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ADMIRALTY LAW IN INDIA: TRACING PAST AND PRESENT DEVELOPMENTS

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INTRODUCTION: NATURE AND HISTORY OF ADMIRALTY LAW

A. Admiralty law is a domestic law having character of International Aspects

Maritime law is branch of law that deals with transportation of goods and people from one place to another. The history of maritime transaction can be traced back to time immemorial and similarly the customs of maritime transaction. However, in the modern times positive law has replaced old customs especially with the advent of the idea of nation-state theory. The aspect of state sovereignty and territoriality has done away with the practices of free-market society (without boundaries). With state comes state-based law that allow or disallow any foreign legal regime to be made applicable or not. Similarly the primary nature of maritime law is international in character however, there are certain nuances of domestic law that makes possible either the application of those laws or formulates its own laws to provide remedy to parties involved in the maritime transaction. Such application of rules pertaining to jurisdiction of court to try matters of maritime transaction including its practice and procedure are collectively termed as admiralty laws. Therefore it can be said though maritime law posses international character prima facie however, in order to provide space to remedy arising out of a maritime claim, domestic recognition becomes inevitable and it is this admiralty law that opens up the gates for maritime claims to be remedied before any national court of a country.

In this light we may consider that under UNCLOS (United Nations Convention on Law of the Sea) 1982 provides for extent of territorial jurisdiction of a state which shall extend up to 12 nautical miles from the baseline of the coastal state.[1] This range of sea comes within the legislative jurisdiction of the state and a state can have subject-matter jurisdiction over vessels within and ordinary civil and criminal jurisdiction can be exercised. Therefore the nature of admiralty law is a mix of domestic and international features. Since a foreign vessels jurisdiction by a state can be assumed under International law and this can be enforced under Municipal law.

B. Admiralty law is an independent legal system

Admiralty law can be considered as part of the common law of the sea and is an independent legal system of the world. The peculiarities of admiralty law are *sui generis*, irrespective of the court before which it is applied and tried. Admiralty court across the globe, follow almost similar postulates and premises upon which the said law is based. Interaction of admiralty court in different jurisdictions is still a common feature where sharing of traditions, values, ideas and outlook can be witnessed. With this interaction since ancient times and before that principles and concepts have been developed that finds its universal application.[2] Though admiralty law in contemporary times is codified however, even whenit was not codified the admiralty courts took help of customary laws which were found to be international in character. Under the idea of comity of nations even if a nation has not codified admiralty law the objective of ensuring justice

[1] Article 3 of UNCLOS available at https://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm (Last accessed on 01.10.2019)

[2]Prof. John henry Wigmore in his *A Panorma of World's Legal Systems*, Saint Paul, West Publishing Co., 1928, treats "Maritime Legal System" as a "parallel and separate legal system ranking with the Anglican legal system, the Romanesque Legal System, the Papal (or Canon) Legal System, the Germanic Legal System, the Salvic Legal System, the Keltic Legal System, the Mohammedan Legal System, the Roman Legal System, the Greek Legal System, the Japanese Legal System, the Chinese Legal System, the Hindu Legal System, the Hebrew Legal System, the Mesopotamian Legal System and the Egyptian Legal System".

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would never restrict the application of admiralty law in different jurisdictions. Under Roman law *jus gentium* was the law applicable to individuals of foreign land. Admiralty law was since part of Law Merchant infusion of foreign element becomes inevitable and thus in Roman Empire would attract application of *jus gentium*.[1]

C. Admiralty Law as part of Law Merchant

Business cannot happen without transportation of goods from one place to another. Earlier Law Merchant dealt with such area of governance that takes into account the peculiarities of merchant transaction. Therefore interest of merchant and interest of ship owner run together. We may formulate that La merchant is constitutive of commercial law and maritime law (including admiralty law). This body of law has developed in a manner distinct from common law.[2] As Sir William S. Holdsworth puts it:

"The Law Merchant of primitive times comprised both maritime and an intimate relationship had subsisted between them. Both applied peculiarly to the merchants, who, whether alien or subject, formed in the Middle Ages a class very distinct from the rest of the community. Both laws grew up in a similar manner from the customary observances of a distinct class. Both laws were administered in either the same or similar courts which were distinct from ordinary courts. Both laws differed from common law. Both had in Middle Ages an international character and both continued to possess this international character right down to modern times."[3]

