

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/11/2003

CORAM

THE HONOURABLE MR.JUSTICE N.DHANAKAR
AND
THE HONOURABLE MR.JUSTICE A.KULASEKARAN

O.S.A.No.175 OF 1998
AND
C.M.P.Nos.14624 OF 1998, 14828 TO 14830 OF 1998,
2565 & 2566 OF 1999 AND 981 AND 1174 OF 2003

Petromarine Products Ltd.,
Company incorporated under the
laws of Cyprus, having its
registered office at Libra Towers,
23,Olympian Street,
Limassol, Cyprus,
rep.by Constituted Attorney .. Appellant

-Vs-

1.Ocean Marine Services Co.Ltd.,
rep.by its Power of Attorney Agent,
Mr.T.Satakopan,
16, I Floor,
Errabalu Chetty Street,
Chennai-600 001.

2.Owners and Other parties
interested in the vessel
m.v.ELENI, rep.by its
Master, now lying at the
Port of Madras.

3.Compass Shipping & Trading Pvt.Ltd.,
46, Rajaji Salai,
III Floor,
Chennai-600 001.

4.Sea Traffic,
30, Errabalu Chetty Street,
Chennai-600 001.

5.Mr.V.Ramajegadeesan,
Advocate Commissioner,

No.280, Lloyds Road,
Royapettah,
Chennai-600 014.

6.The Board of Trustees
of the Port of Madras,
Rajaji Salai,
Chennai-600 001. ... Respondents

For appellant : Miss. Ferishte Setana

For respondent 1:Mr.S.Vasudevan
For respondent 3:Mr.Srinivasa Raghavan
For respondent 4:Mr.M.B.Gopalan
Respondent No.5 :Mr.V.Ramajegadeesan,
Advocate Commissioner.

Appeal against the order dated 06.10.1998 made in Application No.121 7
of 1997 in C.S.No.97 of 1997 on the file of this Court.

:J U D G M E N T

A.KULASEKARAN,J.

In this appeal, the appellant has challenged the order dated
06.10.1998, passed by the learned single Judge of Original Side in Application
No.1217 of 1997 in C.S.No.97 of 1997.

2. Before the appeal being dealt with, it is relevant to look
into the dates and events of the case admitted by both sides. The first
respondent herein has filed the suit in C.S.No.97 of 1997, for recovery of US
\$ 22,705.84 against the second respondent herein on 26.02.1997 . Along with
the suit, the first respondent filed Application No.750 of 1997, praying for
an order of arrest of the vessel, which has arrived at Port of Madras, and the
same was ordered on 27.02.1997 as prayed for. The appellant herein filed a
suit in A.S.No.27 of 1997 on the file of the Bombay High Court, for recovery
of amount of US \$ 39.7 12.97. At the instance of the appellant, the Bombay
High Court ordered arrest of the vessel m.v.ELENI on 19.03.1997. On
17.04.1997, the Madras High Court ordered sale of the said vessel. On
21.04.1997, M/s.Erricson and Richards were appointed as Court Surveyor to
value the vessel, by the Madras High Court. On 25.04.1997, terms and
conditions for sale were approved by the Madras High Court. From 30.04.1997
to 06.05.1997, publications were effected in respect of the sale of the said
vessel in Lloyds List, Indian Express, The Hindu, Express Newslines and
Financial Express. The Madras High Court received a tender from M/s.Jansee

