

# LEGALFOXES LAW TIMES

## AN OUTLOOK OF MARITIME LAW IN INDIA

- Anubhuti Sharma

*"The law of admiralty or maritime law is the corpus of rules, concepts, and legal practices governing the business of carrying goods and passengers by water"<sup>1</sup>*

### INTRODUCTION

Over centuries, the Maritime Law has evolved since the medieval times which are considered as wide ranging law. Ships and Maritime laws represents one of the oldest branches of law that is known by humankind. Maritime Law, in simple terms is a set of rules and regulations that govern the affairs related to sea and ships such as commerce, navigation, the carriage at sea of people and property. Maritime Law is also termed as Admiralty Law or Sea Law. It is a law of both domestic and private international law governing marine activities and controlling relationships between private entities which operate ships on oceans. It also covers the commercial or trading activities occurring on land which are Maritime in character. Maritime Law was formed by the practical needs of those countries that are bordered by the Mediterranean Sea, involved in maritime trade. The pre-colonial laws that still govern the admiralty jurisdiction of India courts are in a need to be properly amended in order to correct the inconsistency being created because of the disoriented legal sector.

### RESEARCH QUESTIONS

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<sup>1</sup> Gilmore and Black , The Law of Admiralty, page 1; W.A.No.1994/2010

- What is the history of Maritime Law? Is India still following the laws formed by the British?
- What is the Legislative Framework; Admiralty Jurisdiction of Courts in India? What are the current practices of Maritime Law in India?
- Are Satellite devices and arms and ammunition banned in Indian waters? What is the Cabotage policy of India?
- What are various Maritime Liens?
- What are the Laws applicable to Maritime Law? What is Merchant Shipping Act?
- What is ship arrest; what is the procedure after ship arrest?
- What was the latest Bill introduced by Lok Sabharegarding prevention of Maritime piracy?

### **HISTORICAL PROVISIONS**

The Admiralty law, as known today, was evolved in the Courts of the Lord Admiral in England. The jurisdiction of Court of Admiralty in England had developed in 19<sup>th</sup> century because of the growth of British maritime commerce and this expansion of the jurisdiction of Court of Admiralty in England was made relevant in the Courts of British India. In order to bring consistency in the jurisdiction of the High Courts of Admiralty in England and jurisdiction of the High Courts of Admiralty in India, also in other British dominion, the British Parliament executed the Colonial Courts of Admiralty Act of 1890, consequently providing that the Legislature of British India may proclaim certain Courts to be Colonial Courts of Admiralty and the Courts so proclaimed shall have the Admiralty jurisdiction as was operated by the High Court of Admiralty in England under any statute or otherwise. In the year 1890, Colonial Courts of Admiralty Act, 1890<sup>2</sup> was validated in the British Parliament. The above mentioned Act had the authority to declare some Courts in India to be Colonial Courts of Admiralty. If an exclusive jurisdiction in respect of certain issues is given to High Court of Justice in its Admiralty Division in England, the High Court at Bombay would even have the similar jurisdiction. The

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<sup>2</sup> 1890, Colonial Courts of Admiralty Act (Victoria chapter 27)

Administration of Admiralty jurisdiction today in India, under Article 372 of the Indian Constitution is still governed by the British Statutes. Therefore the present law in India is not inclusively evolved for today's changing frameworks on order to accommodate the changes that take place in International and national doctrines of common law overtime as accepted in the current British statutes and general practices of Maritime law around the world. The Supreme Court in the case *M.V. Elizabeth v. Harwan Investment Co.*<sup>3</sup> rejected the claims as enumerated in the stated British legislation. Further, the Admiralty Jurisdiction of the High Court was further consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925<sup>4</sup> so as to include various issues such as any claim for injury done by a ship, and claim arising out of an agreement relating to the utilization or hiring of a ship or relating to the conveyance of goods in a ship.

