view the answer to this question ought to be in the negative. As noted above, the purpose of s. 23, in creating the alternative remedy by way of a suit, is to ensure that the port authority is not disadvantaged if it does not invoke the statutory power. It is to preserve the position of its claim. But, at the same time, the purpose is not to put it in a more advantageous position. If one consequence of the suit is that the port authority becomes entitled to markup, which it could not otherwise have claimed had it simply invoked the statutory power, then while the markup cannot be denied, it cannot also be accorded the same precedence or priority as the claim itself. Thus, in our view, the correct answer to the fourth question is as suggested by the learned amicus. If a port authority's suit is decreed with markup, then for purposes of the priority a distinction must nonetheless be maintained between the claim (to the extent decreed) on the one hand, and any markup awarded on the same. The former is entitled to priority in terms as herein above stated. The markup is not.

27. Before concluding, we may also take a look at the case law from our own jurisdiction that was cited. The judgment of this Court in *Hong Leong Finance Ltd. v m.v. Asian Queen* PLD 1991 SC 1021, to the extent presently relevant, has already been referred to in para 19 above. The actual facts of the case do not however, in our respectful view, provide any particular insight as would be relevant for the questions that arise in the present matter. In *Muhammad Bashir Butt v. m.v. Taheri* PLD 1980 Kar. 458, the statutory provision involved was s. 52 of the KPT Act. The Karachi Port Trust, which had certain port dues outstanding against the ship allowed it to be sold but without prejudice to its claimed priority. The question was whether such a claim was justified in law. The learned Single Judge was referred to various English authorities including some herein above cited. He concluded (at pg. 463) that the KPT was "entitled to have its claim satisfied before other claims are considered". It was also held that "the seamen's lien is postponed to the harbour dues" (pg. 464). Subject to what has been said herein above there is no cavil with the conclusions arrived at. In the last case to which we were referred, *Twaha v. The Master m.v. Asian Queen and others* PLD 1982 Kar. 749 (which judgment was of the same learned Single Judge (Naimuddin, J) who had decided the preceding case cited), it was noted (at pp. 750-1) that a joint statement was filed by the learned counsel appearing in the matter, setting out the "priorities for payment". It is clear from the statement (see at the top of pg. 751) that there was a consensus that the port dues were to be paid after the marshal's charges but in priority over other claims. Subject again to what has been stated herein above, this judgment (which otherwise contains much useful material) also does not, with respect, provide any particular assistance as regards the points specifically in issue here.

28. Having determined the four questions of law specified in para 11 above in the foregoing terms we are of the view that, with respect, the learned Division Bench and the learned Single Judge erred in respect of important issues and in particular, in concluding that the whole of the fund representing the Vessel was to be released to PQA and that the other decree holders were to end up with nothing. As is clear, in our view, PQA did have a priority with regard to the fund (inclusive of the accrued profits and not just in relation to the sale proceeds) but only up to its decreed claim of Rs. 19,512,422/-. To this extent, it was entitled to payment in preference over the other decree holders. However, it was not entitled to any preference in respect of the fund above this amount, and the excess ought to have been dealt with in the manner herein below stated.

29. In view of the foregoing, this petition is converted into an appeal to consider the four questions of law set out in para 11. Those questions are answered in terms of the analysis and discussion above. The appeal stands allowed in the foregoing terms. The impugned judgment of the learned Division Bench is set aside. The judgment of the learned Single Judge, to the extent that it is inconsistent with what has been said herein above, is also set aside. As a consequence, the respective decrees stand varied and modified and shall apply and be satisfied in the following manner:

a. The PQA shall within 30 days return to, and deposit in, the Court the amount paid to it in excess of Rs. 19,512,422/-, and the Official Assignee shall deal with the amount so returned in the manner herein after appearing.

b. The decretal amounts in Adm. Suits 1254/1997, 14/1998, 35/1999 and 7/2000, subject to what is stated below, are affirmed. Those amounts (subject to a subsequent rectification of PQA's decree), are Rs. 862,628.80, Rs. 9,065,871/-, Rs. 2,907,848.70 and 19,512,422/-, respectively.

c. The suits are decreed with markup at the rate of 18%, but such markup (to be computed by the Official Assignee after notice to the parties) shall in each case be only for the period from 16.10.2006 to the date on which the fund representing the sale proceeds plus accrued profit was actually released to PQA (and if payment was made on various dates, the last such date).

d. The Official Assignee shall, from the amount returned by PQA in terms of sub-para (a) above, first make payment to each of the

other decree holders of the decretal amounts set out in sub-para (b) above.

e. The balance left over (i.e., after payments have been made or provisioned for in terms, or for the purposes, of sub-para (d)) shall be shared ratably among all four decree holders and paid accordingly, the said shares to be computed on the basis of the markup calculated in terms of sub-para (c). (It is clarified that the shares so ascertained shall be paid out even if they exceed the amounts calculated in terms of sub-para (c).)

30. The leave petition, converted into an appeal, is allowed and disposed off in the above terms.

Judge

Judge

Judge

Announced in open Court at Islamabad on 12.09.2018

Judge

Approved For Reporting