Steel Industry Pvt.Ltd. on 26.05.1997. On 04.08.1997, order of confirmation was made in favour of M/s.Jansee Steel Industry Pvt.Ltd. by the learned single Judge. The said order was challenged by one M/s. Bancorex in O.S.A.No.15 of 1998. The same Bancorex filed another O.S.A.246 of 1997, challenging the order passed in Application No.906 of 1997. O.S.A.No.246 of 1997 was disposed of on 28.08.1997, directing the parties to agitate before the learned single Judge. On 11.09.1997, the Bombay High Court decreed the suit filed by the appellant for a sum of US \$ 50,081.74 with interest etc. On 25.09.1997, the appellant wrote a letter to the advocate commissioner, appointed by the Madras High Court, informing the decree passed in their suit. On 30.09.1997, the advocate commissioner requested the appellant herein to send certified copies of the decree and other related papers. On 21.10.1997, the Sheriff of Mumbai wrote a letter to the advocate commissioner, informing him of the condemnation of the ship ELENI. On 24.10.1997, the learned single Judge of Original Side of the Madras High Court confirmed the sale in favour of M/s.Jansee Steel Industry Pvt.Ltd. On 24.01.1998, the decree, transmitted by the Bombay High Court, was received by the Madras High Court. On 10.02.1998, the appellant filed Execution Application No.98 of 1998 before the Bombay High Court. On 17.03.1998, the Bombay High Court issued a notice under Order 21 Rule 52 of the C.P.C., requesting the Madras High Court to hold the decretal sum in an aggregate amount of US \$ 58,325.64 from and out of the funds deposited by M/s.Jansee Steel Industries. O.S.A.No.15 of 1998 was allowed on 23.04.1998, setting aside the confirmation of sale made in favour of M/s.Jansee Steel Industry Pvt.Ltd. and the matter was remanded to the learned single Judge to ensure that the best possible price is secured. On 01.09.1998, the learned single Judge of Original Side of the Madras High Court accepted the only bid of M/s.Jansee Steel Industry Pvt.Ltd. for a sum of US \$ 4,70,000 and directed to pay the balance consideration within three weeks, failing which the earnest money, deposited by them, shall stand forfeited. The learned single Judge also directed the advocate commissioner to deposit the entire amount to the credit of the suit. On 07.09.1998, the Registry of Madras High Court noted the attachment made by the Bombay High Court in the suit register. On 22.09.1998, payment of sale consideration was made to the advocate commissioner. On 25.09.1998, the Bombay High Court requested the Registrar of the Madras High Court to remit the funds, lying attached. On 03.10.1998, the appellant informed the Registry of the Madras High Court the actual amount of Rs.24,80,006.21 to be remitted by the Madras High Court. The learned single Judge of Madras High Court confirmed the sale made in favour of M/s.Jansee Steel Industry Pvt.Ltd. on 05.10.1998 and ordered reimbursement of cost of sale, payment to the crew and charges to the statutory authorities. On 06.10.1998, the advocate commissioner filed a memo, stating the details of disbursement made as per order dated 05.10.1998. On 06.10.1998, the learned single Judge of the Madras High Court directed to deposit the balance amount in the Court to the extent of Rs.12,38,164/-. On 07.10.1998, delivery of possession of ship was made to the purchaser and sale certificate was also issued. On 07.10.1998, Bombay High Court makes a further order in favour of the appellant. Thereafter, the appellant herein filed the present O.S.A. on 12.10.1998. The Registry of Bombay High Court sent letters dated 28.01.1999, 09.03.1997 and 11.03.1999, requesting the Registrar of the Madras High Court to give reply for non-remittance of the attached funds. On 03.09.1999, Bombay High Court gave liberty to the appellant, to obtain suitable orders from the

Madras High Court and closed the Execution Application.

3. The appellant herein filed C.M.P.No.14624 of 1998, seeking leave to file the O.S.A. A Division Bench of this Court directed the registry to register the appeal, keeping open the question of maintainability, by an order dated 13.10.1998; C.M.P.No.14828 of 1998 is filed by the appellant, seeking for order of attachment; C.M.P.No.14829 of 19 98 is filed to direct that the petitioners are in priority to the entitlement of the amount; C.M.P.No.14830 of 1998 is to direct the respondents 3 to 4, to deposit or re-deposit into the Court a sum of US \$ 60,000; C.M.P.No.2565 of 1999 is filed, seeking permission to amend the date of the impugned order as 05.10.1998 instead of 06.10.1998; C.M.P.No.2566 of 1999 is to direct the remittance of sum of Rs.12,38,16 4/-, lying in this Court to the credit of the suit C.S.No.97 of 1997, pursuant to the order of attachment passed in E.A.No.98 of 1998 on the file of the Bombay High Court; C.M.P.No.981 of 2003 is to implead M/s.Jansee Steel Industry Pvt.Ltd as seventh respondent in the O.S.A. and C.M.P.No.1174 of 2003 is filed, seeking permission to raise additional grounds.

4. Miss. Ferishte Setana, learned counsel appearing for the appellant submitted that the Bombay High Court issued notice of attachment under Order 21 Rule 52 CPC on 17-03-1998 and on service of notice, the appellant is entitled to the decree amount absolutely; on 25-09-1998, Bombay High Court passed an order for payment out, while so, under no circumstance, the amount attached ought not to have been disbursed to third parties; that the amount disbursed to third parties without notice to the appellant/ attaching creditor is illegal; that the custody court namely the Madras High Court has no authority to make rateable distribution. Counsel for the appellant added that the appellant is a decree holder, hence, it should have been accorded absolute priority. The learned single Judge failed to note that the parties who have received monies from the advocate commissioner are not decree holders. The sum lying in the Court together with accrued interest to be remitted to the Bombay High Court forthwith for the benefit of the appellant and the balance of amount, for which the appellant is entitled to to be recovered from the parties who have received the same and prayed for setting aside the order passed by the learned single judge.

5. The learned counsel appearing for the appellant relied on the following decisions in support of her case:-

i) (T.H. Ismail Hassan Vs. T.S. Haji Moosa & Co) AIR 1930 Madras Page 538 wherein it was held thus:-

"The principle of those decisions is this that the charge-decree holder is entitled to the benefits of his charge-decree in execution of the decree, and any other person who refuses to be bound by the decree on whatsoever ground it may be, has got to file a regular suit for the proper relief. In the present case, the respondents attaching creditors would all be entitled to file suits or they may jointly file a suit alleging that the claims of plaintiff and defendant 1 in C.S. No. 160 of 1927 are bogus claims and if they proceed they will be entitled to recover the full amounts of the decree out of the amounts now to be drawn by the plaintiff and defendant 1 in execution of C.S. No. 160 of 1927; but, until such a suit is filed by them

and it is found in their favour, the charge, decree must have its course."