### **GENERAL OVERVIEW OF LEGISLATIVE FRAMEWORK OF ADMIRALTY LAW IN INDIA**

Shipping and carriage at sea in India is centrally regulated and exclusively controlled by the Government of India. The Government manages shipping through the Ministry of Shipping (MoS). The Ministry of Shipping has set up an independent statutory body known as the Directorate General of Shipping (DG Shipping), whose functions are circumscribed by the Indian Merchant Shipping Act, 1958<sup>5</sup>, to deal with all issues that are related to shipping legislation, policy, execution of different international conventions and other compulsory provisions of the International Maritime Organization. The Governments of various states like Gujarat, Maharashtra and Tamil Nadu have enacted law in order to set up autonomous maritime boards that operate ports and produce framework for the collection of tariffs in their respective states. Significantly in a number of cases, port officials have entered into adjustment agreements with private terminal operators under the Build, Own, Operate and Transfer (BOOT) Policy<sup>6</sup> which is made up

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<sup>3</sup> Supp 2 SCC 433

<sup>4</sup> Supreme Court of Judicature (Consolidation) Act, 1925 available at <http://www.legislation.gov.uk> (last visited on June 13, 2020)

<sup>5</sup> Merchant Shipping Act, 1958 available at <https://www.dgshipping.gov.in/> (last visited on June 13, 2020)

<sup>6</sup> Build, Own, Operate and Transfer (BOOT) Policy, available at <https://meity.gov.in/> (last visited on June 13, 2020)

for private sector participation in the development of Indian ports. In the above mentioned circumstances, a private terminal operator imposes a port tariff on ships calling at the port.

### **In rem actions and in personam actions**

In *rem* and *in personam* actions are two defining characteristics of Admiralty jurisdiction. *In personam* actions have been ages old phenomenon which is legal in nature, but the requirements of international commerce do not every time allow the luxury to being able to recognize the individual who could be made liable. Thus, in *rem* actions were developed in the Admiralty Courts in order to counter the above matter. The Admiralty Courts possessed by the High Courts in India has been the most complex matter so far for Maritime Law in India. It took a longer period of time to create a detailed legislative system of Admiralty in India. Thus, the Admiralty Bill, 2005 was enacted to solve the above issues. This bill also takes into deliberation different international developments.

### **Admiralty Courts**

In India Admiralty High Courts have exclusive powers in the context of crimes, torts committed on the high seas and it can try and determine all maritime causes. The nature and scope of the Admiralty jurisdiction exercised by High Courts in India have been considered and determined in the case of *Kamlakar v. The Scindia Steam Navigation Co. Ltd*<sup>7</sup> and in the case, *National Co. Ltd. v. M. S. Asia Mariner*<sup>8</sup>. By the aforementioned judgments, High Courts are well established in Bombay, Chennai and Kolkata and they have exclusive jurisdiction authorities over all Maritime related causes and injuries. These Courts can also establish proceedings in *rem* or in *personam* in order to reclaim compensation in lieu of damage caused by the crime.

Civil Courts in India have territorial jurisdiction or pecuniary jurisdiction and commercial disputes in India are litigated primarily in these types of courts. The High Courts of

<sup>7</sup> AIR 1961 BOM 186, (1960) 62 BOMLR 995

<sup>8</sup> LAWS(CAL)-1967-4-4

Bombay, Calcutta, Delhi, Madras and Himachal Pradesh exercise original jurisdiction for causes that have arisen within their territorial or pecuniary jurisdiction, while all other civil lawsuits have to be established in the Courts, which are generally the significant district courts. Although, Admiralty lawsuits are to be brought before the High Court of a coastal state, which are the only Courts that are vested with admiralty jurisdiction. The enactment of Commercial Courts Act, 2005<sup>9</sup> extremely improved the prevailing judicial procedural framework. The Government has also set up special commercial courts, modelled on the lines of the English High Court to deal only with 'commercial disputes' involving specialized subject issues and assertion of a specified value. India has given effect to UNCITRAL Model Law on International Commercial Arbitration by the Arbitration and Conciliation Act, 1996 (Arbitration Act)<sup>10</sup>. The Arbitration Act was amended twice after 1996, first in 2015<sup>11</sup> and recently in 2019<sup>12</sup>. The Arbitration Act empowers Indian courts to pass provisional orders for security and other additional assistance in support of arbitration taking place outside India. Another noteworthy trait is permitting any individual who is claiming through or under a party who was a witness of the original arbitration agreement to be party to the arbitration agreement.

