IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL NOTICE OF MOTION (L) NO.1392 OF 2018
IN
COMMERCIAL ADMIRALITY SUIT (L) NO.20 OF 2018

Altus Uber ...Applicant

IN THE MATTER BETWEEN :

Siem Offshore Redri AS ...Plaintiff

Vs.

Altus Uber ...Defendant

Mr. Prashant Pratap, senior advocate a/w. Mr. Vishal Muglikar I/b. Mr. Kaushik Krishnaswamy for plaintiff.
Mr. Sunip Sen a/w. Ms. Priyanka Pol I/b. Pol Legal Juris for defendant/ applicant in NMCDL/1392/2018.

CORAM: K.R.SHRIRAM, J.
RESERVED ON: 30th JULY 2018
PRONOUNCED ON: 25th SEPTEMBER 2018

P.C.:

1 This notice of motion is taken out by one Marine Engineering Diving Services (FZC) [hereinafter referred to as MEDS] on behalf of defendant vessel, for setting aside/recall of the order of arrest dated 1st June 2018 and releasing defendant vessel – *Altus Uber* from arrest.

2 Plaintiff had obtained an ex-parte order of arrest on 1st June 2018 from the vacation Judge. Defendant is an offshore supply vessel/ platform vessel flying the flag of Liberia and presently at Mumbai within the territorial waters of India and within admiralty jurisdiction of this Court. According to plaintiff, defendant vessel is owned by MEDS and MEDS has

denied this fact. According to MEDS they are only the bareboat charterers of the vessel and the owner is someone else – Swordfish Shipco Limited.

3 Plaintiff has filed this admiralty suit, *inter alia*, for recovery of amount of USD 28,889,304/- which includes charter hire in the sum of USD 6,797,554/- and claim for capital value of a vessel in the sum of USD 22,061,750/- together with further interest and costs. It is plaintiff's case that plaintiff had entered into a bareboat charter-party dated 13th May 2015 (said bareboat charter-party) with the owners of defendant vessel and the owners of defendant vessel committed a breach thereof.

4 According to plaintiff, plaintiff is the owner of a motor vessel - *Siem Marlin*. By the said bareboat charter-party, plaintiff gave on bareboat charter m.v. *Siem Marlin* to MEDS for a firm period of five years with a purchase obligation at the end of the five years or a purchase option at the end of the first/second/third/fourth year from the date of delivery. According to plaintiff, MEDS was to take delivery of *Siem Marlin* between 25th September 2015 and 25th October 2015. It seems MEDS were to, prior to delivery of *Siem Marlin* furnish a bank guarantee for USD 4,000,000/- as guarantee for full performance of the obligations under the charter-party and this bank guarantee was to be furnished in between 10th September 2015 to 15th September 2015. As the bank guarantee was not furnished, the time to take delivery of *Siem Marlin* was extended to 8th November 2015 to

22nd November 2015. An addendum to the charter-party dated 13th May 2015 was entered into on 11th October 2015. Once again, it is plaintiff's case that MEDS did not honour its commitment and therefore, without prejudice to and whilst keeping all its rights and remedies under the bareboat charter alive, plaintiff and MEDS entered into a BIMCO supply time charter-party dated 7th November 2015. This charter-party was to come into effect only upon MEDS furnishing a bank guarantee for USD 2,000,000/-. It is stated that this charter-party was also breached by MEDS and therefore, plaintiff through its advocates' letter dated 26th January 2016, informed MEDS that it was in repudiatory breach of its obligation under the bareboat charter-party despite giving enough opportunities to rectify the breach and in view therefore, terminated the charter-party and in view thereof, plaintiff had no option but to accept MEDS – charterers repudiation and notified MEDS about bringing the charter-party to an end. Plaintiff also informed MEDS about steps plaintiff will be taking to mitigate their losses and finally invoked arbitration clause. The arbitration was invoked in April 2016. On 26th April 2016, plaintiff filed its statement of claim before the arbitral tribunal and copy was sent to MEDS. MEDS, by an email dated 17th May 2017 requested for extension of time till mid July 2017 to submit their response/defence to plaintiff's claim, which was rejected and an extension of 14 days time was granted. Thereafter, from June 2017 negotiations were going on between the parties and no settlement was arrived at.

5 According to plaintiff, sometime in November 2017, plaintiff learnt that MEDS had purchased defendant vessel – *Altus Uber*. Plaintiff relied upon a Seaweb Report dated May 2018 which confirms that MEDS was the owner/charterer of *Altus Uber*. Therefore, plaintiff filed this admiralty suit in this Court for the same (identical) claim that it has made in the arbitration proceedings in London. Plaintiff obtained the order of arrest as mentioned above. According to plaintiff, notwithstanding the pendency of the arbitration proceedings and award that may be passed in London, plaintiff is entitled to file the present suit seeking arrest of defendant vessel as security for plaintiff's claim in the suit. According to plaintiff, it is also entitled to seek decree against defendant vessel and obtain security for its claim in the suit. An alternative stand also is taken that defendant vessel can be retained as security for the arbitration proceedings commenced in London. Paragraph 46 of the plaint reads as under:

> *46. The Plaintiff notwithstanding the pendency of the arbitration proceedings and award that may be passed in arbitration proceedings in London are entitled to file the present admiralty suit seeking arrest of the Defendant vessel as security for the Plaintiff claim in the suit. The Plaintiff is entitled to seek decree against the Defendant vessel as claimed in the suit and obtain security for its present claim in the suit. In the alternative the Defendant vessel can be retained as security for the arbitration proceedings commenced in London.*

6 It is in this background that MEDS/applicant has taken out the present notice of motion for vacating the order of arrest. According to applicant:

(a) Plaintiff having already commenced arbitration in London

cannot file this suit for the same relief. If plaintiff wanted any security it has to take steps under the English Arbitration Act and not file a suit in this nature and obtain an order of arrest;

(b) the Seaweb Report which notes that MEDS are the owners is incorrect and defendant vessel is not owned by applicant and therefore, no action *in rem* is maintainable against defendant vessel;

(c) even though plaintiff has sought a decree, in effect, reading the plaint as a whole or on a holistic reading of the plaint it is evident that the main intention for filing the present suit is only to obtain security pending arbitration and nothing else;

(d) averments or prayer for decree are only cosmetic with no intention of pursuing the same because plaintiff having elected to go to arbitration and proceeded in the arbitration by filing statement of claim, this suit cannot go in for trial. Once security is furnished that will be the end of the suit and therefore, effectively the suit is filed only for security until the enforcement and/or execution of the arbitral award. Such a suit is not maintainable in view of the judgment of the Apex Court in ***Bharat Aluminium Company vs. Kaiser Aluminium Technical Services INC***[1] (hereinafter referred to as BALCO) and judgment of a single judge of this Court in ***Rushab Ship International LLC vs. Bunkers onboard Ship M.V. African Eagle and Freight and Ors.***[2] (hereinafter referred to as African

1. (2012) 9 SCC 552
2. 2014 (4) Bom. C.R. 269

Eagle); and

(e) even under the new Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (hereinafter referred to as Admiralty Act, 2017) the Act does not provide for security in foreign arbitrations which provision was there under Article VII of the International Convention on Arrest of Ships, 1999 (hereinafter referred to as 1999 Arrest Convention) and as the Admiralty Act has excluded that provision similar to Article VII, the suit for security pending arbitration is not maintainable.

7 It is plaintiff's case that:

(a) the arbitration is an action *in personam* against MEDS and the present suit is an action *in rem* against defendant vessel and both are maintainable;

(b) a Full Bench of this Court in ***J.S. Ocean Liner LLC vs. m.v. Golden Progress and Anr.***[3] ***(***hereinafter referred to as *Golden Progress)* has noted that absent explicit legislation providing that action *in rem* may be used to obtain and retain security even though the merits of the dispute are to be determined in the arbitration proceedings and that subject matter of the dispute falls within admiralty jurisdiction, some procedure which is not prohibited and that is also not inconsistent with the law be devised which helps in advancing the cause of justice in accordance with Article VII of Arrest Convention, 1999;

3. 2007 (2) Bom C.R. 1

(c) the judgment in *BALCO (Supra)* and in *African Eagle (Supra)* though has laid down the correct proposition in law, both are technically not applicable today because in the present case (i) plaintiff has sought a decree; (ii) after these two judgments, Section 9 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as Arbitration Act, 1996) has undergone an amendment in as much as now an application under Section 9 during the arbitration was maintainable even for foreign arbitration;

(d) just because an action *in rem* cannot be maintainable for arrest of ship under Section 9 of Arbitration Act, 1996 as held by the Full Bench of this Court in *Golden Progress (Supra)*, it does not mean that plaintiff will be rendered remediless mainly because an action *in rem* in the facts and circumstances of the case, independent of the arbitration was maintainable and just because there was an arbitration clause and plaintiff commenced arbitration, in London, does not mean plaintiff should be put to disadvantage and

(e) Article VII of the 1999 Arrest Convention provided for a situation where arbitration proceedings have been commenced and an action *in rem* was maintainable for security pending arbitration. The Admiralty Act, 2017 does not have a similar provision. At the same time, it does not bar the provisions of 1999 Arrest Convention. As held by the Apex

Court in ***m.v. Elizabeth vs. Harwan Investment and Trading Pvt. Ltd.***[4] and ***m.v. Sea Success I vs. Liverpool and London Steamship Protection and Indemnity Association Limited***[5] and *Golden Progress (Supra)* if the law is silent and there is no express prohibition and the provisions are not inconsistent with the law, a procedure can be devised which helps in advancing the cause of justice and in *m.v. Sea Success I (Supra)* the Apex Court has held that the 1999 Arrest Convention can be applied as a provision of law in India.

