



BOMBAY HIGH COURT HARMONIZES PROVISIONS OF THE ADMIRALTY ACT AND THE INSOLVENCY & BANKRUPTCY CODE TO UPHOLD RIGHTS OF MARITIME CLAIMANTS.

I. Introduction:

The Bombay High Court (Court), in a landmark judgment dated 19th May 2020 in *Raj Shipping Agencies v. Barge Madhwa and Anr.*,ⁱ considered the nature and provisions of proceedings under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (Admiralty Act) and harmonised the provisions of the Admiralty Act with the Insolvency and Bankruptcy Code, 2016 (IBC) and the Companies Act, 1956 (Companies Act). In doing so, the Court considered the various provisions of law and confirmed and protected the rights of claimants under the Admiralty Act.

There had been a great deal of uncertainty as to whether or not a party can effectively enforce its rights under the Admiralty Act upon the commencement of a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 for the principal debtor. In view thereof, this judgment, in many ways, comes as a relief to maritime claimants. Other important issues such as the following also arose before the Court and came to be decided.

- i) Whether arrest of a vessel can be done by a maritime claimant such as crew, salvors, port authorities, secured creditors and other claimants, during the pendency of winding up proceedings or insolvency proceedings against the corporate debtor?
- ii) How should a maritime claim be treated during the Corporate Insolvency Resolution Process (CIRP) and/or liquidation?
- iii) Whether an admiralty sale of a vessel can be ordered by the admiralty court during the pendency of winding up proceedings or insolvency proceedings or liquidation against the corporate debtor?
- iv) Determination of priorities vis-à-vis maritime claims during winding up proceedings or insolvency proceedings or liquidation.
- v) The manner of distribution of sale proceeds following an admiralty sale of a vessel during the pendency of winding up proceedings or insolvency proceedings or liquidation.

This judgment lays down the guiding principles which litigants and their lawyers will bear in mind while enforcing and/or securing a maritime claim.

The present alert summarises the key findings in the said judgment.

II. Questions

The Court proceeded to frame two common questions of law which arose from the matters before it:

A. **Question No. 1**

Is there a conflict between actions in rem filed under the Admiralty Act and the provisions of the IBC and if so, how is the conflict to be resolved?

B. **Question No. 2**

Whether leave under Section 446(1) of the Companies Act is required for the commencement or continuation of an Admiralty Action in rem where a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator of the company that owned the vessel?

III. **Arguments on the following premises were advanced on behalf of the parties:**

A. **In support of the exercise of Admiralty jurisdiction:**

- i. The Admiralty Act is a special enactment, passed on a later date, and deals with Admiralty matters whilst the IBC is a general enactment dealing with corporate insolvency.
- ii. Since the Admiralty Act confers admiralty jurisdiction only on certain High Courts which are empowered to entertain an action in rem, it impliedly bars the jurisdiction of all other Civil Courts. Thus, the Admiralty Act, which is a later enactment must prevail over the IBC, which is the earlier enactment, even if it were to be treated as a special enactment.
- iii. An action in rem is not a proceeding against the corporate debtor within the meaning of the IBC and thus the moratorium under Section 14(1)(a) to 14(1)(d)ⁱⁱ does not apply to the admiralty suits. Similarly, Section 33(5) of IBC also does not operate as a bar to an action in rem against the vessel but only applies to the corporate debtor.
- iv. The action in rem is against the vessel and the vessel is treated as a person and a wrong doer and is liable to satisfy the claim. An action in rem is not against the property of the corporate debtor but an action against a juristic person, namely, the vessel.
- v. A sale by an admiralty court will always fetch a higher price for the vessel than a sale under the IBC as the sale by the admiralty Court will be free from encumbrances. Only a judicial sale by an admiralty court is recognized the world over as extinguishing all maritime liens against the res thereby giving a clear title to the buyer. Thus, in the event of liquidation, it is in the interest of the Liquidator that the vessel is sold by the admiralty court. It is also in the interest of any financial creditor who has a mortgage registered on the vessel to have the vessel sold by the admiralty court as this would maximise the value received for the vessel.
- vi. It cannot be argued that a maritime lienee, such as a salvor, who has salvaged a vessel and saved it from sinking or being irretrievably lost, be told that Section

53 of the IBC will prevail over Section 9 of the Admiralty Act on priorities of claims.