ii) (Kamini Kumar Choudhuri Vs. Sasanka Sekhar Choudhuri and others) AIR 1933 Calcutta 814 wherein it was held thus:-

"This rule, should, in my opinion, succeed. The Court of the 3rd munsif of Chittagong was only a custody Court and being a custody Court, under Order 21 Rule 52 Civil P.C., it had no authority to make any rateable distribution. Under that rule it could only determine the question of priority and thereafter act under the instructions of the attaching court. The case of Thakurdas Motilal V. Joseph Iskender (1) no doubt approves of a rateable distributing made by a custody court. But in that case the custody court happened to be the attaching Court as well."

iii) (Athivarapu Venkatarami Reddi Vs. Kotamreddi Rami Reddi) AIR (3 7) 1950 Madras 589 wherein it is held in para-7 thus:-

"7.I am satisfied that, as the Law stands in this State, a Court which has passed the decree can despite its having transferred it for execution to another Court and not having received it back with a non-satisfaction certificate, entertain an application by the decree-holder for transfer of the decree to a third Court, or an application for simultaneous execution, which can only be ordered by the Court passing the decree."

iv) (Bisheshar Das and others Vs. Ambika Pershad) AIR 1915 Allahabad 275 wherein it is held thus:-

"..... The effect of the attachment before judgment is only to prevent the debtor from dealing with the property, but the property still continues to be his. Therefore, the plaintiffs in the present case were entitled to attach the money which was in Court, being the proceeds of the sale of the property attached before judgment. As the Court made an order on the 23rd February 1912, directing the money attached to be paid over to the plaintiffs, the plaintiffs were entitled to receive that money and the Court or the Defendant Ambika Prasad could not deprive them of their right to get the money. Had Ambika Prasad already obtained a decree on the date on which the money was ordered to be paid to the plaintiffs and had he applied for execution, different equities might arise...."

v) (Uma Venkataraman & Co., Vs. Methewala Adamji Usman & Co) AIR 191 9 Madras 1616 wherein it was held thus:-

"..... It is true that S.270 of the Code of 1859, by which the attaching creditor was entitled to be paid first out of the proceeds of the property sold under his attachment, was not re-enacted in 1882 or 1908. But that provision did not in terms affect the attachment of a fund and there is no reason for assuming that its disappearance, whatever its effect in cases to which it was applicable affected the application of the English rule conferring a priority to which Bakewell, J., has referred. The material point is that, a fund attached under Order 1 Rule 52 requires no further realisation and that in the absence of creditors entitled to apply under S.73, there can,

from the moment that the attachment is laid on it, be no obstacle to its payment to the attaching creditor. This is recognised by the procedure authorised by the Civil Rules of Practice Nos. 179, 180, under which, after (if necessary) his decree has been transferred to the Court, where the fund is the attaching creditor is entitled to be paid as if he were an assignee of the judgment debtor.

vi) (E.M. Visvanadham Chetti and others Vs. Arunachalam Chetti)
AIR 1921 Madras 218 wherein the Full Bench of this Court held thus:-

"Money deposited in Court to the credit of a judgment debtor before any decree holder applies in execution to have it paid towards the satisfaction of his decree should not be dealt with on a system of priority when several decreeholders afterwards come in and apply to the same Court to have it attached but it should be rateably distributed among them.

The fact that money was lying in Court to the credit of the judgment debtor in a suit other than in which the attachments were made does not make it assets 'held by a Court' within the meaning of S.73 which clearly refers to assets levied in execution or paid into Court in satisfaction of the decree under execution and not to assets lying in the same Court to the credit of the judgment debtor in another suit.

When the attaching Court and the custody Court are the same an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachments took place. It is only when this is done that the Court as attaching Court can properly be said to have received the assets and to hold it within the meaning of Sec.73; and decree holders who have attached prior to that are entitled to rateable distribution."

6. Mr. Vasudevan, learned counsel appearing for the first respondent submitted as follows:-

The appeal is not maintainable since the order dated 06-10-1998 do not affect the right of any parties, including the appellant herein. The first respondent has filed the suit along with an application for arrest of the vessel on 26-02-1997, this Court ordered arrest of the vessel on 27-02-1997. The warrant of arrest was served on 28-02-1997 on the agent and on the vessel on 03-03-1997 since, the vessel was at the outer anchorage. The sale of the vessel was confirmed by the learned single Judge for a price of US Dollars 7,90,000 which was challenged by one of the intervenors namely M/s. Bancorex in O.S.A. No.15 of 1998, which was allowed on 23-04-1998 setting aside the order of sale and remanded back the matter to the learned single Judge to consider afresh from among the bidders who have already approached this Court. Though the original price of US Dollars 7,90,000 was offered by one Jansee Steel Private Limited, it was reduced by them to 4,50,000 US Dollars. At no point of time, the amount of US Dollars 4,50,000 was deposited to the credit of the suit in the name of the Registrar, Madras High Court. When monies were not available in the Court, the appellant herein obtained an ex parte decree dated 11-09-1997 and transmitted the same to this Court for execution. The said facts were brought to the notice of the learned Single Judge on