8 Dealing with plaintiff's point of view, Shri Sen submitted that a suit is totally different from arbitration and Section 10 of the Code of Civil Procedure, 1908 provides that the pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action. But as far as arbitrations are concerned, the statutory mandate requires parallel Court proceedings to be stayed. A suit during the pendency of a foreign judicial proceeding is expressly permitted but no such thing is permitted in arbitration. It is a contractual bar on the party.

9 Though Shri Sen made submissions on various other points like on Section 8 and Section 45 of the Arbitration Act, 1996 the main thrust of his argument was plaintiff having commenced arbitration proceedings cannot file a suit in another forum for the same cause of action. Any action

4. AIR 1993 S.C. 1014
5. 2002 (2) Bom. C.R. (O.S.) 537

that plaintiff wishes to take has to be strictly under the law of arbitration in the country where arbitration has commenced. Shri Sen submitted that because this Court has in *African Eagle (Supra)* and *AL LAAYA (Supra)* held that a suit only for security in foreign arbitration proceedings is not maintainable, plaintiff has filed this suit with the prayer for decree and when one reads the plaint as a whole, the purpose behind the suit is to obtain security in the arbitration proceedings. Therefore, the suit has to be dismissed. Shri Sen submitted that the Court's jurisdiction to arrest a ship in an action *in rem* should not be exercised for the purpose of providing security for an award which was to be made in arbitration proceedings. According to Shri Sen, the purpose of the exercise of the jurisdiction is to provide security in respect of the action *in rem* and not to provide security in some other proceedings, for example, arbitration proceedings. Shri Sen submitted that the arbitration and award are different proceedings and will become a different cause of action and is not subject matter of this suit and one cannot get security for one thing in proceedings for another thing. The cause of action sought to be secured has not arisen and is speculative. Shri Sen relied upon *BALCO (Supra)* and *African Eagle (Supra)*. Shri Sen also submitted that the reliance of Mr. Pratap in the judgment of the Division Bench of this Court in ***Islamic Republic of Iran vs. m.v. Mehrab***[6] is also misplaced. Shri Sen submitted that *Mehrab (Supra)* is no more good

6. AIR 2002 Bom 517

law and post *Mehrab (Supra)*, the Apex Court in *BALCO (Supra)* has held that in a suit for security for claims in a foreign arbitration proceeding is not maintainable as the cause of action sought to be secured has not arisen and is speculative. It was also applicant's case that the law laid down by ***S.P. Gupta vs. Union of India***[7], is "Procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities". Whether a person may sue on the subject matter of arbitration in breach of an arbitration agreement is not a procedural matter. Further, there is no inherent right to security as such in any litigant unless such right is otherwise expressly granted. It is a substantive law issue whether there is a right to get security in a particular case. Even *BALCO (Supra)* held that if you do not have a right granted by statute, you simply have no right and the Courts can and should do nothing about it. The Court was not 'finishers and polishers' for the purpose of giving security. If legislature did not give that right or there was a lacuna or gap left, it was simply too bad. The Courts cannot fill that in. To that extent, all judgment s giving security on the basis of `justice' or equity or the like are overruled. That right must flow from the law and nothing else. Further, plaintiff, a Norweigian litigating in London against an Emirati company simply demands that the Court create a right to security in India for him. It has not even tried to explain why it cannot get security in the UAE especially since it

7. [1982] 2 SCR, 365, 520, 521

alleges that the person liable, MEDS, owns two other ships as well. Even in equity plaintiff has not made out a case although equity won't step in to fill a perceived gap in substantive law.

10 Shri Sen also submitted that 'securing the amount in dispute' in arbitration is now extended to international arbitrations seated abroad. Section 2 of the Arbitration Act, 1996 has been amended to extend Section 9 to foreign arbitrations (Part II). The issue of security for foreign arbitrations is covered by statute but excludes the right to proceed in Admiralty. *BALCO (supra)* considered the situation where a party has no remedy of obtaining security and held that it was not the Court's function to devise a method of obtaining security. The Arbitration Act, 1996 is held to be a self contained code with no possibility of looking outside in respect of arbitrations (***Fuerst Day Lawson vs. Jindal***[8]). The Arbitration Act, 1996 deals with all matters relating to arbitrations and awards and specifically provides for circumstances in which a party may secure the amount in dispute, including in foreign arbitrations. If it does not permit something, or if no remedy is available elsewhere, it does not follow that Indian law must be juggled around to give plaintiff security. It simply means that by Indian law plaintiff is not entitled to security.

This directly overrules *Mehrab (Supra)* and *Golden Progress (Supra)* to the extent it permits securing the amount in dispute in the

8. (2011) 8 SCC 333

arbitration through a method not permitted by the Arbitration Act, 1996.

The Admiralty Act, 2017 omitted Section 23 of the 1861 Act and did not incorporate the Convention provisions relating to arrest and security for arbitration. Instead, it restricted jurisdiction to "The High Court may exercise jurisdiction to hear and determine any question on a maritime claim .....". The new Act also defines arrest as "detention or restriction for removal of a vessel by order of a High Court to secure a maritime claim including seizure of a vessel in execution or satisfaction of a judgment or order;" An arbitration award is not a maritime claim and does not fall within any of these. Jurisdiction is therefore limited to the maritime claim itself, not awards which form a different cause of action.

11 Both, the Arbitration Act, 1996 (as amended in 2015) and the Admiralty Act, 2017 are consolidating statutes. The nature of Consolidating is explained by the Supreme Court as follows:

> *The Code of Civil Procedure as its preamble indicates, is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. No doubt it also deals with certain substantive rights. But as the preamble vouchsafes, the object essentially is to consolidate the law relating to Civil Procedure. The very object of consolidation is to collect the law bearing upon the particular subject and in bringing it upto date. A consolidating Act is to be construed by examining the language of such a statute and by giving it its natural meaning uninfluenced by considerations derived from the previous state of the law.*

Prem Lal Nahata vs. Chandi Prasad Sikaria[9]

Consolidating statutes are complete in themselves as to the then

9. (2007) 2 SCC 551

existing state of law. When amending the Arbitration Act, 1996 and enacting the Admiralty Act, 2017, Legislature had the benefit of the Conventions as well as the 1999 Arrest Conventions. Neither is incorporated and if they were part of the law before these statutes, it is no longer permissible to take them into consideration. Both statutes expressly deal with the subject matter here, i.e., arrest as well as securing the amount in dispute in arbitration. In light of the foregoing, it was further submitted:

(a) An Arbitration agreement is a bar on the parties from approaching any judicial authority except as permitted by the Arbitration Act. There is also a fetter on jurisdiction with a limited window. No suit can lie on a subject matter covered by an arbitration agreement and the bar is on any action on the same subject matter before any judicial authority. It is immaterial whether the action is *in personam* or *in rem*, so long as the subject matter is covered by the arbitration agreement. There is, however, always a chance that a party may file a suit in breach of the arbitration agreement and if suit filed before any step has been taken in the arbitration a Court has a preliminary jurisdiction to examine the arbitration agreement but must dismiss or at least stay the suit once the subject matter is found to be covered by an arbitration agreement (S. 8). In this case, there is an existing reference to arbitration and a suit is barred at the threshold.

(b) In the case of an arbitration, the original cause of action gets eclipsed and will be subsequently supplanted by a future award which

will, in future form the cause of action provided always that the Plaintiff succeeds in the arbitration.

(c) Interim relief can only be in aid of final relief. This proposition applies both to *in rem* and *in personam*.