D. Admiralty Law: A Part of Public and Private International Law

Admiralty law finds a substantial interface with public international law. This does not imply that if a matter concerns international law it will be binding upon all other nations. The decision given by an admiralty court has its application in its own sovereign territory. There have been questions with respect to applicability of admiralty law over foreign ships and in this light the oldest practice is of English courts wherein regardless of the nationality of the ship the English Admiralty court has adjudicated. The idea of territorial waters provide, jurisdiction to coastal state and the concept of high sea since a longer period of time entitles flag state jurisdiction. However, we have witnessed matters instituted before an Admiralty Court in cases occurring at high seas have been tried. This is primarily based upon the core idea of providing justice in matters of law merchant since aspects of territoriality can diminish the whole idea of having admiralty courts. Thus admiralty law derives its practice from international law in general and law merchant. Though we don't see traditionally usage of private international law and is also part of common law courts. As we may see in *Tolten's Case*[4] the court refused to accept application of private international law in admiralty law. It said admiralty law follows a system which has its own peculiarities such as maritime lien, action *in rem* and arrest of ship which are not known to private international law. Thus we see application of *jus gentium* in Admiralty Law.

E. Admiralty Law in Relation to Common Law and Civil Law

Common law is considered to be the general law of the land whereas admiralty law is a distinct law bearing practices and concepts different from common law. Maitland has described the term 'Common law': "I think it comes into use in or shortly after the reign of Edward the First. The word 'common' is not opposed to 'uncommon'. Rather it means 'general' and the contrast to common law is special law. Common law is in the first place un-enacted law; thus it is distinguished from statutes and ordinances. In the second place it is

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[1]Mogadar v. Holt, (1691) Shower 318.

[2]"Owing to local mercantile courts being subject to writ jurisdiction of the High Court in London, by 18th century law merchant had been greatly influenced by common law ideas: so much so that it had become virtually incorporated in common law of the realm, though maintaining the identity of its own": Alan harding, A Social History of English Law, 1966, Pelican p. 309

[3]Sir W.S. Holdsworth, A History of English Law, 7th Ed (1966 Reprint), Vol. 1, Ch. VII, p. 526

[4]United Africa Co. Ltd. v. Owners of MV Tolten, (1946) 2 All ER 372

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common to the whole land; thus it is distinguished from local customs. In the third place it is the law of temporal courts; thus it is distinguished from ecclesiastical law, the law of courts Christian, courts which throughout the middle ages take particular marriages and testaments. Common law is in theory traditional law – that which has always been law and still is law, in so far as it has not been overridden by statute or ordinance."[1]

Admiralty Jurisdiction has been kept separate from civil jurisdiction by virtue of the provision Section 4 (1) and Section 112 (2) of the Civil Procedure Code, 1908. Section 4 (1) provides: *"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time in force."*

The provision is based on the general principle of *"generalia specialibus non derogant"* which means that the code of civil procedure will not over ride any subsequent special law, and this can be affirmed from section 12 of the Admiralty Act, 2017 which provides: *"The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall apply in all the proceedings before the High Court in so far as they are not inconsistent with or contrary to the provisions of this Act or the rules made thereunder."* This shows that in case of any inconsistency the Admiralty law shall prevail since it is a special law. This can be further sufficed by section 112 (2) which provides: *"Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction or to appeals from orders and decrees of Prize Courts."*

Thus Civil Procedure code will be applicable in general scenarios however, where it is in conflict with the admiralty law, the peculiarities of admiralty law shall prevail. This establishes admiralty law equivalent to civil and criminal law designating it a separate law.

F. Sources of Admiralty Law

Developed from usages are certain laws that were given shape. Local courts of the cities situated at ports used compile deliberations and decision pertaining to maritime and admiralty law. These compilations later helped in formation of laws. Some of the earliest laws are Rhodean Law of the sea (3rd century B.C.) at the Island of Rhodes (Greek city state in the Mediterranean Sea). It is said that such culmination of rules is a result of 5000 years of development and practice. Other initial compilations are laws of Oelron in the Bay of Biscay (near Bordeaux of France), Wisby on the Island of Gothland and the Hanse towns on Baltic.

One of the most revered compilations in England is "Black Book of Admiralty". Selden calls it "the jewel of admiralty records"[2]. It is through decision of cases that admiralty law developed all around the Europe and where European nations went as colonies these laws travelled with them and stayed.

