IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION
IN ITS COMMERCIAL DIVISION
NOTICE OF MOTION NO.41 OF 2017
IN
COMM. ADMIRALTY SUIT NO.14 OF 2014

Ms M.V.Nordlake GmbH, a limited liability company, incorporated under the laws of Germany and having its place of business at Vorsetzen 50, 20459, Hamburg, The Federal Republic of Germany ... Applicant/Plaintiff

versus

1. Union of India
through the Indian Navy,
The Commanding Officer,
INS Vindhyagri
C/o Fleet Mail Office,
Mumbai – 400 001.

2. All other persons claiming or being entitled to claim losses and/or damages by reason of the collision of M.V.M.V.Nordlake with INS Vindhyagiri
Near the Sunk Rock lighthouse
off the Colaba Coast on 30 January 2011 ... Defendants

Mr. Atul Rajyadhayksha, Senior Advocate with Mr. Sunip Sen, Mr. Ashwini Sinha, Mr. Adil Patel, Ms. Sanika Kulkarni i/by Bhatt and Saldanha for Applicant in NMCD 41 of 2017 and for Defendants in ADMS 23 of 2011.
Mr. Rahul Narichania, Senior Advocate with Mr. Ashish Mehta, Ms. Aarya More, Ms. Shiny Rey, Ms. Komal Bhail i/by Ethos Legal Alliance, for Respondents in NMCD 41 of 2017 and for Plaintiff in ADMS 23 of 2011.

CORAM : N. J. JAMADAR, J.

RESERVED ON : 29 SEPTEMBER 2022
PRONOUNCED ON : 17 FEBRUARY 2023

JUDGMENT :

1. The Plaintiff has taken out this Notice of Motion seeking declaration that it is entitled to limit its liability in respect of all losses and damages in respect of all property claims and consequential losses resulting from the collision between M.V.Nordlake and INS Vindhyagiri on 30 January 2011 at Mumbai Port in accordance with the provisions of Part XA of the Merchant Shipping Act, 1958 (the Act, 1958). The Plaintiff also seeks directions for constitution of Limitation Fund, to limit the liability of the Plaintiff in the sum of SDR 27,89,234 equivalent to Rs.20,01,86,113/- and for appropriation of the said amount out of the security deposited by the Plaintiff in ADMS No.23 of 2011; refund of the balance amount, and injunction in rem restraining the Defendants and other claimants from exercising any right against any assets and property of the Plaintiff and consequential reliefs.

2. The Plaintiff is a company incorporated under the laws of Germany. The Plaintiff is the owner of the Vessel M.V.Nordlake, registered at the Port of Limassol, Cyprus and flying the Cyprus flag.

3. Defendant No.1 is Union of India through Indian Navy. Defendant No.2 are all other persons claiming or being entitled to claim losses and/or damages either in *rem* or in *personam* against the Vessel M.V.Nordlake and/or its owners resulting from the collision of M.V.Nordlake with INS Vindynagiri.

4. The Plaintiff asserts, gross tonnage of M.V.Nordlake is 16,202 MTS.

Cyprus is a signatory to the Convention on Limitation of Liability for Maritime Claims, 1976 (Convention, 1976). M.V.Nordlake was flying the flag of one of the parties to Convention 1976. The Plaintiff, thus, claims to be entitled to invoke the right to limit its liability under Section 352A of the Act, 1958.

5. The Plaintiff has approached the Court with a case that on 30 January 2011 at about 16.18 IST, the out-bound M.V.Nordlake was close to North Karanja buoy, at Mumbai Port. It was advised that a convoy of 14 naval ships was inbound. At the same time, another vessel M.V.Seaeagle was entering the harbour. Post communication, the lead navalship and second naval ship in the said convoy moved to the western side of the channel and passed, M.V.Nordlake 'green to green', as agreed. The third and fourth naval ship 'INS Vindhyagiri' did not move to their left as had been agreed with the original leader of the convoy and it appeared that the third naval ship and 'INS Vindhyagiri' were shaping to pass M.V.Nordlake from the eastern side which was contrary to the plan, as agreed.