(d) Once a matter is referred to arbitration, it is referred in pursuance of a contractual remedy. The underlying cause of action exhausts itself or does not survive. The underlying claim will never be considered by the Court thereafter. Instead the issue, if at all will be the validity of the arbitration and/or the award, i.e., a totally different cause of action that:

i. is not subject matter of the suit as existing;
ii. is a cause of action that has not arisen;
iii. is a speculative cause of action, i.e., presumes that plaintiff will succeed in the arbitration.

Plaintiff, in such matters (i.e., covered by an arbitration agreement) cannot maintain an action for a decree on the underlying claim once the arbitral tribunal has been constituted. It is immaterial whether defendant is the party himself or someone whose liability is derived through the party. Since he cannot get final relief in the suit on his claim, he obviously cannot get interim relief. Equally, he cannot get security for a future award (apart from the fact that it is speculative) because that is not his cause of action in the suit and interim relief can only be in aid of final relief.

12 Shri Sen further submitted that once there is a reference, the underlying cause of action is exhausted / excluded and plaintiff's cause of action from then on is the future award that he may get in the arbitration and this is what ***P. Anand Gajapathy Raju***[10] also states. The new Admiralty Act, 2017 permits arrest only for maritime claims: "The High Court may order arrest of any vessel …..... for the purpose of providing security against a maritime claim which is the subject of an admiralty proceeding,....". That 'lacuna' if any, cannot be filled in by the Courts. *Golden Progress (Supra)* allowed arrests to secure arbitrations/awards only where the tribunal had not been constituted, i.e., a suit filed before the reference. It restricted the right to arrest and hold security during the window before parties are referred to arbitration or the suit is stayed.

After *Golden Progress (Supra)*, Section 9 of the Arbitration Act, 1996 was amended to cover even international commercial arbitrations. It now covers `securing the amount in dispute'. Section 9, however, did not incorporate anything akin to the UK Arbitration Act provision. The Admiralty Act, 2017 was enacted but did not incorporate similar provision, nor incorporated Art VII of the 1999 Arrest Convention or similar provision but in fact restricted the power to arrest. *Fuerst Day Lawson (Supra)* holds that the Arbitration Act, 1996 is a self contained code with a negative import, i.e., only such acts as are mentioned in the Act are permissible to be

10. AIR 2000 SC 1886

done and acts or things not mentioned therein are not permissible to be done. Other means of securing the amount in dispute are, therefore, excluded. *BALCO (Supra)* held that neither a suit on the main cause of action, nor on the future award, nor one for interim relief lies. It also held the Courts could not fill in any lacuna if it exists. The Admiralty Act, 2017 was enacted as a consolidating statute but did not incorporate Art. VII of the 1999 Arrest Convention. Instead, it allows arrests only for maritime claims and limits jurisdiction to maritime claims. Art. VII of the 1999 Arrest Convention itself refers to a pre-reference suit only. The Convention cannot apply in view of the later statute and further, it now directly conflicts with both statutes. *Golden Progress (Supra)* cannot be implemented nor can it be good law in view of *BALCO (Supra)* and *Fuerst Day Lawson (Supra)*. *Golden Progress (Supra)* in any event restricted the *Mehrab* position only to future arbitrations (where reference had not commenced) and does not permit suits or arrests in pending arbitrations/where arbitrations have commenced. That position will never change whether the action is *in rem* or *in personam* because it is the underlying subject matter of the dispute that gets excluded from scrutiny by the Courts. If at all, after an award is made, it is the award and its validity that might get scrutinised but never the original cause of action. The original cause of action gets excluded or exhausted or subsumed by the reference to arbitration. A suit on the underlying cause of action cannot survive a reference to arbitration.

13 To sum up, Shri Sen submitted that Indian common law as well as English law did not permit actions *in rem/* arrest of vessels for obtaining security in support of arbitration or arbitral awards. This was obviously because (a) neither the arbitration or arbitral awards was a subject matter of the suit, (b) the then existing subject matter of the suit would not survive the arbitration, and (c) the security in support of a future award was speculative and not a valid cause of action. This position was changed in UK. In India, this subject matter is dealt with by the Arbitration Act, 1996 but the Act does not permit Admiralty actions for security for awards. Being a self contained code, it is not permissible to look outside the Act for matters relating to arbitration or arbitral awards (unless they expressly relate to these matters). *Golden Progress (Supra)* is limited to suits instituted before a reference to arbitration. *Golden Progress (Supra)* must be deemed to have been overruled because *Fuerst Day Lawson (Supra)* puts in the negative connotation barring the application of other laws. *BALCO (Supra)* says the cause of action does not survive and the potential cause of action, i.e., the award is speculative and not a valid cause of action. There is no final relief in furtherance of which an interim relief can be ordered. Neither the Arbitration Act, 1996 nor the amending Act of 2015 nor the Admiralty Act, 2017 permit arrest or incorporate any provision similar to Art VII of the 1999 Convention and/or the UK provisions. *Golden Progress (Supra)* expressly stated “The applicability of Arrest Convention, 1999 in the absence

of any domestic law or inconsistency with the domestic law would be more in regard to the international general principles and interaction between the arbitration agreement and *in rem* action". It was also based on S. 45, at a time when S. 9 did not extend to foreign arbitrations. After *BALCO (Supra)*, *Fuerst Day Lawson (Supra)*, the Arbitration Amendment Act 2015 and the Admiralty Act, 2017, this position no longer exists. Once a suit is dismissed, there can be no question of retention of security. There would be no proceeding in which security would be retained. There can be no concurrent adjudication on the subject matter of the arbitration and that part of the suit has to be dismissed as barred by law, especially since the arbitration has already commenced. There is no subsisting cause of action, the award being a speculative future cause of action. In fact the prayer is "applied as a security to enure for the benefit of an Award that *would be passed in favour of the Plaintiff*....

14 Shri Pratap made equally elaborate extensive submissions and while dealing with Shri Sen's submissions, very convincingly explained why Shri Sen's view point should not be accepted. I am inclined to agree with Shri Pratap's submissions. Instead of reproducing the submissions, I shall straightaway proceed to give my conclusions. My conclusions are an endorsement of Shri Pratap's submissions.

15 The Full Bench, in *Golden Progress (Supra)*, held in paragraph 78 (i) that an application under Section 9 of the Arbitration Act, 1996 is not maintainable for the arrest of the vessel for obtaining security of an award that may be made in arbitration proceedings. The opinion of the Full Bench was that Section 9 (ii) (b) of the Arbitration Act, 1996 cannot be construed so as to read into it *in rem* jurisdiction. According to the Full Bench, the said provision did not cover the arresting of a ship or the keeping of a ship under arrest, in the exercise of the Court's jurisdiction *in rem* at all. The Court said that what is provided by Section 9(ii) (b) is securing the amount in dispute in the arbitration by way of an interim measure which does not include the arrest of the ship and the said provision does not refer to the jurisdiction to issue a warrant of arrest. The Full Bench did not make any distinction between the case where arbitration has already been commenced before an action *in rem* is filed and a case wherein arbitration is yet to be commenced and on commencement an action *in rem* is filed. It will be useful to reproduce paragraph 78 of the judgment in *Golden Progress (Supra)* which reads as under:

> *78. We shall, accordingly, articulate our conclusions thus:*
>
> *(i) An application under Section 9 of the Arbitration and Conciliation Act, 1996 is not maintainable for the arrest of the vessel for obtaining security of an Award that may be made in arbitration proceedings. The view to the contrary in m.v. Indurva Valley, to that extent is overruled.*
>
> *(ii) An action in rem (in admiralty jurisdiction) for recovery of the claim and arrest of the vessel where the parties have agreed to submit the dispute to arbitration can be maintained and in such case if by way of an interim measure, the vessel is arrested or the security provided to obtain the release of the vessel, matter shall proceed in accord with Article VII of the*

International Convention on Arrest of Ships, 1999.

(iii) If the proceedings are brought within the time so ordered by the Court before the arbitral tribunal, any final decision resulting therefrom shall be recognised and given effect with respect to the arrested ship or to the security provided in order to obtain its release provided that the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for defence and in accord with the provisions contained in Arbitration and Conciliation Act, 1996.

(iv)With regard to clauses (ii) and (iii), it is, however, clarified that retention of security shall remain a matter of discretion and it shall be for the court to pass appropriate order in that regard after taking into consideration all relevant circumstances.

16 The reasons given by the Full Bench for its conclusions articulated in paragraph 78 are extremely important. These are set out in paragraphs 72, 73 and 77. Of particular importance is what the Full Bench has stated in paragraph 73 which reads as under:

"the application of Article VII of 1999 Arrest Convention in admiralty jurisdiction in our view would be purposive and preferable. The applicability of Arrest Convention, 1999 in the absence of any domestic law or inconsistency with the domestic law would be more in regard to the international general principles and interaction between the arbitration agreement and in rem action. Such purposive interpretation would be in consonance with broadly accepted international procedure by which the security obtained by the arrest of the ship in the action in rem is retained to satisfy the judgment and award of arbitral tribunal ……".