Further in addition to above-mentioned development modern day source of admiralty law are conventions

I. The Convention for Unification of Certain Rules of Law respecting Collisions, Brussels, 1910

II. The International Convention on Unification of Certain Rules of Law respecting Assistance ans Salvage at Sea, Brussels, 1910

III. The Convention on Limitation of Liability of Owners of Sea-going Vessels, Brussels, 1924

IV. The International Convention for Unification of Certain Rules Relating to the Immunity of State Owned Vessels, Brussels, 1926 and Protocol, 1934

V. The International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels, 1926

[1]F.W. Maitland, The Constitutional History of England, 1st Edn. (1968 Reprint) p. 22. "the term common law refers to judicial declaration of customary law of the Kingdom": A.L. Goodhart in 76 LQR 45 (1960).

[2]Encyclopaedia of Laws of England.

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VI. The International Convention for the Unification of Certain Rules of Law relating to the Arrest of Sea-going ships, Brussels, 1952 etc.

G. History of Admiralty Law: India

It is well known fact that maritime activities in Indian Sub-continent are not new rather has a rich history of its own, however, there were issues pertaining to documentation of these transactions. It must be noted that there used to be a great deal of trade transaction that used to take place between India and Europe, though it wasn't direct but changed hands at Balkh, Aden or Palmyra. Sometimes goods travelling from India also were bartered for some other goods and ultimately itbecame difficult to trace the origins. This led to inaccuracy and vagueness of accounts changing the story as it passed through various hands in the west.[1]

Further there are evidences and allusions in *Rig Veda*[2] that Indian sailors were an experienced ones, this can be evidenced from early Indian literature that contains abundant references to ships and contains testimony to sea-faring skills of Hindu mariners. Indian ships in early times were much advanced and there is mention about a ship as large as having hundred oars[3] and could carry seven hundred people[4] that marched through distant islands and galleys.

Action *In Rem* and Action *In Personam*

It is to be noted that there are three requirements of jurisdiction i.e. locality, subject-matter and person, to be undertaken before an admiralty court assumes jurisdiction. In connection to this it must be noted that the nature of admiralty matters is such that a ship travels beyond jurisdictions and there is a possibility in such cases that a ship which is also the *res* of the owner may escape and it might be difficult to confirm the presence of the owner before the court. Therefore in order to resolve the issues pertaining to wrongs done by vessel at port or at high sea two types of claims or actions have been recognized. These actions are known as action *in rem* and action *in personam*. An action *in rem*[5] is instituted before the court against a property which may be a ship or a cargo, wherein due to reasons of negligence or otherwise the claimant has an actionable demand. The underlying principle behind action in *rem* is that the state has the power to determine the title, status or condition of property within its sovereign power.[6] However, this principle has certain limitations i.e. prior to exercise of the power of the state it must serve notice and provide hearing to the defendant.[7] Thus the limitation becomes preliminary step to be undertaken by the court before proceeding with action in *rem.* Now, here we need to understand that action in rem was invoked with the purpose of

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[1] Trans. Cowell and Rouse (Cambridge, 1907), in. p. 83. This tale probably dates from the fifth century B.C. Professor Minayef first drew attention to this point.

[2]*e.g. Rig Veda,* i. 25. 7, 56. 2, 97. 7, 116. 3; 11. 48. 3 ; VII, 88. 3, etc. Biihler, *Origin of the Brahma Alphabet,* p. 84.

[3]*Rig Veda,* i. 116. 3.

[4]*Mahavamsa.* Tr. Turnour, Ch. vi *fin.*

[5]Halsbury's Laws of England, 2nd (Hailsham) Edn., Vol. 1, para 84, p. 65. This statement of the law, in so far as it describes the basic nature of the action, holds good even today, *see* Halsbury's Laws of England, 4th Edn. (Re-Issue), Vol. 1(1), para 305, p. 420 and paras 311-312, pp. 426-427 and notes thereunder. *See also* The Banco, (1971) 1 All ER 524 (CA). The present law preserves the jurisdiction based on maritime lien (The Supreme Court Act, 1981 (U.K.), Section 21(3), and extends the right to proceed in *rem* to many claims which do not give rise to maritime lien (sections 21(2) and (4)). The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 is on similar lines, wherein Section 4 and 6 of the Act provides for the same.