- vii. If there is a conflict or inconsistency between the provisions of two special enactments an attempt should be made to achieve a harmonious construction of both enactments.
- viii. A maritime claim is crystallized and perfected by arrest of the vessel. A claimant having a maritime claim becomes a secured creditor when he causes the vessel to be arrested and the vessel is effectively encumbered with the claim. His security, however, is limited to the value of the res and subject to other competing maritime claims.
- ix. An action in rem is not against the owner of the vessel. If a vessel is arrested in an action in rem and no appearance is entered by the owner the action proceeds in rem, the vessel is sold and the proceeds are paid out to the successful claimant after determination of priorities if there are multiple claims. If the owner enters appearance but no security is furnished the action will still proceed as an action in rem against the vessel and as an action in personam against the owner. Thus, even when the owner is contesting the claim, it is still open to the admiralty court to sell the vessel if circumstances require it to do so and no security is furnished for its release.
- x. On the other hand, proceedings under IBC are proceedings against a corporate debtor who is defined as a corporate person meaning a company or any other person incorporated with limited liability. A vessel against whom a maritime claimant can proceed in an action in rem does not fall within the definition of a corporate debtor under the IBC and neither is the vessel being proceeded against as an asset of the corporate debtor. It is the vessel itself which is liable as an independent juridical entity de-hors the status of its owner and without reference to its owner.
- xi. The action in rem gets converted into an action in personam only once the owner of the vessel enters appearance and deposits security. In this case, on a declaration of moratorium under Section 14 of the IBC, the proceedings would have to be stayed but in the event of liquidation, the Plaintiff in such a suit would be allowed to realise his security under Section 52 of the IBC.
- xii. In the event a moratorium is declared under section 14 of the IBC then an action in rem if instituted prior to or after the declaration of the moratorium, cannot be continued during the corporate insolvency resolution process as this would defeat the very purpose of insolvency resolution under the IBC.
- xiii. In the event an order for liquidation of the corporate debtor is made under Section 33 of the IBC and a Liquidator is appointed, this by itself will not bar the institution of an action in rem against the vessel as it is not a suit instituted against the corporate debtor which is barred under Section 33(5) of the IBC.
- xiv. Considering Section 52(1)(b) of the IBC determination of priorities will also be in accordance with the Admiralty Act.

B. Opposing the exercise of Admiralty jurisdiction:

- i. The Hon'ble Supreme Court in *Swiss Ribbons (P) Ltd.*ⁱⁱⁱ has exhaustively dealt with and reiterated the objects and the purpose of IBC and moratorium under Section 14 of IBC. The IBC has been held to be a special enactment and an exhaustive code on the subject of insolvency in relation to corporate entities^{iv}. It contains a non-obstante provision under Section 238 and also a provision barring the jurisdiction of Civil Courts under Section 231. Thus, the IBC will override anything contained in any other law which is inconsistent with its provisions.
- ii. The Supreme Court has further in *Anand Rao Korada*^v set aside the auction of an immoveable property of a corporate debtor during the period of moratorium after considering the scope of Section 231 and Section 238 of the IBC.
- iii. The Hon'ble Supreme Court in *Duncans Industries Ltd.*^{vi} has held that the provisions of IBC will have an overriding effect over the Tea Act, 1953.
- iv. IBC is enacted for re-organisation and insolvency resolution of corporate debtors with an emphasis being laid on the recovery of money by the secured creditor. The purposes of two enactments are completely different. It matters not that the Admiralty Act is a later enactment. Looking into its purpose, the IBC must prevail over proceedings in the form of Suits under the Admiralty Act.
- v. If the admiralty action against the vessel in rem is allowed to be pursued, the entire scheme and object of the IBC would come to a naught.
- vi. Arrest of a vessel prior to moratorium setting in would not create lien in favour of the claimant (unsecured creditor) and consequently such claimant would be treated as an operational creditor under the IBC and he is bound by the resolution plan as envisaged under Section 31 of the IBC. However, if the amounts are deposited, in such event, such amount would be to the benefit of that claimant alone and he would not be bound by the order of the adjudicating authority approving the resolution plan under Section 31 of the IBC.
- vii. Section 53 of the IBC would stand overridden to the limited extent that the liquidator shall ensure payment in respect of the entire claim in the nature of maritime lien and the dues of the harbour authorities by following the dictum of the Supreme Court in *ICICI Bank Ltd.*^{vii}.
- viii. An admiralty suit filed either against the vessel or against the owner or against both gets interdicted once an order is passed under Section 14 of the IBC by which moratorium comes into force.
- ix. The moratorium under Section 14 of the IBC is wide and puts a complete bar against the institution or continuation of suits or any legal proceedings against the corporate debtor. Therefore, during the period of the moratorium, the admiralty claimant cannot proceed with the suit for sale of the vessel.
- x. Expenses incurred towards the vessel under arrest could be treated as "the insolvency resolution process costs" in terms of Section 30(2)(a) of the IBC.