17 The view of the Full Bench in paragraph 77 is equally important. It said:

"We are of the view, absent explicit legislation providing that action in rem may be used to obtain and retain security even though the merits of the dispute are to be determined in the arbitration proceedings and that subject matter of the dispute falls with admiralty jurisdiction, some procedure which is not prohibited and that is also not inconsistent with the law be devised which helps in advancing the cause of justice in accord with Article VII of the Arrest Convention, 1999".

18 Thus what the Full Bench has done is to devise a procedure which is not prohibited and is also not inconsistent with the law and which

helps in advancing the cause of justice. This is the touch stone of the judgment in *Golden Progress (Supra)* and the emphasis of the Full Bench is on a purposive interpretation in consonance with broadly accepted international procedure by which security obtained by the arrest of the ship in an action *in rem* is retained to satisfy the judgment and the award of arbitral tribunal. Thus what the Full Bench has done is to evolve a procedure which is neither prohibited nor inconsistent with domestic law with a view to advancing the cause of justice.

19 To quote (Late) Mr. Justice V.R. Krishna Iyer from (***The Chairman, Board of Mining Examination and Chief Inspector of Mines vs. Ramjee***[11]***)*** *"to be literal in meaning is to see the skin and miss the soul of the Regulation".* The soul of the judgment in *Golden Progress (Supra)* is to devise a procedure to permit a party who has agreed to submit disputes to arbitration to file an action *in rem* for the purpose of obtaining security for his claim in arbitration whether already commenced or yet to be commenced. To hold otherwise in the light of *BALCO (Supra) (which is dealt with hereinafter)* would tantamount to looking at the skin and missing the soul. Neither is there any scope or reason to re-interpret this judgment in the light of *BALCO (Supra)*. Both operate in different fields. *BALCO (Supra)* in regard to Section 9 of the Arbitration Act, 1996 (pre 2015 amendment) and *Golden Progress (Supra)* in regard to an action *in rem* under the

11. (1977) 2 SCC 256

Admiralty jurisdiction, which is not available under Section 9.

20 A single judge of the Calcutta High Court in the case of ***Alexandras Dryron S.A. vs. M.V. Prapti***[12] was faced with a similar situation where plaintiff had commenced arbitration against the charterer for breach of charter-party in London and subsequently commenced an action *in rem* in the Calcutta High Court for arrest of a vessel to secure their maritime claim against the charterer under the charter-party. The claim in arbitration and the claim in the suit were similar. In paragraph 9 of the judgment the Ld. Judge relied upon English cases including the case of ***The Jalamatsya***[13] and adopted the principle of allowing a Claimant in an arbitration to secure the claim by issuing a writ *in rem* which was a principle based on common law procedure. This also shows that allowing a Claimant to arrest the vessel for securing a claim which is the subject matter of arbitration is a principle based on common law procedure. Consistent with this common law procedure is the procedure devised by the Full Bench in *Golden Progress (Supra)* for retention of security in such cases where arbitration is pending or yet to be commenced and an action *in rem* is filed to obtain security in respect of a maritime claim.

21 The Ld. Judge held that there was no abuse of process of the Court by instituting the admiralty suit to secure a claim made in the pending

12. 1997 SCC Online Cal 331

13. (1987) Volume 2 Lloyds Law Reports 164

arbitration already commenced in London.

22 As observed by the Hon'ble Apex Court in *M.V. Elizabeth (Supra)* *"Procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities".*

23 All of the above shows that the retention of security method devised by the Full Bench in *Golden Progress (Supra)* is only a practical procedural device to do substantial justice to a Claimant who is seeking security in respect of a maritime claim which is required to be arbitrated.

24 Let us examine whether the judgment of the Constitution Bench of the Apex Court in *BALCO (Supra)* changes the position?

The background to the *BALCO* judgment *(Supra)* was the uncertainty prevailing in the matter of application of Section 9 appearing in Part I of the Arbitration Act, 1996 to international commercial arbitrations held outside India which fall under Part II of the said Act. A three Judge Bench of the Apex Court in the case of ***Bhatia International vs. Bulk Trading S.A.***[14] had taken the view that a party can apply for interim measures of protection under Section 9 notwithstanding the fact that the arbitration is held outside India and hence falling under the Part II of the said Act. This was followed by the Apex Court in ***Venture Global Engineering vs. Satyam Computer Services Ltd.***[15]. The Apex Court in

14. (2002) 4 SCC 105V

15. (2008) 4 SCC 190

BALCO (Supra) overruled both *Bhatia International (Supra)* and *Venture Global Engineering (Supra)* and held that Section 9 cannot be made applicable to an arbitration which takes place outside India because Section 9 falls under Part I of the said Act and does not apply to international commercial arbitrations where the seat of arbitration is outside India since Part I is limited to arbitration that takes place in India. It is in this context that the Apex Court observed that it would also not be open to a party to file a civil suit only for interim reliefs in the absence of any main relief in the suit. This is because interim relief can only be granted in aid of or as ancillary to the main relief.

25 In view of the judgment in *BALCO (Supra)*, the Arbitration Act, 1996 was amended with effect from 23rd October 2015 to provide that the provisions of Section 9 shall also apply to international commercial arbitrations even if the place of arbitration is outside India.

26 Thus the purpose of *BALCO (Supra)* was served and the law was amended. Consequently, as matters stand today it is open to a party to apply to a Court in India for interim measures under Section 9 even if the seat of arbitration is outside India. This application can be made prior to or during the pendency of arbitration proceedings, i.e., to secure a claim in future or pending arbitration and even after the arbitration proceedings but before it is declared enforced.

27 *BALCO (Supra)* does not impact the judgment in *Golden Progress (Supra)* in any manner. *Golden Progress (Supra)* holds in paragraphs 31 and 34 that on its true construction Section 9 does not refer to the jurisdiction to issue a warrant of arrest and does not cover the arrest of a ship or the keeping of a ship under arrest in exercise of the Court's jurisdiction *in rem* at all. A vessel cannot be arrested under Section 9 irrespective of whether the interim measure is sought in connection with a domestic arbitration under Part I or an international commercial arbitration the seat of which is outside India. Thus *BALCO (Supra)* holding that interim measures under Section 9 cannot be availed of if the seat of arbitration is outside India does not impact *Golden Progress (Supra)* in any manner as, according to *Golden Progress (Supra), "Section 9 cannot be construed so as to read into it in rem jurisdiction"*. Thus a Court has no power to arrest a ship under Section 9 irrespective of whether the arbitration is in India under Part I or the seat of arbitration is outside India and Part II applies.

28 The position as regards to Section 9 of the Arbitration Act, 1996 was completely different prior to the amendment of the said Act in 2015. Since Section 9 fell in Part I of the Act and Part I dealt only with domestic arbitrations, it followed as a matter of necessary implication that Section 9 is not available in respect of foreign arbitrations held outside India, which are covered by Part II of the Act. In not making available the remedies under

Section 9 to international commercial arbitrations falling under Part II and by not having an equivalent provision in Part II, the intention of the legislature was not to permit Section 9 measures in regard to international commercial arbitration held outside India which fell under Part II of the Act. This was not just a lacuna in the law which could be filled in by the law Courts. Applicability of Section 9 was impliedly excluded. If interim measures are available for a certain type of arbitration (domestic) and not available for other types of arbitration (foreign with seat outside India) then it is not merely a lacuna but there is an implied exclusion to such measures being made available for foreign arbitrations. It is in this context that the Constitution Bench in *BALCO (Supra)* held that the Court cannot supplement this lacuna and the remedy is for the Parliament to rectify the same. It is in this context the Court observed in paragraph 168 of *BALCO (Supra)* that the intention of Parliament is available within the text and the context of the provisions. The Court also noted in paragraph 170 of *BALCO (Supra)* that the same law (as regards interim measures) was contained in 3 different instruments, i.e., the Arbitration Act, 1940 read with the 1961 Act and Arbitration (Protocol and Convention) Act, 1937 and cannot be considered as a lacuna when the same law is consolidated into one legislation, i.e., the Arbitration Act, 1996. The position as regards an action *in rem* to secure a claim in pending or future arbitration is completely different and has no connection with either the Arbitration and Conciliation

Act, 1996 or the judgment in *BALCO (Supra)*.