Despite attaining Independence from British, years ago, the Indian Parliament has still not exercised its jurisdiction to make laws exclusively with regard to Admiralty<sup>13</sup> and thus the Indian courts exercise Maritime jurisdictions on traditional British statutes that continue to remain in force by the virtue of Indian Constitution.

### **SATELLITE DEVICES AND AMMUNITION BANNED IN INDIAN WATERS?**

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<sup>9</sup> Commercial Courts Act, 2005 available at <http://legislative.gov.in/> (last visited on June 13, 2020)

<sup>10</sup> Arbitration and Conciliation Act, 1996 available at- <http://legislative.gov.in/> (last visited June 13, 2020)

<sup>11</sup> The Arbitration And Conciliation (Amendment) Act, 2015 available at- <http://www.adrassociation.org/> (last visited on June 13, 2020)

<sup>12</sup> The Arbitration And Conciliation (Amendment) Act, 2019 available at- <http://egazette.nic.in/> (last visited on June 13, 2020)

<sup>13</sup> Constitution of India, Article 372

There have been incidents in Indian territorial waters in which foreign crew members were arrested for using satellite devices such as Thuraya and Iridium phones<sup>14</sup>. The use of such types of satellite devices is completely banned in Indian waters by the Director General of Shipping<sup>15</sup>. Even though, the foreign flagged vessel carries in it all the valid documents that permit it to carry satellite phones or devices, the Indian authorities have the right to deny the permission to make use of them. But there is an exception to this, i.e. the satellite phone can be permitted to use only when there is a no objection certificate from the Department of Telecommunications. The carriage of arms and ammunition has also posed many difficulties for vessels that are being called into Indian ports following the incident with the MV Seaman Guard Ohio. In the Madras High Court, the Madurai bench<sup>16</sup> absolved 35 foreign seafarers on the MV Seaman Guard Ohio, a foreign-flagged floating headquarters, which had been arrested in India for entering Indian waters.

### **CABOTAGE POLICY**

India does not have a regime that prohibits foreign players from functioning in the Indian market. Quite the contrary, India has a right of first refusal regime in which an Indian ship owner is given a chance to match the price quoted by a foreign ship owner to the Indian charterer. In these conditions, it would be open for an Indian charterer to charter a foreign flagged vessel in the occasion no Indian ship owner is able to match the offer quoted by the foreign ship owner. Under the current regime, the Director General of Shipping would first circulate an inspection with the Indian National Ship owners Association (INSA) which is a private body of Indian ship owners which decides whether an Indian shipowner could provide a vessel having same characteristics at the same or a lower shipping rate, i.e. quoted by the foreign shipowner. It is only then INSA issues a no objection certificate that a permit is issued to the Indian party to charter a foreign flagged vessel. The Ministry of Shipping issued an order<sup>17</sup> in which prohibition on foreign flagged vessels undertaking a coastal trip from one Indian port to another port have been eased for the carriage of empty containers.

<sup>14</sup> The Shipping Law Review, India, edition 6 available at- <https://thelawreviews.co.uk/edition/the-shipping-law-review-edition-6/1195054/india> (last visited on June 13, 2020)

<sup>15</sup> Vide Order No. 2 of 2012 (48-NT (1)/2012)

<sup>16</sup> *Dudnik Valentyn and Ors.v. The Inspector of Police*, 'Q' Branch CID, CrI. A. (MD) Nos. 41, 43, 44 of 2016