6. In the meanwhile, another Vessel M.V.Seaeagle was spotted entering the harbour. M.V.Seasegal was contacting each naval ship, in turn, to seek their permission to overtake. There was a fair amount of confusion in the passing of the vessels and, as a result thereof, M.V.Nordlake was being closed upon by three approaching vessels, namely the third vessel in the original convoy, 'INS Vindhyagiri' (being the fourth ship in the convoy) and M.V.Seaeagle. The confusion ultimately resulted in collision

between M.V.Nordlake and INS Vindhyagiri. INS Vindhyagiri, post collision, was taken to the Port. INS Vindhyagiri sank at her berth on the day following the collision.

7. The Defendant No.1 filed a suit for the arrest of M.V.Nordlake. The Plaintiff made a deposit of Rs.33,98,90,000/- as security and M.V.Nordlake was released from arrest by an order dated 25 April, 2012 in Notice of Motion No.1525 of 2011 in ADMS 23 of 2011. The Plaintiff had instituted a suit No.20 of 2011 without giving notice under Section 80 of the Code of Civil Procedure, 1908 and, therefore, the said Suit was withdrawn with liberty to institute a fresh suit on the same cause of action by an order dated 20 January 2014.

8. In the instant suit, the Plaintiff seeks a decree under Section 352C of the Act, 1958 limiting its liability for the said collision in the sum of SDR 27,89,234 equivalent to Rs.20,01,86,113/-. The Plaintiff asserts, apart from Defendant No.1, no other person has made claim, in this Court or any other Court in India or elsewhere for loss or damages arising out of the collision between M.V.Nordlake and INS Vindhyagiri.

9. The Plaintiff has taken out the instant Notice of Motion asserting that under the provisions of Act, 1958, the entitlement of the Plaintiff to limit its liability for claim or claims resulting from the aforesaid collision is absolute. This right to limit the liability by the owner of the Vessel is *de hors* the resultant loss suffered or any act or omission on the part of the owner, who seeks to limit the liability. The claims

arising out of the aforesaid collision are covered under Section 352A of the Merchant Shipping Act, and, therefore, the Plaintiff's right to limit the liability for the said collision is indefeasible and absolute.

10. Without prejudice to the aforesaid assertions, the Plaintiff avers that the right of the Plaintiff to limit the liability can only be curtailed upon proof that the loss resulted from the personal act or omission committed with an intent to cause such loss or recklessly with the knowledge that such loss would probably result. However, in that event, the burden of proof would be on the Defendant No.1 / Plaintiff in Suit No.23 of 2011. The Defendant No.1 made no endeavour to substantiate such a case by furnishing particulars of the personal act or omission of the Plaintiff. Therefore, the Plaintiff cannot be deprived of the right to limit its liability.

11. It is further averred that the suit claim and security towards the release of the vessel demanded by Defendant No.1, in Suit No.23 of 2011, is in excess of the sum of Rs.20,01,86,113/-, the amount for which the Plaintiff is entitled to limit its liability. Hence, this Notice of Motion for the aforesaid reliefs.

12. An Affidavit in Reply is filed on behalf of Defendant No.1. At the outset, the Defendant No.1 contends that the prayers in the instant Notice of Motion manifest dishonest intent on the part of the Plaintiff to withdraw the security deposited under the order of the Court. Laying emphasis on the fact that on account of the collision, Defendant No.1 lost a warship which sank on 30 / 31 January 2011,

the Defendant No.1 contends that prayer of limiting the liability is wholly misconceived. The tenability of the Application is also assailed on the count that the provisions contained in Part XA of the Act, 1958 do not govern naval warships.