29 On the contrary, sustenance can be taken from the fact that the Arbitration Act, 1996 was amended in October 2015 and Section 9 of the Act is now available for the purpose of interim measures in respect of a foreign arbitration where the seat of arbitration is outside India. These interim measures can be sought from a Court in India before commencement of arbitration, during the pendency of arbitration and after the award is made but before it is declared enforceable. Thus, there is nothing inherently wrong in permitting interim measures to secure a claim during the pendency of foreign arbitration. The Arbitration Act, 1996 specifically permits this. However, since Section 9 does not cover arrest of a ship in exercise of the Court's *in rem* jurisdiction, the *Golden Progress (Supra)* then devised a procedure consistent with *in rem* proceedings and the principle that merely because parties have agreed to arbitrate their disputes, the jurisdiction of a civil Court is not ousted. This is consistent with the principles that no party should be left without remedy to apply for interim measures to protect and secure his claim on the ground that the seat of arbitration is outside India and that arbitration has been commenced. Thus interim measures are now available to a party both under Section 9 of the amended Arbitration Act, 1996 and also by way of *in rem* proceeding's for arrest of a ship where the seat of arbitration is outside India.

30 An action *in rem* is filed by way of a suit and governed by the provisions of the Code of Civil Procedure, 1908. The Full Bench in *Golden Progress (Supra)* was conscious of the fact that a suit cannot be filed simplicitor for interim relief as they have expressed their conclusion in paragraph 78(ii) by saying that the action *in rem* must be for recovery of the claim. This can only mean that a decree must be sought as a decree is the only manner in which a claim can be recovered in a suit.

31 This Court in *African Eagle (Supra)* was considering an action *in rem* where the prayer in the suit was confined to seeking security pending arbitration, i.e., for interim reliefs only. The suit was not for recovery of the claim at all and no final relief of decree was sought. It is in this context, this Court, relying upon the settled legal position reiterated in *BALCO (Supra)* held that such a suit only for interim relief is not maintainable. The present suit of plaintiff is not such a suit. In fact in the case of *African Eagle (Supra)*, this Court observed in paragraph 21 that *"the Full Bench (in Golden Progress), in my view has not considered a situation like in the present suit as to whether a suit seeking a final relief at the interlocutory stage is maintainable or not"*. Consequently, the judgment in *African Eagle (Supra)* is distinguishable on facts because that suit was only for interim relief and no decree for recovery of the claim was sought.

32 The Admiralty Act, 2017 does not affect in any manner the view taken by the Full Bench in *Golden Progress (Supra)*. The Admiralty Act, 2017 sets out the jurisdiction of the Court to entertain an action *in rem* in respect of certain identified maritime claims and also the power of the Court to arrest a ship to secure such claims. As long as plaintiff is able to satisfy the jurisdictional test set out in the Act and show that it has a maritime claim and the ship is within jurisdiction and the ship is liable to be arrested by exercise of powers conferred by Section 5 of the Admiralty Act, plaintiff is entitled to an order of arrest of the vessel in question. The procedure to be followed by the Court for retention of security in the event the parties have agreed to refer the disputes to arbitration which is either pending or yet to be commenced, is not provided in the statute. Neither was any such procedure provided under the law applicable for arrest of ships prior to the Full Bench judgment in the *Golden Progress (Supra)*. Thus the Full Bench judgment devised this procedure for retention of security following a successful *in rem* action and arrest of a ship to secure a maritime claim in proceedings filed in the Admiralty jurisdiction of the High Court. This does not in any manner affect the Court's jurisdiction under the law as it stood prior to or under the Admiralty Act, 2017. Infact the Admiralty Act, 2017 is silent on the procedure following the arrest of a ship. If the disputes are to be arbitrated then the procedure devised by the Full Bench is to be applied as the same is neither inconsistent nor prohibited by the said Act but, on the

contrary, is in accord with international general principles and based on interplay between the arbitration agreement and an *in rem* action.

33 The Full Bench in *Golden Progress (Supra)* has devised a procedure consistent with Article VII of 1999 Arrest Convention and based on sound reasons set out in paragraphs 73 and 77 of the judgment . The Full Bench has observed that such a procedure would help in advancing the cause of justice and in accord with Article VII of 1999 Arrest Convention. Thus the Full Bench has drawn upon Article VII to devise a procedure to do substantial justice to a party who seeks to invoke the *in rem* jurisdiction of the High Court where the merits of the claim are to be adjudicated in arbitration proceedings. Section 5 on the other hand simply confers the powers of arrest upon the High Court. It does not set out any procedure to be applied once a vessel is arrested pursuant to exercise of powers by the High Court under Section 5. Thus Section 5 applies at the stage of arrest. The procedure devised by the Full Bench in consonance with Article VII applies after the vessel has been arrested. The two operate in different fields.

34 Following the arrest of a vessel in an action *in rem,* in the event the disputes are to be arbitrated (whether the arbitration has commenced or is yet to be commenced), once the retention of security method as devised by the Full Bench is adopted, the suit is required to be stayed and the

security retained for the benefit of the arbitration and the final award that may be passed. The successful Claimant who obtains an award would then have to satisfy the High Court that the award is enforceable under the provisions of the Arbitration Act, 1996. Once the award is declared enforceable then the security retained by the High Court pursuant to the action *in rem* will be made available to the Claimant in satisfaction of the judgment of the High Court declaring the award enforceable as a decree of the High Court. This is also made clear by the Full Bench in paragraph 78(iii) where the Court refers to recognition of the final decision of the tribunal in accord with the provisions contained in the Arbitration Act, 1996.

35 The Division Bench of the Hon'ble Gujarat High Court in the case of ***Nautical Global Ship Management BMCC vs. M.T. Nautical Global VII***[16] also applied the retention method as devised by the Full Bench in *Golden Progress (Supra)* consistent with the provisions of Article VII of the 1999 Arrest Convention. The Division Bench also observed that *"the suits are required to be kept pending and as such are required to be stayed till competent court and/or arbitral tribunal decide the disputes/claims between the parties"*. From this judgment it is also clear that retention method adopted and the procedure devised by the Full Bench in *Golden Progress (Supra)* has also been applied by the Hon'ble Gujarat Court as recently as

16. 2017 SCC Online Guj 487 (judgment dated 2nd March 2017 in admiralty suit no.3 of 2017)

March 2018.

36 Another facet of the use of an action *in rem* for the purpose of obtaining security for a claim which is the subject matter of *in personam* proceedings turns on the well settled distinction between *in rem* and *in personam* proceedings. This distinction is clearly brought out by three different judgments of this Court of three different Ld. Single Judges as below.

37 In the case of ***Crescent Petroleum Ltd. vs. M.V. Monchegorsk***[17], a Single Judge of this Court held and observed with reference to Section 35 of the Admiralty Courts Act, 1861, *"that a perusal of the same would clearly show that this Court exercises jurisdiction in rem independently of the proceedings which may be taken out against the persons liable in personam".* This distinction of an action *in rem* and an action *in personam* is valid even today. The Ld. Judge thereafter referred to the judgment of the English Court in the case of "*Nordglimt*" and quoted a passage from that case which appears on page 9 of the judgment . "..... *It is of the character of proceedings in rem that they are not alternative to proceedings in personam; they are cumulative. The cause of action in rem does not merge with a judgment in personam given in respect of a cause of action in personam arising from the same facts……. If an action in rem would be still open to a claimant after having recovered a judgment in personam (but*

17. 1999 SCC OnLine Bom 610/AIR 2000 Bom 161

without having obtained full monetary satisfaction), then how much more clearly must it be open to him to commence the action in rem whilst the action in personam is still pending and has not yet proceeded to judgment .". The Single Judge agreed with the aforesaid proposition and held *"I am in respectful agreement with the observations made above and would adopt the same".*

38 From the above it is clear that commencement of *in personam* proceedings is no bar to an action *in rem*. This is because the two sets of proceedings are cumulative and not in the alternative. Arbitration is *in personam.* Commencement of arbitration therefore is no bar to commencement of an action *in rem* even though both may arise from the same facts. Thus the Plaintiff having commenced *in personam* proceedings by way of arbitration against MEDS can commence *in rem* proceedings for arrest of the Defendant vessel to obtain security in respect of its maritime claim. Such an *in rem* action is permissible in law and would not amount to abuse of process.