09-01-1998 and the learned single Judge considered the same and has given his finding in order dated 24-01-1998 stating that the appellant herein was entitled to work out his remedy in the execution of the decree. Even at that point of time, no amount was lying to the credit of the suit. The appellant herein filed Execution application before the Bombay High Court and obtained an order dated 12-03-1998 for attachment of sale proceedings of US Dollars 7,90,000 or any other sum in the hands of the Registrar of High Court, Madras which was communicated to this Court on 17-03-1998, however, the Registrar of this Court communicated that the order of attachment was effected on 07-10-1998 to the Bombay High Court. At that time also, no funds were available in the hands of the Registrar to the credit of the suit CS No. 97 of 1997. The learned counsel also pointed out that a memo dated 12-12-1997 was filed by the counsel for the appellant informing the transmission decree from the Bombay High Court to Madras High Court for execution. From that day onwards, the counsel for the appellant was aware that no amount was lying to the credit of the suit with the Registrar, Madras High Court, though communications were exchanged. The learned Single Judge has directed the advocate commissioner to open a personal account and deposit the sale proceeds by order dated 22-09-1998. In so long as no funds are available at the hands of the Registrar, Madras High Court, the attachment made is unsustainable. Anticipatory attachment is not valid in the eyes of Law. Under Order 21 Rule 52 CPC, the Madras High Court is competent to disburse the amount to the creditors, who were before it. By order dated 05-10-1998, the learned single Judge directed to disburse of the amount to the persons who have approached it and accordingly the same was disbursed by the advocate commissioner. After disbursement the balance amount available namely Rs.1 2,38,164/- was ordered to be deposited into the Court for the benefit of other creditors. After disbursement is made, nine claimants, including the appellant herein are there, but the funds available is only Rs.12,38,164 with accrued interest. The learned single Judge of original side of Madras High Court is competent to determine priorities among the creditors and priority of the appellant can only be decided after issuing notice to the said persons who are interested in the available funds. The appellant herein failed to file intervening petition soon after the sale of the vessel was made by this Court. Though the learned single Judge by order dated 06-10-1998 acknowledged the receipt of the order of attachment from Bombay High Court has not passed any orders to transfer the remaining funds for the obvious reason that there are number of claimants who are already filed intervening petitions. The appellant has participated in the proceedings before this Court but allowed it to be terminated as such there is no right for the appellant to challenge the order dated 06-10-1998. Under Admiralty practice, this Court is vested with the power to sell the vessel and to decide priorities of the parties and the same was rightly decided by this Court. The order of attachment passed by the Bombay High Court is not valid in Law since the decree is in rem, which can be executed only against the vessel and not by resorting to Order 21 CPC which is applicable only to the cases of decree in personam. The appeal is liable to be dismissed for non-joinder of necessary parties namely the other creditors and prayed for dismissal of the appeal.

7. Mr. Vasudevan, learned counsel appearing for the 1st respondent relied on the below mentioned judgment.

i) (Tulaji Fatesing Raje Bhosle Vs. Balabhai Lakhmichand) I.L.R. Volume XXII Page No.39 wherein the Court held that "at the date of attachment on 06-04-1895, there was no money in the hands of the Postmaster at Pune. The money sought to be attached did not reach his hands until 13-04-1895 and so it could not be attached on 6th April 1895. Section 272 does not, in my opinion allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands."

ii) (Maharaja Sree Maharaja Saheb Meharban Dostan Sree Maharaja Sri Honourable Rao Venkata Swetachalapati Ranga Rao Bahadur, the Maharaja of Bobbili Vs. Sree Raja Narasaraju Peda Baliar Simhulu Bahadur Garu and another) ILR Volume XXXVII Page 232 wherein it was held thus:-

"The Court to which a decree is sent for execution is the only Court which has ceased of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under Section 41, CPC, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attaching such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution proceedings unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent had been stayed for the purpose of executing the decree in the former Court.

"In Krishtobishore Dutt Vs. Roopal Dass (2), also there was an order by the Court which passed the decree for simultaneous execution. These decisions are authorities for the proposition that decrees may be executed simultaneously in more than one Court, but in all those cases, there were orders allowing such execution and the consideration that I have already set out would seem to indicate the necessity of an order permitting concurrent execution before such execution proceedings can be carried out. In the present case, after the decree was transferred for execution to the Parvatipur Munsif's Court that Court had ceased of the execution proceedings and it was bound to carry them on until execution was obtained or further execution became impossible. There was no order of the District Court of Visagapatnam staying execution in that Court, for the purpose of executing the decree in the Visagapatnam Court itself. I am therefore of opinion that the Judge is right in holding that the application for sale in 1997 should have been made to the Parvatipur Munsif's Court and that the District Court was not therefore the proper Court to entertain such an application"

iii) The decision cited supra was upheld on appeal by the Privy Council in the decision reported in (Maharajah of Bobbili Vs. Naasaraju Peda Baliara Simhulu Bahadur) ILR Volume 39 Privy Council Page No. 640 holding that