13. The Defendant No.1 contends that it was the sole negligence on the part of M.V.Nordlake, which principally contributed to the collision. Reliance is sought to be placed on the judgment of the English Court, whereby 60% of the blame was attributed to M.V.Nordlake. A party who is guilty of causing loss resulting from his personal act or omission with intent to cause such loss, or committed recklessly with knowledge that such loss will probably result, looses the right to limit the liability under the Convention, 1976. A ship-owner, according to the Defendant No.1, can never have an absolute right to limit the liability. In the event, the Plaintiff is permitted to limit the liability and the limitation fund is constituted in the sum as prayed for by the Plaintiff, the Defendant No.1, who has a huge claim of 1397.76 Crores, would suffer an irreparable loss. Therefore, the Notice of Motion be rejected.

14. An Affidavit in Rejoinder is filed by the Plaintiff controverting the contentions in the Affidavit in Reply. It is categorically denied that the provisions of the Act, 1958 do not govern the case at hand. Since the Applicant is the owner of a merchant vessel, it is entitled to seek setting up of the limitation fund. Likewise, the contention of the Defendant No.1 that the aspect of negligence becomes relevant is controverted.

15. In the light of the aforesaid pleadings, I have heard Mr. Atul Rajyadhayksha, learned Senior Advocate appearing for the Plaintiff, and Mr. Rahul Narichania, learned Senior Advocate appearing for Defendant No.1. With the assistance of the learned Counsel for the parties, I have perused the pleadings and the material on record.

16. Mr. Rajyadhayksha submitted that under the provisions of Part XA of the Act, 1958, once a case falls within the ambit of Section 352A of the Act, the right to limit liability is absolute. Taking the Court through the historical perspective of the rationale behind the principle of limiting the liability, Mr. Rajyadhayksha strenuously submitted that the question of fault is wholly irrelevant. Even otherwise, according to Mr. Rajyadhayksha, there is no material to demonstrate negligence on the part of M.V.Nordlake, or for that matter, a major portion of the blame lay on M.V.Nordlake.

17. Mr. Rajyadhayksha also traced the history of the Maritime Convention on limiting liability and the incorporation thereof in the domestic law in the shape of Part XA of the Act, 1958. Mr. Rajyadhayksha further submitted that the absolute nature of the right to limit the liability is no longer *res integra*. Banking heavily upon the judgment of a learned Single Judge of this Court in the case of **Murmansk Shipping Company V/s. Adani Power Rajasthan Ltd. & Ors.**[1], Mr.Rajyadhayksha submitted that after an elaborate discussion, it has been authoritatively laid down that

1 2016 SCC Online Bom 167

the ship owner's right to limit the liability is absolute as long as the claims in respect of which limitation is sought, are claims being capable of limitation under Section 352A of the Act, 1958. A ship owner's right under Part XA of the Act, 1958 is absolute and without reference to any proof of loss resulting from personal act or omission of the ship owner.

18. In law, according to Mr. Rajyadhayksha, there is no prohibition to constitute a limitation fund at an interim stage without going for a full fledged trial. In the context of the nature of the dispute, it would be proper to determine the issue of limitation of liability at the earliest and it need not await a full fledged trial. Mr. Rajyadhayksha further submitted that the limitation fund is required to be constituted in accordance with the provisions of the Convention, 1976, as it stood when the collision occurred. Mr. Rajyadhayksha further submitted that once this position in law is appreciated, the resistance sought to be putforth on behalf of the Defendant does not merit countenance. Reliance on the judgment of the English Court in the matter of apportioning the blame amongst the Vessels, is of no assistance as the question of fault becomes wholly inconsequential.

19. In opposition to this, Mr. Rahul Narichania submitted that the instant application for limiting the liability does not deserve to be entertained for reasons more than one. Firstly, in Notice of Motion No.1525 of 2011 the Plaintiff had come up with an identical prayer of constitution of limitation fund and restricted the

application to furnish security equivalent to value of the Vessel. Thus, on the basis of the principle analogous to one under Order XXIII Rule 1 of CPC, the Plaintiff is precluded from seeking the same relief which was not pressed in the said Notice of Motion.