39 Another Single Judge of this Court in the case of ***Korea Metals Trading Corporation vs. M.V. Smart***[18] held in paragraph 8 that *".....the jurisdiction of this Court to entertain an action in rem against the vessel which is in Indian water cannot be ousted by an agreement between the parties.....".* The Ld. Judge further held in paragraph 8 that *"The Admiralty jurisdiction is*

18. Dated 9th January 2002 in Notice of Motion No 3074 of 2001 in Admiralty Suit No 30 of 2001

conferred on this Court by statute, therefore it can be ousted only by a statute and not by an agreement between the parties". These observations make it clear that *in rem* jurisdiction is not ousted by a provision in the Contract to refer disputes to arbitration. If that is the position then surely it is not ousted merely because arbitration is invoked. The Single Judge referring to the judgment of the Apex Court in *M.V. Elizabeth (Supra)* paragraphs 55, 56 and 58, held in paragraphs 9 and 10 of the judgment as follows:-

> *"9. The present suit, therefore, is an action in rem. The significant feature of an action in rem is that jurisdiction can be assumed by this Court in respect of any maritime claim by arrest of the ship irrespective or the nationality of the ship or of its owner. The admiralty law confers upon the claimant a right in rem to proceed against the ship as distinguished from a right in personam to proceed against the owner of the ship. It is clear that an action in rem initiated against the vessel gets converted into action in personam against the owner, once the owners appears before the court and furnishes security.*
>
> *xxxxxxxxxxxxx*
>
> *10. It is, thus, clear that until the owner appears before the Court and furnishes security for getting the vessel released from arrest, the action is an action in rem against the vessel and for satisfaction of the claim of the Plaintiff the vessel itself can be sold, but once the owner appears before the Court and furnishes security, then it becomes an action in personam against the owner and it is at that stage that the owner can raise all the defences that are available to him. Of course, an owner or the vessel can come before the Court and even without furnishing security can seek vacation of the order of arrest on some basic issues like when the owner says that the vessel itself was not in Indian water, that there is no maritime claim against the vessel or that there is no liability on the owners of the vessel. But the owners of the vessel cannot come before the Court without furnishing security and raising other defences like desirability of this Court making interim orders in favour of the Plaintiff, because of the conduct of the Plaintiff or other defences on merits or the controversy.....".*
>
> (emphasis supplied)

40 It is clear from the above quoted portions from *M.V. Smart (Supra)* which relies upon paragraphs 55, 56 and 58 of *M.V. Elizabeth*

(Supra) that it is only after the owner enters appearance and submits to jurisdiction and furnishes security that the action *in rem* gets converted into an action *in personam*. It is at this stage before proceeding further with the action *in personam,* the Court will adopt the procedure devised by the Full Bench in *Golden Progress (Supra)*. Until such time as the owner has entered appearance and submitted to jurisdiction and furnished security, the action *in rem* remains an action *in rem* and the vessel is available to the Plaintiff as security in respect of its maritime claim which is the subject matter of *in personam* proceedings by way of arbitration against the owner or the party liable *in personam.* Furnishing of security is also essential for the action *in rem* to be converted to an action *in personam* because until such time security is furnished, the vessel remains under arrest and the action against the vessel continues *in rem*.

41 The observations of another Single Judge of this Court (Goa Bench) in ***Prime International Ltd. vs. M.V. Mariner IV and Ors.***[19] are very relevant in the context of the powers of the Court to render substantial justice based upon the principles of justice, equity and good conscience. These observations are made in connection with the power of the Court to grant an order of arrest and to retain security notwithstanding the fact that the parties have agreed to submit their disputes to arbitration. In paragraph 11 (page 26) the Ld. Judge said as follows:-

19. Unreported judgment dated 8th November 1996 in Civil Suit No.1/96 and Civil Application No.175/96, Appellate Side (Panaji Bench) Goa

> *"The question is whether this Court has jurisdiction to grant interim relief pending the reference of the dispute to arbitration or giving effect to the clause pertaining to the arbitration. Even under the Indian Arbitration Act 1940, the jurisdiction of the Civil Court to grant interim relief pending the hearing of the application for stay was never considered to be ousted. The jurisdiction of the civil court continued in the matter of granting of interim relief. Such a power was also there even after the matter had been referred by the parties to arbitration. In other words, there was never any ouster of the jurisdiction……. The jurisdiction to do justice is a part of the jurisdiction which a court of record has……. It is not something which is conferred on the Court. It is something that it is inherent in the Court to do justice between the parties.*

In paragraph 14 the Ld. Judge held that:

> *"The admiralty jurisdiction of the Court is an action in rem when the court acts against a vessel by arresting it in the enforcement of a maritime claim. It is only when the owner of a vessel puts in an appearance and gives security that the action becomes an action in personam. The clause for arbitration is not between the Plaintiff and the Defendant No.1, but between the Plaintiff and Defendant No.2 and 3 or rather Defendant No.2. It is therefore this clause for arbitration between the Plaintiffs and Defendant No.2 that has been given effect to. This will be given effect to after the Court exercise its jurisdiction of arresting the ship."*

The Ld. Judge then refers to the powers of the Court to make interlocutory orders and refers, in paragraph 15, to paragraphs 66 and 67 of the Apex Court judgment in *M.V. Elizabeth (Supra)* and lastly states in paragraph 16 as follows:-

> *"Therefore, what is relevant to be seen from this pronouncement of the Apex Court is that the proceedings continue as a personal action after the owner puts in an appearance and furnishes security. Before that action is in rem. It will not be out of the context to also refer to para 87 of the judgment of the Apex Court reproduced below:-*
>
> *The judicial power of this country, which is an aspect of national sovereignty is vested in the people and in articulated in the provisions of the Constitution and the laws and is exercised by Courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to Court which is an important right vested in every citizen implies the existence of the power of the Court to*

render justice according to law. Where statute is silent and judicial intervention is required, Court strive to redress grievance as according to what is perceived to be principles of justice, equity and good conscience"

The Ld. Judge holds in paragraph 17, which is the ratio of the judgment , as follows:

"From the paragraphs in the judgment of m.v. Elisabeth as reproduced, it is clear that the provisions in a contract for reference to arbitration does not oust the admiralty jurisdiction of this Court which is an action in rem. It is only when the owner put an appearance and gives security that the action becomes an action in personam. It is from that stage that the provisions pertaining to arbitration, etc. have to be considered. However, the power of the Court to do justice between the parties is inherent to it at all times as long as the court is seized of the matter. This action to do justice between the parties has not been taken away by the provisions of section 45 of the arbitration and conciliation act 1996. There is no express provision in the Act nor by implication can it be understood that the power which is inherent to the court to do justice to the parties is to be understood as being taken away by the provisions of section 45. Such an interpretation is not possible considering the law as it earlier stood and the express language of section 45. In my opinion therefore the power of granting interim relief till the parties are directed to proceed in arbitration continues with the court."

(emphasis supplied)

42 From the judgment in *Mariner IV (Supra),* the following position emerges:-

a) The jurisdiction to do justice is a part of the jurisdiction which a Court of record has.

b) Where statue is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience (referring to *M.V. Elizabeth*).

c) Prima facie no matter is deemed to be beyond the jurisdiction of the superior Court unless it is expressly shown to be *(M.V. Elizabeth)*.

d) The admiralty jurisdiction of the court is invoked by an action *in rem* when the Court arrests the vessel for securing a maritime

> claim. It is only when the owner of the vessel puts in an appearance and gives security that the action becomes an action *in personam*. The clause for arbitration is not between the Plaintiff and the vessel but between the Plaintiff and the owner of the vessel. This clause for arbitration will be given effect to after the Court exercises its jurisdiction to arrest a ship. It is from that stage that the provisions pertaining to arbitration have to be considered.
>
> e) The power of the Court to do justice is inherent to it at all times as long as the Court is seized of the matter. This power to do justice between the parties is not taken away by the provisions of the Arbitration and Conciliation Act, 1996.
>
> f) The power of granting interim relief till the parties are directed to proceed in arbitration continues with the Court.

43 The same observations apply with equal force when it comes to the provisions of the Admiralty Act, 2017 and there is no express provision in the said Act nor by implication can it be understood that the powers which are inherent to the Court to do justice to the parties, are taken away.

44 It is thus clear from the above judgment s in *M.V. Smart (Supra)* and *M.V. Mariner IV (Supra)* read with *M.V. Elizabeth (Supra)* that an action *in rem* gets converted into an action *in personam* only after the owner or party liable *in personam* enters appearance and submits to jurisdiction and furnishes security. It is only after this happens that the arbitration provisions are required to be considered and given effect to. As held in *M.V. Monchegorsk (Supra)*, *in personam* proceedings are no bar to an action *in rem*. Consequently, applying the principles set out in the aforesaid three judgment s and the judgment in *M.V. Elizabeth (Supra)* to the facts of

the present case, it is clear that it was open to the Plaintiff to commence *in personam* proceedings by way of arbitration in respect of its claim and also to commence an action *in rem* for arrest of a defendant vessel. It is only after the owner or party liable *in personam* enters appearance and submits to jurisdiction and furnishes security that the action would continue as an action *in personam* and it is at that stage that this Hon'ble Court would apply the procedure devised by the full bench in *Golden Progress (Supra)* to retain security for the benefit of the arbitration commenced by plaintiff.