"As the decree of the 5th April 1904 had by order of the Court of the District Judge been sent on the 30th September 1904 to the Court of the Munsif of Parvatipur for execution by the latter Court and as the copy of the decree with the non-satisfaction certificate was not returned to the Court of the District Judge until the 3rd August 1910, and as the position of the 13th December 1907 was for execution of the decree by sale of the immovable property of the respondents which was within the local limits of the

jurisdiction of the Munsif Court, their Lordships, having regard, particularly to Sections 223, 224, 228 and 230 of the Code of Civil Procedure, 1882, are satisfied that when that position of the 13th December 1907 was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the decree by sale of the immovable property which had been attached to the Court by the Court of the Munsif should have been made and that the proper Court to which that application should have been made was the Court of the Munsif of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court. Consequently, the application by the petition of the 27th April 1910 was, when made, time barred under Article 182 of the second schedule of the Indian Limitation Act, 1808, as no application had been made within three years in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree. Further, their Lordship's agree with the District Judge that the application of the 27th April 1910 was not made to the proper Court."

(iv) (R. Chinnaswamian Vs. R. Thirurangadiah) AIR 1915 Madras
Page No. 236 (1) wherein it was held thus:-

"The fund in Court consists of the surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree. The money was paid into Court by the auctioneers on 27th March 1913 and was subsequently attached at the instance of the present applicant. The attachment at the instance of the opposing creditor was made before the money had been paid into Court and therefore before there was any property in the custody of the Court, within the meaning of Order 21, Rule 52, and was therefore bad.

v) (Thakurdas Moti Lal Vs. Joseph Iskender and others) AIR 1917
Calcutta 13 wherein it was held thus:-

"Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by notice to such Court. It is clear that the rule was only intended to relate to an officer who has at the time the application is made, in his hands the funds which may be the subject of attachment. My interpretation of the rule is borne out by the judgment of this Court, to which my learned brother Mookerjee, J was a party, in the case of Padmanand Singh Vs. Rama Prasad. The passage in his judgment to which I desire to refer is at Page 19 of CWN and is as follows:-

"In so far as R.52, O.21 is concerned, the case is equally clear. As already stated, that rule applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is restricted only to money actually in his hands."

Then it was argued by Mr. Das on behalf of the respondent that even if that were so, and even if the attachment which was effected by his client was invalid, still there was this sum standing to the credit of the suit in which his client was the plaintiff and he had made an application to have so much as would satisfy his claim paid out of that sum and that inasmuch as the

creditor whose attachment was valid, namely, Chuni Lal Johurry had not made any objection and inasmuch as the attachment effected by Mr. Sarkar's client was invalid, he was entitled to have the money paid out of that sum. With that argument, I cannot agree for this simple reason. To my mind, it is obvious that that application was based upon the original application for execution; it was clearly having regard to the wording of the petition, made in continuation of his application for execution and inasmuch as I have already come to the conclusion that the attachment was an invalid attachment, I do not think that that application for the payment out of the money in question was one which could have been acceded to by the Court, quite apart from the fact that the order for the transfer of the money had been obtained *exparte*, upon a representation that it was for the purpose of distributing the money rateably amongst the creditors."

vi) (M.V. Elisabeth and others Vs. Harwan Investment & Trading Pvt Ltd., Hanoekar House, Swatonapeth, Vasco-De-Gama, Goa) AIR 1993 Supreme Court 1014 wherein it was held in Para Nos. 11, 25, 46, 47, 73 and 78 as follows:-

"11. The powers of the Madras High Court are traceable to the Admiralty Court Act, 1861 (24 & 25 Victoria c.104) by reason of the Letters Patent of 1865 read with the Colonial Courts of Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891. By the last two Acts, the Madras High Court was invested with the same admiralty jurisdiction as was vested in the High Court of England. The Letters Patent of 1865 declared that the High Court of Madras would and continue to be a Court of record and that it would exercise ordinary, original and civil jurisdiction within its local limits to try and determine suits. The Government of India Act, 1915 declared that all the High Courts established by Letters Patent were Courts of record and had such original and appellate jurisdiction including admiralty jurisdiction as had been vested in them by Letters Patent. The Government of India Act, 1935 declared that 'every High Court shall be a Court of record' and that its jurisdiction, the law administered by it and the powers of the Judges were the same as immediately before the commencement of Part III of that Act (Sections 220 and 223).

25. It was because of the unlimited civil jurisdiction that was already vested in these High Courts that they were declared to be Colonial Courts of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom. The High Courts were declared to be competent to regulate their procedure and practice in exercise of admiralty jurisdiction in accordance with the Rules made in that behalf. There is, therefore, neither reason nor logic in imposing a fetter on the jurisdiction of these High Courts by limiting it to the provisions of an imperial statute of 1861 and freezing any further growth of jurisdiction. This is all the more true because the Admiralty Court Act, 1861 was in substance repealed in England a long time ago. See Halsbury's Law of England, 4th ed.vol. I (1) Para 307; Halsbury's Statutes of England, Volu.I,p.9.