<sup>17</sup> General Order No. 1 of 2018 dated May 21, 2018

In an attempt to strengthen the 'Make in India Policy' of the Government of India and add stimulation to the ship building commerce in India, the Government recently issued a notification<sup>18</sup> the Proposed RoFR Regime in which for the very first time, an Indian built foreign flagged vessel would have inclination over a foreign built Indian flagged vessel. Previously to the notification of the Proposed RoFR Regime, the order of preference among various categories of shipowners was as follows-

1. First preference: Indianflagged vessel
2. Second preference: Indian owned foreign flagged vessel
3. Third preference: Foreign flagged vessel

Under the Proposed RoFR Regime the order of preference would be as follows:

1. First preference: Indian built vessel irrespective of whether she flies the Indian flag or a foreign flag.
2. Second preference:
  - A. Foreign built, owned by Indian, Indian flag.
  - B. Foreign built andforeign flag but should be Indian chartered.

The Delhi High Courtpassed an ad interim order staying the operation of the Proposed RoFR Regime in the case of *The Great Eastern Shipping Company Limited v. Union of India*<sup>19</sup>. In respect to the consequence of this proceeding and any further appellate proceedings, there is likely to be a disastrous shift in the Indian Cabotage regime, which is bound to have far reaching consequences for all shareholders.

## MARITIME LIENS

Lien is a legal interest in property, held by the assignee who secures payment of liability or debt. A Lien may authorize assignee to either take the property or to have the property sold in order to raise money to pay a debt in liability or default which is secured by Lien. Lien creates a right over other's property; it can also be exercised under Indian Law.

<sup>18</sup> Shipping Development Circular No. 02 of 2019

<sup>19</sup> AIR 1971 Cal 150

Such as if a cargo is required to be released at a port which is designated as a major port, a ship owner may be able to exercise a statutory lien over the cargo ship, on board vessel for assertion of outstanding cargo and other expenses that are payable to the ship owner<sup>20</sup>. In the ownership of State Governments, certain ports such as in Gujarat have similar regulations that enable a ship owner to exercise statutory lien over freight<sup>21</sup>.

### **LAWS APPLICABLE TO MARITIME LAW**

The different laws of India that deal with the transport of goods by sea are:

1. The Merchants Shipping Act, 1958
2. The Indian Carriage of Goods Act by Sea Act, 1925
3. The Bills of Lading Act, 1856
4. The Contract Act, 1872
5. Major Ports Trust Act, 1963
6. The Indian Ports Act, 1908
7. Sales of Goods Act, 1930; and other statutes.

### **Merchant Shipping Act**

The present Merchant Shipping Act was enacted in the year 1958<sup>22</sup> for certain provisions as well as development in the field of shipping. Aside from this act there were several other acts and statutes which were repealed like the Coasting Vessels Act, 1838, Steam Vessels Act, 1917 which were implemented by the British Government, but all the acts were not according to the existing Indian system of coastal commerce. Hence several acts were implemented by the Government of India like Merchant Shipping Act, 1958, Major Ports Trust Act, 1963 and The Indian Ports Act, 1908 in order to enhance the prevailing coastal commerce. The Merchant Shipping Act provides guidelines for administration of Indian shipping, by establishing the office of Director General of Shipping, radio inspectors, mercantile marine department, shipping offices and surveyors. It contains regulations for procedure of Indian ships, governing navigation, ownership of Indian

<sup>20</sup> Section 60- Major Port Trust Act, 1963

<sup>21</sup> Section 48- Gujarat Maritime Board Act, 1981

<sup>22</sup> Merchant Shipping Act, 1958 available at <https://www.dgshipping.gov.in/> (last visited on June 14, 2020)

vessels. The act also provides detailed instructions on its control over foreign ships and vessels that come to India for various economic activities. In the case of *British India Steam Navigation Co. v. Shanmughavilas Cashew Industries*<sup>23</sup> the Supreme Court reported that a statute or act extends territorially, until the contrary is said, throughout the nation and extends to territorial waters. There is no authority to legislate foreign vessels and foreigners in them by the Indian Parliament. Indian statutory enactments do not deprive any foreign ships or its owner of their rights unless it is covering the territorial jurisdiction. Therefore, Indian statutes and acts are non-effective against foreign property and foreigners outside the territorial jurisdiction. This principle is quoted in Section 2(2)<sup>24</sup> of the Merchant Shipping Act, 1958. There are also certain instructions that governs trade practices through seas, mentioned in Merchants Shipping Act-

1. A general trade permits.
2. A license for any part or whole part of coasting in India.
3. A permit is required for certain period of trip.