45 *Golden Progress (Supra)* is only devising the procedure based upon legal principles as set out by various judgment s referred to above including *M.V. Elizabeth (Supra)* to ensure that the cause of justice is served and based upon principles of justice, equity and good conscience which are a hallmark of the administration of justice. Jurisdiction to arrest a vessel to secure a maritime claim is also an equitable jurisdiction to do justice to a Claimant and ensure that he is able to realize the fruits of a judgment , decree or award that he may eventually obtain whether by way of arbitration or in Court proceedings. The overriding principle there is that the High Court being a Court of equity, it is equitable principles that must guide the Court in the matter of interlocutory orders. The procedure devised by the Full Bench is consistent with these principles and can be adopted in the facts and circumstances of the present case to secure the maritime claim

of the Plaintiff by the action *in rem* and arrest of the Defendant vessel.

46 A right *in rem* is a valuable right that a party has for the purpose of obtaining security in respect of a maritime claim. To debar a party from approaching the Court on the ground that the party has agreed to arbitration would tantamount to depriving a party of his vested right to file an action *in rem* under the Admiralty Act, 2017. This right cannot be taken away unless there is a statutory bar or an express provision denying such a right to a Claimant. There is no such bar or prohibition under existing law. Neither is there any bar to the exercise of this right merely because *in personam* proceedings have been commenced by way of arbitration or in Court. On the contrary considering the distinction between *in rem* and *in personam* proceedings, it is manifestly clear that a right *in rem* is available to a Claimant notwithstanding commencement of *in personam* proceedings in respect of the same claim and cause of action. This is because a right *in rem* in admiralty jurisdiction is essentially available to secure a maritime claim by arrest of a ship. It is only after the owner of the ship enters appearance and submits to jurisdiction and provides security that the action *in rem would* proceeds as an action *in personam*. It is only at that stage that the Court will apply the arbitration clause in the Contract between the parties and require the parties to arbitrate their claims. By this the right *in rem* is preserved and any security that the Claimant is able to obtain by exercising this right, is retained and made available to the

Claimant for the purposes of satisfying his claim in the *in personam* proceedings whether by way of arbitration or in Court.

47 Applicant has not been able to show a single judgment of any Court in India or for that matter a foreign Court that would have any bearing on the submissions of plaintiff supported by the judgment s in *Golden Progress (Supra)*, *Monchegorsk (Supra)*, *Mariner IV (Supra)* and *M.V. Smart (Supra)*. None of the judgment s relied upon by the Applicant are relevant for the purpose of considering the issues as raised in the application. The judgment s relied upon by the Applicant can be distinguished as under:

i) Indus Mobile Distribution Pvt. Ltd. vs. Datawind innovations Pvt. Ltd. & Ors.[20] **:**

This was a case where the parties had had agreed to the seat of arbitration as Mumbai and also that the Courts at Mumbai would have exclusive jurisdiction. The party applied to the Delhi High Court for interim relief under Section 9 and for appointment of arbitrator under Section 11. The Delhi High Court held that no part of the cause of action arose in Mumbai and therefore the exclusive jurisdiction clause cannot apply. The Supreme Court held that the jurisdictional tests under the Code of Civil Procedure are not applicable and it is open to a party to designate a neutral venue as a juridical seat. Consequently, once the seat of arbitration is fixed it would be in the nature of an exclusive jurisdiction clause. The neutral

20. (2017) 7 SCC 675

venue may not be in the classical sense have jurisdiction and neither would the provisions of Section 16 to 21 of Code of Civil Procedure be attracted. In arbitration law the moment a seat is agreed as Mumbai, it would vest the Mumbai Court with exclusive jurisdiction for the purposes of regulating arbitral proceedings.

It is clear that the judgment has no application to the present case. The judgment deals with an application under Section 9 and 11 of the Arbitration Act, 1996. The present suit is an action *in rem* and not an application under the Arbitration Act, 1996.

***ii) Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd. (Supra)*:**

This judgment dealt with the question whether the Arbitration Act, 1996 is a complete code in itself and if so whether an order made under Part II of the said Act is appealable under Letters Patent notwithstanding the fact that it is not appealable under Section 50 of Part II which expressly provides for appealable orders. The Apex Court held that since the Arbitration Act, 1996 contained an exhaustive code in itself, Letters Patent appeal against an order not appealable under Section 50 stands excluded. This has no relevance to the facts of the present case or the question of law that arises. Proceedings *in rem* are not proceedings under the Arbitration Act, 1996 and the latter bring a complete code in itself is of no consequence.

iii) *Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. & Ors.*[21] :

This judgment infact makes it clear that disputes relating to rights *in rem* are required to be adjudicated by Court and not by private arbitration. Thus the only way to exercise a right *in rem* in Admiralty is by filing an action *in rem* for arrest of defendant vessel as has been done by plaintiff. Just as a mortgage suit for sale of mortgaged property is an action *in rem* for enforcement of a right *in rem* so also is an Admiralty Suit for arrest and sale of a ship in an action *in rem* for enforcement of a right *in rem*. Both Suits are not mere Suits for money but are for the enforcement of a right *in rem* which can only be enforced by a Court having jurisdiction and not by an arbitral tribunal. This judgment of the Apex Court in fact support plaintiffs and is of no assistance to applicant.

iv) *Prem Lala Nahata & Anr. vs. Chandi Prasad Sikaria (supra)* :

Applicant relied upon paragraph 9 of this judgment. This judgment deals with rejection of Plaint under Order 7 Rule 11(d) of the Code of Civil Procedure as barred by law. However, applicant has not been able to show any bar to the maintainability of the present suit *in rem* in the admiralty jurisdiction of this Court. It is also held in the said judgment that the Code of Civil Procedure is an Act to consolidate and amend the laws relating to the procedure of the Courts of civil judicature. The very object of

21. (2011) 5 SCC 512

consolidation is to collect the law bearing upon the particular subject and in bringing it up-to-date. It is in this context that it was submitted by the Applicant that the Admiralty Act, 2017 is also a consolidating statute since in the Statement of objects and reasons it is stated that *"The Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2016 consolidates the existing British era laws on civil matters of admiralty jurisdiction of courts, admiralty proceedings on maritime claims, arrest of vessels and relating issues in line with modern trends in the maritime sector and in uniformity with prevalent international practices."* However, the purpose of the Admiralty Act, 2017 was not to deal with the procedure to be followed once an action *in rem* is filed and the order of arrest is made consistent with the provisions of the Admiralty Act, 2017 and particularly Sections 3, 4 and 5 thereof. The procedure for retention of security is a procedure devised by *Golden Progress (Supra)* once there is a successful arrest of a ship in compliance with the legal requirements which are now set out in the Admiralty Act, 2017. Neither was this procedure set out in the law as it stood prior to the Admiralty Act, 2017. This is a procedure evolved by the Full Bench in *Golden Progress (Supra)*. The Admiralty Act, 2017 has not set out the procedure but only the extent of the Court's jurisdiction to arrest a ship. What happens after the ship is arrested and the owners submits to jurisdiction and furnishes security is that the suit will proceed *in personam* and the Code of Civil Procedure will apply. Similarly, it is only after the

owner submits to jurisdiction and furnishes security that the arbitration provisions will apply [see the observations of Rebello J. in *Mariner IV (Supra)* and also Deshmukh J. in *M.V. Smart (Supra*)]. It is at this stage that the retention of security method devised by Full Bench in *Golden Progress (Supra)* will apply. Hence the judgment in *Prem Lala Nahata (Supra)* is of no assistance to applicant.

v) *Intesa Sanpaolo S.P.A. vs. Videocon Industries ltd.*[22] :

Applicant did not press this judgment although a copy was tendered. It is clearly not relevant to the facts of the present case or the issue that arises. The present suit is neither on a foreign judgment and neither has plaintiff's cause of action merged into either an award or a judgment . The arbitration proceedings are pending.

vi) *Sunil B. Naik vs. Geowave Commander*[23] :

Although a copy was tendered, this judgment was not pressed by applicant. It is clearly not relevant. In this case, plaintiff had a maritime claim arising out of a time charter of his own ship to the time charterer. The person liable was the time charterer. Plaintiffs sought to arrest another vessel which was demise chartered to the time charterer, i.e., a vessel on demise charter to the time charterer. Neither the 1999 Arrest Convention nor the Admiralty Act, 2017 permits such an arrest. This question also does

22. (2014) 183 Comp Cases 395

23. (2018) 5 SCC 505

not arise in the facts of the present case where the Plaintiff's claim arises out of a demise charter and the person liable is the demise charterer and the vessel arrested is owned by and / or demise chartered to the same demise charterer.