46. Admiralty Law confers upon the claimant a right in rem to

proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtain security to satisfy judgment. A successful plaintiff in an action in rem has a right to recover damages against the property of the defendant. The liability of the ship owner is not limited to the value of the res primarily proceeded against ... An action... though originally commenced in rem, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability'. (Roscoe's Admiralty practice.5th ed.p.29)

47. The foundation of an action in rem, which is a peculiarity of the Anglo American Law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a 'sistership' i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

73. A foreign vessel, no matter what flag she flies, owes temporary and local allegiance to the sovereign of any port to which she comes. And the persons in such a vessel likewise must obey the laws and regulations of the port. Such jurisdiction is discretionary. Once a foreign vessel passes out of territorial waters, she owes no further duty to the place which she has left, unless she is 'hotly pursued'. But her conduct on the high seas or in foreign ports may subject her to penalties on returning on a subsequent visit. (Benfict, The Law of American Admiralty, Sixth Edition, Pages 121 & 122).

8. The Merchant Shipping Act, 1958 contains various provisions to enforce territorial jurisdiction. The Act being essentially regulatory in character, the various authorities, tribunals and Courts entrusted with the administration and enforcement of its provisions are essentially stated. The High Court is defined under S.3 (15) as follows;

"3(15) High Court, in relation to a vessel means, the High Court within the limits of whose appellate jurisdiction-

- (a) the port of registry of the vessel is situate
- (b) the vessel is for the time being; or
- (c) the cause of action wholly or in part arises.

Accordingly, a foreign ship falls within the jurisdiction of the High Court where the vessel happens to be at the relevant time i.e., at the time when the jurisdiction of the High Court is invoked, or, where the cause of action wholly or in part arises.

9. The learned counsel appearing for the 4th respondent Mr. M.B. Gopalan submits that in admiralty proceedings where several persons have lodged their claim, even the attachment made by the Bombay High Court has to be decided only if an application for payment of attached amount is made, while so, the appellant, without approaching the admiralty proceedings seeks a declaration in this appeal that it is not entitled to priority. The appellant was fully aware of the development of the proceedings in the suit but not chosen to raise any objection before the learned single Judge with a malafide intention. The learned single Judge has passed the order on hearing all the parties concerned who have approached the Court and there being no opposition by any of the parties including all the claimants and the creditors. The order of attachment made by the Bombay High Court is not sustainable as the decree has been transmitted to this Court for execution. If any attachment or other order is to be passed in execution proceedings, the same can be passed only by the transferee Court (Madras High Court) to which the decree has already been transmitted. Hence, after having got the decree transmitted to this Court, the appellant has moved the Bombay High Court itself for judgment and obtained an order without notice to the creditors/claimants. The act of the appellant exposes that he conveniently avoided the contest being made by the other claimants/creditors. No right flows to the appellant from the decree of the Bombay High Court since the vessel has been sold by this Court invoking admiralty jurisdiction. Several claimants have filed their claims before this Court, but only the appellant has gone to Bombay High Court, that too after arrest of the vessel by this Court. The appellant has deliberately suppressed the fact in their suit that the vessel was arrested by this Court. The appeal is also bad for non-joinder of necessary parties namely crew and others. The Division Bench of this Court by order dated 13-10-1998 granted leave to the appellant to file the appeal only against the order dated 06-10-1998, leaving the issue of maintainability open and the appeal was numbered only in the above terms. Soon after receipt of the appeal papers, this respondent has pointed out that it has not received any payment under the order dated 06-10-1998 as such not a necessary party. After lapse of substantial time i.e., on 10-02-1999, the appellant has filed other applications to amend the date of the impugned order from 06-10 -1998 to 05-10-1998. Hence, it is not open to the appellant to convert the appeal against the order dated 05-10-1998 and prayed for dismissal of the appeal.

9. Mr. V. Ramajagadeesan, learned Advocate Commissioner/5th respondent herein submitted that he was appointed as advocate commissioner to sell the ship. He denied the averments that he had transferred the bid amount of Rs.2 crores to his personal account and disbursed the sale proceeds indiscriminately. The Canara Bank, Perambur Branch has moved the Debt Recovery Tribunal against the purchaser namely Jansee Steel Industries Pvt Ltd wherein he was also impleaded as a party and also attached the amounts lying in the account of the advocate commissioner in the very same bank. The learned single Judge of this Court directed Canara Bank to transfer the entire amount lying in the account of the purchaser to his personal account maintained with State Bank of India, Royapettah Branch and accordingly the same was transferred. Every disbursement was made by him after production of carbon copy or certified copy of the order from this Court by the respective parties and not even single pie is disbursed without any specific order. This

Court, on its own discretion awarded the sum of Rs.6 lakhs towards remuneration. The application and the suit and the proceedings relating to the sale were pending for more than two years as such the remuneration fixed at Rs.6 lakhs is reasonable amount and prayed for dismissal of the appeal.

10. The learned counsel appearing for the 6th respondent submitted that they have received the charges for the services rendered for the vessel i.e., maritime liens and therefore the question of redeposit for the charges collected does not arise and prayed for dismissal of the appeal as well as connected applications.

11. We have carefully considered the arguments advanced by the learned counsel on both sides as well as the catena of judgments relied on by them.