- x. Principles of insolvency would apply even to admiralty law and therefore a solution to protect a maritime claimant would have to be found within the umbrella of the IBC and not de-hors the IBC.
- xi. While interpreting the IBC viz-a-vis admiralty law there are provisions in the IBC which permit the secured creditors under admiralty law to protect their security and to realize their security. Therefore, the status of an admiralty creditor or a maritime lien holder would have to be found within the umbrella of the IBC and not de hors the IBC.
- xii. In the event of liquidation, a secured creditor under the Admiralty Act can stand outside liquidation and is not subject to Section 53 which provides for distribution of assets consequent upon liquidation. Such a secured creditor who wants to stand outside liquidation, however, has to inform the liquidator of his intention along with details of his security interest so as to enable the liquidator to identify the same. Once this condition is satisfied the maritime claimant would be entitled to realise its security under the applicable law which would be the Admiralty Act.
- xiii. Admiralty proceedings, even though an action in rem is against the vessel, would include an in personam liability of the owner and consequently the owner would be a de facto Defendant in the action. The claimant is required to establish in personam liability of the owner and therefore the action is really a claim against the owner and his property. Thus, moratorium under Section 14 of the IBC would bar institution or continuation of admiralty proceedings.

IV. Outcome:

The Court upheld the rights of maritime claimants in admiralty proceedings and ruled in favour of the admiralty jurisdiction of the High Courts under the Admiralty Act. The observations of the Court are as follows:

Scheme of the Admiralty Act.

- i. The Court held that the Admiralty Act is a complete code as regards legal proceedings in connection with vessels (otherwise called actions in rem), their arrest, detention, sale and determination of priorities in respect of the sale proceeds of the vessels that were ordered to be arrested.
- ii. A harmonious construction which is intended to give effect to both statutes bearing in mind the purpose and policy underlying them must be adopted.

The Admiralty Act can be harmoniously interpreted, and no conflict arises with the IBC.

- i. The Court noted that a maritime claim is enforced by an action in rem against the vessel (or its sale proceeds) and thus the vessel is liable to pay the claim. In such proceedings the owner is not a necessary or proper party.
- ii. This action in rem continues as an action in rem notwithstanding that the owner may have entered appearance, if security is not furnished for release of the vessel.

- iii. Referring to the *Ram Janmabhumi Temple case*^{viii}, the conclusion that the vessel could be treated as an independent legal personality was reiterated. In admiralty proceedings only the vessel is sued in its own name de hors the status of its owner (who may be the corporate debtor) and without reference to its owner. The vessel is itself liable and can be arrested for crystallizing the maritime claim in this respect.
- iv. Thus, proceedings against the vessel may commence and continue without the corporate debtor or company even though they may be undergoing winding up proceedings.

Effect of moratorium on in rem actions under the Admiralty Act.

- i. The Court held that if the action in rem was filed prior to the moratorium being declared, looking at the object of the IBC, the action in rem will not be continued during the CIRP as this would defeat the very purpose of insolvency resolution under the IBC which is the reorganization and insolvency resolution of the corporate debtor.
- ii. The Court further held that a maritime claimant could institute an action in rem even after a moratorium is declared as the action in rem is not against the corporate debtor. However, the suit would not be continued after the arrest of the vessel so as to allow for the CIRP to be effective.

Status of maritime lien holders in CIRP and thereafter.