[6] American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200 (1911); Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557 (1890); See RESTATEMENT, Conflict of Laws § 98 (1934)

[7] Windsor v. McVeigh, 93 U. S. 274 (1876); Boswell's Lessee v. Otis, 9 How. 335 (U. S. 1850); See RESTATEMENT, JUDGMENTS § 6 (1942)

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securing defendant's presence before the court, however, a taking into account the nature of maritime transactions action in *rem* developed into a large form. In *rem* literally means right against the whole world which is preferential in nature and therefore, the moment wrong is done preferential right accrues in favour of the claimant. Thus, after a collective reading of the above mentioned it can be deduced that the moment collision or any other type of recognized wrong happens, a charge is created over the *res* i.e. the vessel or the ship and this charge so created is known as Maritime Lien (discussed later). All of this can be procedurally fulfilled if the ship or vessel is within the jurisdiction of the court. The procedure to secure the interest of the claimant is by arresting the vessel and not release till the owners furnish the security to free the vessel or the court gives judgment to sale the vessel after its satisfaction. All of this is primarily done to secure the presence of the owner of the vessel, as already mentioned; therefore, where the owner is present within the jurisdiction of the court then an action in *personam* may brought to institute a normal court proceeding against the owner of the property[1]. The property may be charged later on after the owner fails to repay the claimant by execution under judgment to the extent owner may have had. Therefore depending upon the conditions an action may be brought *inrem* or *inpersonam* or both.

An action *in rem* has been introduced in two types of instances i.e. firstly, to secure the presence of the defendant (as mentioned above) so that an action *in personam* can be instituted which is based on statutory recognition and secondly, to secure the claim by instituting a suit against the property of the owner which may be a ship or a cargo also known as Maritime Lien which is based on practice of the court to charge property and ensure claimants right through lien. Maritime Lien is based upon the premises that a ship is considered to be a juridical personality (discussed below in detail). The historical scenario for both the instances have been different, action *in rem* instituted only to secure the presence of the defendant or the owner of the vessel or cargo is more local in nature and the idea was not to create a charge upon the *res* rather the moment defendant appears before the court action *in rem* transforms to action *in personam*. Whereas under Maritime Lien, the moment wrong is committed a charge is created upon the *res.* The defendant may free the charge by clearing the dues however, in case defendant fails to pay the dues the claimant has the right to make good of the damage done by the *res*, from the *res*. This, as said earlier, endows juridical personality upon the ship. Under action *in rem* the value of recovery is limited to the value of the res and not beyond whereas in an action for *personam* the recovery can be irrespective of the value of the *res.* Therefore it can be deduced that action *in rem* provides for limitation of liability in case it happens to arise as a result of maritime lien.[2] It should also be noted that the above-mentioned position can be found in the contemporary laws as well such as under Section 21 and 20 of the Supreme Court Act, 1981 and Section 4 and 6 of the Admiralty Act, 2017. Under these sections there are actions in rem that are having statutory origin and are known as 'statutory actions *in rem'* distinct from those arising from maritime lien.

Once an action in rem is instituted it may result into judgment in rem i.e. judgment against the whole world, this signifies that judgment in rem is of wider import. Whereas judgment in pesonam binds only parties and is *inter partes,* which can be contradistinguished from judgment in rem. Section 41 of the Indian Evidence Act, 1872 provides for judgment in rem such as grants of probate or administration, decrees in a matrimonial

[1]This position of law has been accepted by the Bombay High Court in *Bombay Coast and River Steam Navigation Co. v. Rene Heleux*, 4 Bom HCR OC 149, wherein it was held that since the case was cognisable in admiralty jurisdiction, the ship being not available in Bombay harbour, an action *in personam* was competent. This view was reiterated in Kamalakar Mahadev v. S.S. Navigation Co. Ltd., AIR 1961 Bom 180 para 37, p. 198.

[2]The Dictator, (1892) p. 304; The Gemma, (1899) p. 285; The Dupleix, (1912) p. 8; The Joanis Vatis (No. 2), (1922) p. 213. If the owner or the other person interested in the *res* does not acknowledge service, the claimant's only remedy is sale of the arrested *res* and he could neither obtain any execution for the unsatisfied balance of the claim nor claim any remedy such as an order for specific performance against the defendant. *See also* Edward C. Mayers, Admiralty Law and Practice in Canada, Stanford Library, Sweet and Maxwell Publications Ltd. (1916) p. 10-11

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suits, adjudication orders or discharge orders made on insolvency proceedings, in which the judgment given might be in the form of in personam but is available against the whole world. Further it must be understood that admiralty law is sui generis i.e. it is an independent legal system with its own characteristics and peculiarities. Therefore the general or common understanding of *jus in rem* and *jus in personam* (conflict of laws) must not be confused with the actions *in rem* and *inpersonam* in admiralty suits. Where in actions in personam suit dies with the death of the person,[1] in admiralty suit such is not the case, and recovery can be made out of the *res*. This makes admiralty law function differently from other forms of law and practice. Even then it must not be denied that rules of common law are and have been frequently applied in determining cases of admiralty.