12. The appellant herein filed application seeking leave of this Court to file appeal on the ground that without determination of the priorities of the parties or without giving opportunity to the appellant herein, who is not a party to the proceedings, the order dated 06-10 -1998 has been passed prejudicial to their interest by the learned single Judge of the original side of this Court. This Court, although granted leave by order dated 13-10-1998 kept open the question of maintainability.

13. As a general principle, no one can appeal unless he was a party to the proceedings or was treated as such or legal representative of the party or unless his privity in estate, title or interest is apparent on the face of the record. However, any person have a legal grievance which might have deprived him of the benefit or bound by the order passed is certainly entitled to the leave. It is more appropriate to refer the judgments of the Honourable Supreme Court reported in (Adi Pheroz Shah Gandhi Vs. H.M. Servai, Advocate General of Maharashtra, Bombay) AIR 1971 SC 385 and (State of Punjab and others Vs. Amarsingh and others) AIR 1974 SC 994 at 1016. It is from that point of view the appellant is an aggrieved person. Even in case of doubt as to the existence of the right of appeal, the appellant should get the benefit of doubt, hence we hold that the appellant is entitled to file the appeal as such the appeal is maintainable.

14. The first respondent herein filed suit C.S. No. 97 of 1997 invoking the admiralty jurisdiction of this Court. Along with the suit, the first respondent has also filed application No. 750 of 1997 praying this Court to arrest the ship which was also granted by this Court. The first respondent has also filed application No.1212 of 1997 to appoint an advocate Commissioner and this Court by order dated 17-04-1 997 appointed the 5th respondent herein as advocate commissioner to conduct the sale of the said vessel. The suit in A.S. No. 27 of 1997 was filed by the appellant herein before the Bombay High Court invoking the admiralty jurisdiction on 17-03-1997 which was decreed exparte on 11-09-1997. The appellant and Sheriff of Bombay

High Court had sent a communications to the advocate commissioner/5th respondent herein informing the decree passed in their favour by the Bombay High Court.

15. After exchange of the said communications, on 12-12-1997 the appellant herein has filed a memo stating that the Bombay High Court has transmitted the decree for execution by Madras High Court. On 24-01 -1998, the learned Single Judge accepted the bid of Jansee Steel Industries Limited. Thereafter, on 12-03-1998, at the instance of the appellant, the Bombay High Court has ordered attachment of the sale proceeds said to have been deposited with the Registry of Madras High Court. On receipt of communication, the Assistant Registrar of Madras High Court noted in the ledger that 'in pursuance of the said order, a sum of US Dollar 58325.64 (Rs.20,41,375/-) shall be withheld in the amount standing to the credit of the suit C.S. No. 97.' Indeed, virtually, no amount was lying with the Registry on that day or subsequent thereto. In the meanwhile, the Division Bench of this Court set aside the order of the learned single Judge dated 24-01-1998 accepting the bid amount of Jansee Steel Industries Private Limited and remanded the matter back for fresh consideration. On 01-09-1998, the learned single Judge accepted the sale price and directed the purchaser to pay the balance amount within three weeks.

16. It is brought to the notice of the learned single Judge by the Advocate Commissioner that the amount of Rs.1,04,40,000/- lying in the account of the purchaser with Canara Bank, Perambur Branch representing part of sale proceeds was refused to be released by the said Bank and prayed for suitable directions to the Bank. Accordingly, the learned single Judge permitted the advocate Commissioner to deposit all the five bankers cheque for Rs.95,60,000/- handed over by the purchaser in his personal account and also directed the Canara Bank, Perambur Branch to transfer the amount to the personal account of the advocate commissioner. Thus, the sum of Rs.2 crores was deposited in the personal account of the advocate commissioner. The advocate Commissioner has also filed memo dated 24-09-1998 along with necessary invoices praying the Court to permit him to disburse the amounts payable to Shipchandlers, Port Trust etc.,

17. In the meanwhile, Canara Bank has filed a suit before the Debt Recovery Tribunal, Chennai in O.A. No. 1437 of 1998 and obtained order of interim injunction restraining the advocate commissioner to transfer the amount to his account. The Canara Bank filed third party application No. 3378 of 1998 to revoke the direction dated 24-09-1998 issued transferring the amount of Rs.1,04,40,000/- which was dismissed by the learned Single Judge on 25-09-1998.

18. The Advocate Commissioner has submitted the details of disbursement made as per the order from and out of the sum of Rs.2 crores and he informed the Court that the balance amount of Rs.18,88,064/- is lying in his account. The learned single Judge allowed the advocate Commissioner to withdraw a sum of Rs.6 lakhs towards his remuneration and another sum of Rs.50,000/- to the mortgagee who spent towards revaluation charges. Thereafter, the learned single Judge passed the order dated 06-10-1998 observing as follows:-

"The Commissioner has filed memo to the effect that he has made all the disbursements indicated by this Court on yesterday. Now it is brought to my notice that the High Court of Bombay has passed a garnishee order to

withhold a sum of US Dollars 58,145.64 equivalent to Rs.2 0,41,375/-. Now the Commissioner has made disbursements towards all the maritime liens and statutory liens. The balance amount available is Rs.12,38,164/-. In the light of the garnishee order passed by the Bombay High Court, I feel it is expedient to keep the amount in Court deposit by way of fixed deposit for a period of 46 days, revocable periodically if necessary, in the name of the Registrar, High Court, Madras to the credit of the suit. The Commissioner is directed to handover the fixed deposit to the Registrar, High Court, Madras on 07-10-1998. Issue sale certificate by 07-10-1998 to the auction purchaser."