- i. Under the Admiralty Act, both maritime liens and statutory rights in rem entail the accrual of security by way of a charge.
- ii. Observing that a maritime lien is inchoate from the moment the claim or privilege attaches, the Court held that a maritime lien would crystallise as a statutory lien when the claimant files an in rem proceeding and invokes the admiralty jurisdiction of the Court against the vessel and a warrant of arrest is executed.
- iii. A Plaintiff who has invoked the admiralty jurisdiction of the Court and got a warrant of arrest executed would crystallise its security interest (as per definition in Section 3(31) of the IBC) and the Plaintiff would be a “secured creditor” (as per Section 3(30) of the IBC). However, such Plaintiff would not be a secured creditor vis-à-vis the other assets of the corporate debtor as the Plaintiff’s security would extend only to the particular vessel and the value of such vessel. This would be to the benefit of the Plaintiff.
- iv. For the purpose of CIRP, the Plaintiff would have to be treated as secured creditor. His rights and entitlements will be determined as such by the COC/ Adjudicating Authority.
- v. If the CIRP is successful and a Resolution Plan is approved, then the claim of the Plaintiff for which he has obtained security will be determined in accordance with the resolution plan approved by the COC and the adjudicating authority. In such a situation the Plaintiff should ordinarily be entitled to realise his claim to the full extent of the security provided.
- vi. An order of liquidation under Section 33 of the IBC and appointment of Liquidator would not bar institution or continuation of in rem proceedings against the vessel as it would not amount to a suit instituted against the corporate debtor which is barred under Section 33(5) of the IBC.

- vii. If the CIRP is not successful and the company is ordered to be liquidated, the security provided for the Plaintiff's claim will inure to the benefit of Plaintiff.
- viii. In liquidation, the Plaintiff would be a secured creditor and will be entitled to realise its security interest as per Section 52(4) of the IBC. In such a case it will be open to the Liquidator, to defend the suit relying on Section 35(1)(k) of the IBC.
- ix. Referring to Section 52(4) of the IBC,^{ix} the Court held that the law to be applied to the proceedings before it would be the Admiralty Act.

Whether the High Court exercising Admiralty jurisdiction can proceed with sale of a vessel pending CIRP and/or liquidation proceedings?

- i. **Pending the CIRP and during the moratorium period;** the Court held that the admiralty court will not order the sale of the vessel in order to allow the insolvency resolution process to fructify. This was observed in view of the objective of the IBC i.e. to reorganise corporate debtors and help stressed companies get back on their feet.
- ii. However, in special circumstances the Court held that it could exercise its discretion and proceed to sell the vessel if the vessel is not being manned, equipped and maintained by the Resolution Professional during the moratorium and all charges including port charges, supply of bunker, fuel, and other necessary supplies for the same are not being paid by the Resolution Professional or if the vessel becomes a navigational hazard. This could be done upon an application for sale made by the Resolution Professional or the Plaintiff.
- iii. **After CIRP and pending liquidation;** the Court held that a Plaintiff can approach the admiralty court for sale of the vessel. The Court observed that such a sale would in fact realize maximum value due to the inherent benefits of a judicial sale by an admiralty court and would be in the interest of all concerned since a sale of the vessel by the Liquidator cannot extinguish maritime liens and therefore the vessel may not attract any bidders.
- iv. In all cases where sale of the vessel is applied for before the admiralty Court, notice will be given to the owner who may be represented by the Resolution Professional or the Liquidator before any such sale takes place.

On priorities inter se maritime claimants and distribution of sale proceeds.

- i. The Court held that determination of priorities will have to be done in accordance with Section 10 of the Admiralty Act and inter se priorities of maritime liens will have to be decided in accordance with Section 9 of the said Act.
- ii. Section 9 deals with maritime liens and accords priorities in the order as follows:
 - (a) *claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;*

- ii. The Court further in an attempt to protect others who may be making payments towards the aforesaid costs, held that all expenses incurred with the permission of the Court for preservation and maintenance of the vessel during the period of arrest will be treated as 'Sheriff's Expenses' in Admiralty and 'Resolution Process Costs' under the IBC. The same would be paid out in priority from the sale proceeds of the vessel if the company is liquidated or be accorded priority in the resolution plan as resolution process costs.

On the question of Jurisdiction of the Company Court to hear admiralty matters and/or whether leave of the Company Court is required.