In the Merchant Shipping Act, under Section 443<sup>25</sup> and 444<sup>26</sup>, authorization for detention of foreign ships which caused damage is stated. The Court here held that the word 'damage' done by the ship should not be narrowly limited to the physical damage and exclude any other damage caused by the operation of vessel in connection with the carriage of commodities.

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## SHIP ARREST

Ship arrest is a procedure in which a ship is prohibited from trading and moving until the issue in question is decided upon. Detaining a vessel in order to secure a maritime claim, this exclusive jurisdiction is granted to the Admiralty Court. The term 'Arrest' is defined

<sup>23</sup> 1990 SCR (1) 884, 1990 SCC (3) 481

<sup>24</sup> Merchant Shipping Act, 1958, Section 2(2)- Unless otherwise expressly provided, the provisions of this Act which apply to vessels, shall so apply only while any such vessel is within India, including the territorial waters thereof.

<sup>25</sup> Merchant Shipping Act, 1958, Section 443- Power to detain any foreign vessel that has caused damage.

<sup>26</sup> Merchant Shipping Act, 1958, Section 444- Power to impose detention of ship.

in Article 2<sup>27</sup> of International Convention, 1952 which is related to Arrest of Sea-going ships. In order to exercise the power of ship arrest, following must be the reasons for the ship arrest-

1. If there is loss of life.
2. Any loss of property.
3. Any sort of accident.
4. Violation of norms, usages or customs.

The main purpose or reason for arrest of a ship is to acquire safety for satisfaction of judgment in the action in rem, hence it is important to arrest the ship in order to establish jurisdiction. The most necessary requirement for ship arrest is that the applicant is required to issue a Power of Attorney in the favour of local attorneys. The Arrest Convention, 1952 was made to unify the rules and regulations to arrest ships around the world. It also protects the right and interests of the shipping industry. The Arrest Convention, 1999 extends the right of sister ship arrest to vessels that belong to the people who were time or voyage charterers (not just owners or demise charterers), it also allows forum selection and arbitration clauses. There are many judgments related to ship arrest such as *Bulk Shipping Management SEA & Anr. V. the Bunkers on board MV African Eagle*<sup>28</sup>; it was held that freight cannot be arrested alone. A claim for damages for wrongful arrest of a vessel is not a special law, in the case of *Lufeng Shipping Co Ltd v. MV 'Rainbow Ace and Ors*<sup>29</sup> it was held that principles of mitigation will apply and the claim is subject to mitigation of losses arising from wrongful arrest of the vessel. In the case *Coromandel International Limited v. MV 'Glory I' and Andromeda Ship Holdings Ltd*<sup>30</sup>; it was held that under the arrest the proceedings for the sale of vessel can be taken out on expiry of three days if no security or bail has been furnished, from the date of arrest.

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<sup>27</sup> International Convention, 1952, Article 2- "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment."