19. The learned counsel for the appellant submits that even if the amount is not in the hands of the Registry, but in the hands of the advocate commissioner, it is custodia legis of the Court which cannot be disbursed by the Madras High Court, after the attachment is effected.

20. Per contra, the learned counsel for the first respondent submitted that on 07-09-1998 no money was in the hands of the Registry but it just followed the attachment order of Bombay High Court and made entries in the ledger, the order is nothing but an anticipatory attachment which is invalid.

21. Although the Assistant Registrar, Original Side, Madras High Court has made an endorsement in the suit ledger 'attachment is effected' failed to intimate the fact to Bombay High Court that no funds were available. Indeed, except the earnest money deposit, no further amount was in the hands of the advocate commissioner till 25-09-1998. Only by order dated 25-09-1998 of the learned single Judge the amount was transferred to the personal account of the advocate commissioner.

22. It is seen from the records that the advocate commissioner has intimated to the Court then and there about the order passed by the Bombay High Court. As mentioned supra, the memo has been filed on 12-12-1997 by the appellant through the counsel but failed to file any execution petition for the reason well known to them.

23. It is argued by the appellant that once an order is made under Order 21 Rule 52 CPC, the amount attached should be remitted to Bombay High Court. Even assuming the provisions of Order 21 Rule 52 CPC governs, if the property is in the custody of transferee Court, any question of title or priority arising between the decree holder another person not being the judgment debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise be determined by the transferee Court. Hence, we reject the argument of the counsel for the appellant that after attachment under Order 21 Rule 52, the Registry of Madras High Court has to remit the amount automatically to Bombay High Court.

24. The suit is filed by the first respondent herein invoking admiralty jurisdiction of Madras High Court under Order XLII of Original Side Rules. The relevant Rules under Order XLII of OS Rules is as follows:-

Rule 3. In suits in rem a warrant for the arrest of the property may be issued at the instance either of the plaintiff or of the defendant at any time after the suit has been instituted, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with:

A. The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim or counter-claim, the name and nature of the property to be arrested, and that the claim or counter-claim has not been satisfied.

B. In a suit of wages or of possession, the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the suit has been given to the consul of the State to which the vessel belongs, if there be one resident in Madras and a copy of the notice shall be annexed to the affidavit.

C. In a suit of bottomry, the bottomry bond and if a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct shall be annexed to the affidavit.

D. In a suit of distribution of salvage, the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name and address and description of the party holding the same.

8. In suits in rem, service of summons or warrant against ship, freight or cargo on board is to be effected by nailing or affixing the original writ or warrant for a short time on the main mast or on the single mast of the vessel and by taking off the process leaving a true copy of it nailed or affixed in its place.

11. In a suit in rem, any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the property under arrest or in the fund in the Registry.

25. It is seen from the said provisions that once the suit is filed invoking admiralty jurisdiction of the Madras High Court, the suit in rem, it decides the interest of not only parties to the suit but also other parties who are interested in the property under arrest or in the fund.

26. The learned counsel appearing for the respondents submitted that the appellant has failed to bring it to the notice of the Bombay High Court that the Madras High Court already seized up the matter, had the appellant brought to the notice of the Bombay High Court, the proceedings entertained by the Madras High Court was much prior to the suit filed by them, the Bombay High Court would not have passed the attachment order. We feel that some substance in the said arguments.

27. Madras High Court, while deciding the issues in the suit filed

under admiralty jurisdiction has considered the interest and also priorities of all interveners and also parties to the suit. We follow the judgment of Apex Court reported in (M.V. Elisabeth and others V. Harwan Investment & Trading Pvt Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa) AIR 1993 SC 1014 The catena of judgments relied on by the appellant are no way useful to them. The appellant ought to have made the claim under Rule 11 of Order XLII of O.S. Rules. In the ordinary course, no Court is so prestige-conscious that it will stand in the way of legitimate legal proceedings for redressal or relief sought for by the litigant. We find that necessary parties are not impleaded by the appellant herein and Jansee Steel Industries Pvt.Ltd., which is sought to be impleaded as seventh respondent in this appeal, is not a necessary party to resolve the disputes involved in this appeal. It is not open to the appellant to convert the appeal against the order dated 05.10.1998 instead of 06.10.1998, as the leave was granted to file the appeal only against the order dated 06.10.1998.

28. For the foregoing reasons, we dismiss the appeal. It is needless to mention that still it is open to the appellant to lay their claim under Order XLII Rule 11 of O.S. Rules. Consequently, the connected C.M.Ps. are also dismissed.

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Index : Yes

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