- i. In relation to the admiralty jurisdiction of High Courts, the Court held that the Admiralty Act is a comprehensive code for arrest of vessels, maritime claims and determination of priorities. Hence, it is a subject specific provision relating to specific, defined and describable subjects and is therefore regarded as an exception to and will prevail over a general provision relating to a broad subject as found in the Companies Act. The Admiralty Act has thus been held to prevail over the Companies Act.
- ii. The Court reiterated that an action in rem is against the vessel which is an independent legal entity and distinct from the company owning it. It is not a suit against the company.
- iii. It was thus held that the stay of proceedings under Section 446(1) of the Companies Act would not operate against pending admiralty proceedings or which admiralty proceedings may be sought to be commenced before a High Court.
- iv. The Court further held that leave under Section 446(1) is not required for the commencement of an action in rem or continuation of the action against the vessel where a winding up order has been made or if the Official Liquidator is appointed as Provisional Liquidator of the company which owns the vessel.
- v. On an interpretation of Section 3 of the Admiralty Act^x, the Court held that the company court would not have jurisdiction to entertain or dispose of a suit in rem against a vessel by taking recourse to the provisions of Section 446(2) of the Companies Act.
- vi. It was held that there is no conflict between Section 529A of the Companies Act and Section 10 of the Admiralty Act and that the scheme of priorities under Section 10 of the Admiralty Act takes care of payments due to workmen under Section 529A of the Companies Act.

V. Conclusion:

The Hon'ble Bombay High Court has very lucidly analysed and explained the scope of the Admiralty Act and the IBC. Given the fact that both legislations were fairly recent, there was a significant overlap and difference of opinion pertaining to their applicability and scope as well as the jurisdictions of the admiralty courts and insolvency tribunals. The Hon'ble Court has taken note of the intention of the legislature behind the Admiralty Act and the IBC and has sought to harmoniously interpret and construct their provisions. This in turn will ensure that the sanctity of the provisions remains intact and the rights of maritime claimants as well as the corporate debtors remain unaffected as much as possible.

DISCLAIMER

This alert has been written for general information of our clients and should not be treated as a substitute for legal advice. We recommend that you seek proper legal advice prior to taking any action pursuant to this alert. We disclaim all liability for any errors or omissions. For further clarifications you may write to Pooja Tidke (pooja.tidke@parinamlaw.com), Krushi N. Barfiwala (krushi.barfiwala@parinamlaw.com) and Ryan Mendes (ryan.mendes@parinamlaw.com).

MUMBAI

4TH Floor Express Towers, Ramnath Goenka Marg, Nariman Point, Mumbai - 400 021

Tel - 022 42410000

NEW DELHI

4 Todarmal Lane, Bengali Market, New Delhi 110001

Tel - 9810400283

PUNE

2nd Floor, Kundan Chambers, Thube Park, Next to Sancheti Hospital, Shivajinagar, Pune- 411 005.

Tel - 020 2553 0711

www.ParinamLaw.com

If you wish to stop receiving emails from this mailroom, please click on [unsubscribe](#) to send the request

ⁱ Along with other matters tagged along.

ⁱⁱ Section 14(1) (a) to 14(1) (d) of the IBC prohibits all of the following, namely: (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority; (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

ⁱⁱⁱ Swiss Ribbons Pvt. Ltd. V/s. Union of India **(2019) 4 SCC 17**

^{iv} Innoventive Industries Ltd. V/s. ICICI Bank & Anr **(2018) 1 SCC 407**

^v Anand Rao Korada, Resolution Professional V/s. Varsha Fabrics (P) Ltd. And Others **2019 SCC online SC 1508**

^{vi} Duncans Industries Ltd. V/s. A.J. Agrochem **(2019) 9 SCC 725**

^{vii} ICICI Bank Ltd. V/s. SIDCO Leathers Ltd. & Ors . **(2006) 10 SCC 452**

^{viii} M. Siddiqi V/s. Mahant Suresh Das & Ors. **(2020) 1 SCC 1**

^{ix} Section 52(4) permits a secured creditor to enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

^x Section 3 of the Admiralty Act confers Admiralty jurisdiction exclusively on certain High Courts as defined in Section 2(1) (e) to the exclusion of all other High Courts and Civil Courts