<sup>28</sup> NMSL no. 59 of 2013

<sup>29</sup> Admiralty Suit No. 29 of 2013

<sup>30</sup> Admiralty Suit No. 33 of 2010

After the warrant of the ship is served, the ship is then required to appear through its owner and either settles claim or challenge the arrest also when the warrant is issued, the notice for the same shall be given to the Marshall or the authorized officer. The Marshall has the jurisdiction to arrange the standby in place of the arrested ship and the complainant or his lawyer shall give a carriage to the ship for the service. The Marshall and the other officers are required to have the agreement from the complainant to make further deposits towards the charges as obtained by him in connection with the custody of the ship under the arrest. The custom and harbour authorities of the arrest are required to be confidential. In case of default of the owner, then the court can make an order for the sale of the ship and if the sale proceeds it can thereby be used to settle the claims of the complainant. In case of any surplus then it must be pack to the owner itself. The courts which are erased down with lack of certainty in Admiralty issues should have the power to protect the ship-owners from unlawful claims which are against them and their vessels. Even in the case of an arrest or capture of the ship, the proceedings are required to be quick and conclusive, as huge sum of expenses is involved generally and even the slightest delay can cause huge amount of losses, either to the ship owners or to the charterers.

The growth of the Maritime sector in India over the past decade has been remarkable and substantial. India's 12 major ports and 187 non- major ports continue to increase by leaps and bounds. As per the Ministry of Shipping, around 95 percent and 70 percent trading by volume and value respectively of India is done through Maritime transport<sup>31</sup>. The shipping industry and ports in India play an important role in assisting growth in country's commerce and trade. The Indian Government too plays a dynamic role in supporting the Maritime and port sector. Although, this fast growing sector is in a need of a unified sphere of lawsuit in order to simplify the procedure and provide proper guidance to millions of people who are currently employed and to the others who are yet to come in the sector. With the continuing huge investments pouring in the maritime sector, the legal system in India is in a need to prepare itself to the growing challenges and to put restraint on procedural delays which affects the growth of the Indian Maritime sector.

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<sup>31</sup>Statistics from the Annual Reports, 2014-15, Ministry of Shipping, Government Of India

## **BILL INTRODUCED FOR AVOIDANCE OF MARITIME PIRACY**

The Anti-Maritime Piracy Bill, 2019<sup>32</sup> was introduced in Lok Sabha by the Ministry of External Affairs. The Bill provides for avoidance of Maritime Piracy and about legal proceedings of people for such piracy related crimes. The Bill applies to and beyond to all the limits of Exclusive Economic Zones in India<sup>33</sup>. The Bill defines Piracy as an illegal activity of violence, detention or harm committed to any vessel, for private purposes such acts would qualify piracy. It also involves voluntary participation in the operation of a pirate vessel or aircraft<sup>34</sup>.

## **CONCLUSION**

Admiralty laws and its precedents preferred by the courts are based on well-established concepts of customs and judicial reasoning giving these maritime laws an exclusive blend in them. Laws and Maritime Laws which govern the trade and commerce through the water plays an imminent role in the area of enhancement as they are one of the key areas wherein our nation generates its revenue for the reason of economic and monetary development. There are many statutes that govern this sector of Maritime and its concerned trade practices. Although a consensus is required to see that the extensive potential of the country's shipping industry and the security, safety and control of its Maritime seas are taken care of. It is relevant to note the judicial activism of the Supreme Court in the landmark judgement in M.V. Elizabeth case by advancing the Admiralty jurisprudence consisting of international conventions (Arrest convention) and maritime practices. In *rem* actions and Maritime liens are inherent aspects of Maritime Law, which have tremendous effect on international trade and commerce. The ship arrest on the other hand is usually the quickest way of getting the security against the claims or for recovering the unpaid costs, dues. But the fact is that, there are not strict rules and

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<sup>32</sup>The Anti-Maritime Piracy Bill, 2019 available at- [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/369\\_2019\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/369_2019_LS_Eng.pdf) (last visited on June 15, 2020)

<sup>33</sup>Section 1 (3)-The Anti-Maritime Piracy Bill, 2019

<sup>34</sup>Section 2 (1)(f)- The Anti-Maritime Piracy Bill, 2019

regulations for the maintenance of ships, generally for the ones which are used in trading and exporting of certain materials from India to other places in the world. Thus, proper management system on vessels maintenance must be included by the State Maritime Boards because of that there will be adequate procedures for maintaining vessels so that it results in an increase of sea trade and commerce both in the country and other countries.



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