Analysis of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017

It took sixty eight years to have self governing law with respect to admiralty matters. In the absence this of legislative outcome the true spirit of positivistic method of legal obedience was in dilemma. The Admiralty Act, 2017 removes that dilemma and facilitates the legal environment of the country self dependent in the field of admiralty law, realising a sense of self confidence in the Indian legal system. A lot of confusion arose especially till 1991, when judgement was pronounced in the case of *M.V. Elizabeth v. Harwan Industries*. It was made clear in this case that the English law applicable in the past has not frozen and continues to apply even today, as India does not have its own law with respect to admiralty jurisdiction. The court had to give an elaborative justification to the continuous application of the colonial legislation even today and quote the scenario in Canada, since Canada was also an English colony. The Supreme Court not only equated the presidency courts with that of the High Court of present times in order to delve the requisite original jurisdiction but also had to clarify the exercise of power over admiralty matters, which it considered to be wide enough. After the judgement the legislative body did made attempts to formalise the admiralty jurisdiction and practice by passing legislation of its own however, it did culminate into an Act. The parliament then came up with a Bill in the year 2005 and 2016 and the later was then passed with some modifications in the year 2017.

The Merchant Shipping Act, 1958, the Port Act, 1908, the Inland vessel Act, 1917 etc. concern different facets of the marine transaction attached to the boundary of India and within India. In this line there was an absence of the law to deal with admiralty jurisdiction, institute legal proceedings related and in connection with the vessel. Moreover there was absence of law to deal with the procedure of arrest, detention and other matter incidental to maritime transaction. In order to cover these mentioned issues admiralty law has been passed in most of the maritime rich countries. However, India being one of the major stake-holder in maritime transaction lacked behind in providing legal substance to the above-raised areas. Therefore in order to cover all of these matters under the same heading a consolidating has been passed. It consolidates matters pertaining to "law relating to Admiralty Jurisdiction", "legal proceedings in connection with the vessels", "arrest and detention of vessel", "sale of vessel" and "other matters connected therewith and incidental thereto". Therefore the scope of the Act is quite limited as it only focuses upon admiralty jurisdiction, procedure and practice. The Act has been divided into four chapters wherein the first chapter deals with "title, application, commencement and definitions"; the second chapter concerns "Admiralty Jurisdiction and Maritime Claims wherein it largely covers different forms of maritime claims over which an admiralty jurisdiction can be laid and the type of action that may be instituted with respect to certain claims"; the third chapter describes the procedure to be followed and appeals to be made with respect to aggrieved party and transfer of proceedings; the fourth chapter includes within its fold miscellaneous provisions wherein residuary matters pertaining to power to make rules, remove difficulties and repeal are discussed.

CONCLUSION

It is conclusive from the above discussion that admiralty law is a special law and an independent legal system. It is pertinent to note in this aspect that it is peculiar in respect to continuation of liability i.e. a ship

[1]Halsbury's Laws of England, 2nd Edn., Vol. 1 para 84, p. 65, and comments of Viscount Haldane, LC, in Sinclair v. Brougham, (1914) AC 398, (414-415)

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has been considered to be a juridical personality by virtue of which the concept of maritime lien is developed and makes it possible to sue a ship. Further it is to be understood from the definition of the ship given under the Admiralty Act, 2017 that it does not include every vessel floating on the water. There has to be demarcation between the navigable water and non-navigable waters. Also it must be understood that a vessel involved in navigation mechanically propelled should be considered as ship. The recent developments in the field of admiralty can be much appreciated especially with respect to modern dispute settlement mechanism. The Commercial Courts (Amendment) Act, 2018 includes pre-institution mediation as a method of dispute settlement, and also makes it binding in case the mediation reaches to finality. This will not only help in reducing the burden of the court but will fulfil the norm of ease of doing business in India, flattered internationally.