48 It was submitted by applicant that it is open to plaintiff to commence an action *in rem* to obtain security in respect of a maritime claim in the event plaintiff has not commenced arbitration. What this means is that if the Plaintiff wants to secure his maritime claim he has to first wait until he is able to track and arrest the vessel before he commences arbitration. If he commences arbitration first then he will not be entitled to file an action *in rem* for arrest of the vessel to secure his maritime claim. Such a proposition of law is not supported by any judgment nor does it advance the cause of justice but on the contrary would be regressive in operation inasmuch as it would put a party who has agreed to refer disputes to arbitration at a massive disadvantage because such a party would lose its right *in rem* to arrest a ship to secure his maritime claim, if he commences arbitration before filing an action *in rem*. As stated earlier, a right *in rem* is a valuable right and a party cannot be deprived of the same if he has invoked arbitration, unless there is an express prohibition to this effect in law.

49 *Golden Progress (Supra)* held that an action *in rem* for arrest of a ship to secure a maritime claim can be filed notwithstanding that the disputes are to be arbitrated, irrespective of whether arbitration is pending or is yet to be commenced. In fact, Article 2(3) of the 1999 Arrest Convention states *"a ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State".* This makes it clear that a ship may be arrested even where a maritime claim is to be arbitrated. The words "*is to be arbitrated"* is a very neutral expression and would mean that the dispute is to be ultimately decided in arbitration and not in Court irrespective of whether arbitration is pending or yet to be commenced. In this context, reference may be made to a judgment of the English Court in *Jalamatsya (Supra)* where the Court was called upon to interpret the provisions of Section 26 of the Civil Jurisdiction and judgment s Act, 1982. The said section stated *"Where in England and Wales, or Northern Ireland, a Court stays or dismisses Admiralty proceedings on the ground that the dispute in question <u>should be submitted to arbitration</u>……."* It was argued in that case that the words *"should be submitted"* meant a future submission to arbitration and would not apply to a case where arbitration had already

been commenced. The Judge negatived such interpretation for sound practical commercial reasons and held as follows:-

> *"If that point were valid it would follow that there would be crucial distinctions to be drawn between those cases in which an arbitration had been commenced, and those cases in which, although there was an arbitration agreement, the arbitration had not been commenced. Such a construction would place upon solicitors practicing in this field of litigation an intolerable burden. One does not have to draw very much on one's imagination to see that it would be vital before nominating an arbitrator to find out whether a ship belonging to the defendants, or respondents in the arbitration, was on the verge of coming to the country. Equally, shipowners might be tempted to divert a ship rather than come within the jurisdiction and have their ship arrested, at least until arbitration had been commenced, when they would come in with impunity. To my mind such a construction is entirely contrary to the whole concept which was envisaged when s.26 was enacted. That section was enacted to enable claimants (I use a neutral expression) to obtain security if they proceeded by way of arbitration rather than by action. In my judgment s.26 applies whether or not in arbitration has already been commenced. It follows that if an arbitration has been commenced, and if the claimants in the arbitration have not obtained security for any possible award, they can quite properly issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and they may arrest that ship in order to obtain security".*

50 The above reasoning equally applies when considering *in rem* arrest for the purpose of obtaining security in a case where arbitration proceedings had already been commenced, applying the procedure devised by the Full Bench in *Golden Progress*. It matters not whether arbitration has been invoked or is yet to be invoked.

51 Any other interpretation would not only defeat the interest of justice but would be contrary to the avowed objective of Courts and Parliament to promote alternative dispute resolution by way of arbitration or mediation. If a party agrees to arbitration it cannot be that he is to be

deprived of his right *in rem* to obtain security in respect of his maritime claim. Just as a party who agrees to arbitration with the seat of arbitration outside India (after 2015 amendment) can apply for interim measures to a Court in India under Section 9 of the Arbitration Act, 1996, irrespective of the fact that arbitration may have already been invoked before any such application is made, so also a party should not be deprived of his right *in rem* to invoke admiralty jurisdiction and obtain arrest of a ship to secure his maritime claim even if arbitration may have already been invoked. As noted earlier also, after 2015 amendment, under Section 9 read with Section 2 of the Arbitration Act, 1996, a party can approach this Court for securing the amount in dispute in the arbitration even in the arbitration. Just because the party cannot maintain an admiralty action *in rem* under Section 9, can such a party be deprived of a chance to secure its claim in arbitration? In *Golden progress (Supra)* the Full Bench has in paragraph 78 held that the Court has to devise a procedure to permit a party who has agreed to submit disputes to arbitration and as noted earlier, there is no explicit legislation barring such security.

52 Plaintiff had given their vessel *Siem Marlin* on bareboat charter to MEDS under a bareboat charter-party dated 13th May 2015. Thus MEDS was the demise charterer of plaintiff's vessel. Plaintiff has various claims for damages against MEDS for breach of charter-party. Plaintiff's claims are

maritime claims under Section 4(h) of the Admiralty Act, 2017 because these are claims arising out of an agreement relating to the hire of the vessel.

As per Section 5(2) read with Section 5(1)(b) of the Admiralty Act, 2017, plaintiff is entitled to arrest a vessel which is either owned by or on demise charter to MEDS when the arrest is effected.

According to plaintiff, MEDS is the owner of defendant vessel *Altus Uber*. In support of this assertion plaintiff relies upon the following documents:-

> i) Seaweb Report that shows MEDS as the registered owner.
>
> ii) IR Class documents where the classification society IRS confirms that the registered owner of the vessel is MEDS and the former name of the vessel was Swordfish and the vessel's port of registry is Monrovia and flag is Liberia.
>
> iii) Documents from the website of MEDS where they *"offer three of its own DP II vessels on time charter basis"*. The names of these three vessels shown on the website are Altus Exertus, Altus Optimus and Altus Uber.

The test under Section 5 is *"whether the Court has reason to believe"*. The above documents and particularly the failure of MEDS to even disclose the alleged bareboat charter-party under which they claim to be the demise charterers, is sufficient to demonstrate *prima facie* that MEDS are the owners. MEDS, however, denies that they are owners but say that they are the demise charterers of the vessel. This makes no difference to the arrest of

defendant vessel. Plaintiff is entitled to arrest defendant vessel even if MEDS is the demise charterer of the vessel as contended by them and not the owner. This appears on a plain reading of Section 5(2) of the Admiralty Act, 2017 read with Section 5(1)(b) of the said Act. The powers of arrest are set out in Section 5 of the Admiralty Act, 2017. For the purposes of plaintiff's claim Section 5(2) of the Admiralty Act, 2017 is relevant. Section 5(2) provides for arrest of any other vessel in lieu of the vessel against which a maritime claim has been made. This means that two different vessels need to be involved to satisfy the requirement of S. 5 (2) viz.,

> a. "*The vessel*" with respect to which the dispute originally arose – the contract vessel or offending vessel;
>
> b. "*any other vessel*" to be arrested to secure the claims in respect of "*the vessel*" – the securing vessel.
>
> Note: "Securing Vessel" cannot be the "*Contract vessel/offending vessel*". They are different vessels.

Since Section 5(2) is subject to the provisions of sub-section (1), the relevant provisions pertaining to a claim against a demise charterer are contained in sub-section 5 (1)(b) which provides as follows:-

> *"the demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the vessel when the arrest is effected."*

For 5(1)(b) to respond to 5(2), we must identify the contract vessel/offending vessel and the securing vessel which is being arrested as

follows:-

> *a. "The Vessel" - (contract vessel/offending vessel) (i.e. 'SEIM MARLIN) of which the demise charterer is MEDS at the time when the maritime claim arose and is liable for the claim.*
>
> *b. "any other vessel"- (securing vessel) (i.e. ALTUS UBER) of which MEDS is the demise charterer or the owner when the arrest is effected.*

53 Thus assuming MEDS is the demise charterer of *Altus Uber* as contended by applicant and not the owner as contended by plaintiff, yet applying the provisions of Section 5(2) read with Section 5(1)(b) of the Admiralty Act, 2017, the vessel *Altus Uber* is liable to be arrested for the purpose of providing security in respect of the maritime claim of plaintiff for which MEDS is liable as demise charterer of plaintiff's vessel.

54 Consequently, no case has been made out for vacating the order of arrest which has been correctly granted by this Court on 1st June 2018 under the provisions of Section 5 of the Admiralty Act, 2017. The application of MEDS is liable to be dismissed with costs.

55 Notice of motion dismissed with cost, which is fixed at Rs.5 lakhs.

(K.R. SHRIRAM, J.)