20. Secondly, the order of limitation of liability cannot be passed at an interim stage. In view of the provisions contained in Rule 1105 of the Bombay High Court (Original Side) Rules, 1980, a prayer for limitation of liability can only be made by way of a suit. Since the Defendant No.1 has already filed a written statement and trial has commenced and one of the witnesses has also been examined, at this stage, there is no propriety in entertaining the application for limiting the liability.

21. Thirdly, under Part XA of the Act, 1958, apart from the question as to whether the Plaintiff, being the owner of the Vessel, has an absolute right to limit the liability, disputed questions of facts arise for determination which cannot be adjudicated in a Notice of Motion sans evidence.

22. Mr. Narichania would urge that the tonnage certificate, upon which reliance is sought to be placed by the Plaintiff/Applicant, which bears upon the quantum of the limitation fund, is not an authenticated document. This issue, therefore, must go for trial.

23. On legal premise, Mr. Narichania submitted that Article 4 of the Convention 1976, is implicit in the provisions contained in Part XA of the Act of 1958.

The judgment in the case of **Murmansk Shipping Company (supra),** according to Mr. Narichania, does not lay down the correct proposition of law. Mr. Narichania would urge that a reference of the said decision to a larger Bench is necessitated. Mr. Narichania further submitted that further issues as to whether Protocol 1996 in the matter of the quantum of the liability would apply and what shall be the proper rate of conversion, also arise for adjudication. All these issues, according to Mr. Narichania, ought to be adjudicated at the final hearing of the suit and not at this stage.

24. The aforesaid submissions now fall for consideration. Three issues wrench to the fore. First, whether the right to limit the liability under Section 352A of the Act, 1958 is absolute and *de hors* the question of fault on the part of the Vessel or its registered owner. Second, whether the prayer to limit the liability and constitute the limitation fund can be entertained at an interim stage and decided without full fledged trial. Third, in the event the Court comes to the conclusion that the liability of the Plaintiff deserves to be limited, whether the quantum is to be fixed in accordance with the provisions of the Convention, 1976 or Protocol 1996 and what should be the date to be reckoned for the purpose of conversion of SDR into USD or Indian currency.

25. Before adverting to deal with the aforesaid contentious issues, it may be apposite to note the relevant provisions of Part XA of the Act, 1958 providing for limitation of liability.

"**Section 352.** Definitions.- In this Part, unless the context otherwise requires-

(a) "claim" means a personal claim or property claim;

[2][(b) "Convention" means the Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time;]

(c) "Fund", in relation to a vessel, means the Limitation Fund constituted under section 352C;

(d) "liability", in relation to owner of a vessel, includes liability of the vessel herself;

…….

(j) "Special Drawing Rights" means Special Drawing Rights as determined by the International Monetary Fund]

[2][352A. Limitation of liability for damages in respect of certain claims.-

(1) The ship owner, salvor, any person for whose act, neglect or default the ship owner or salvor, as the case may be, is responsible, and an insurer of liability for claims to the same extent as the assured himself, may limit his liability as provided under section 352B in respect of,-

(a) claims arising from loss of life of or personal injury to, or loss of or damage to, property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) claims arising out of loss resulting from delay in the carriage by sea of cargo and passengers of their luggage;

(c) claims arising out of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;

(d) claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit

his liability in accordance with the provisions of the Convention or the rules made in this behalf prescribe, as the case may be, and such further loss caused by such measures;

Explanation 1.- For the purpose of this section, the act of involving limitation of liability shall not constitute an admission of liability.

Explanation 2.- For the purpose of this Part, the liability of a ship owner shall include liability in an action brought against the ship herself.]

…….

[1]**[352B. Limitation of liability.**- The amount of which any person referred to in sub-section (1) of section 352A may limit his liability in accordance with the provisions of the Convention and in cases where the provisions of the Convention are not applicable, the limit shall be in accordance with the rules in this behalf prescribe.]

352C. Limitation fund and consolidation of claims [1][***].- [2](1) Where any liability is alleged to have been incurred by a person referred to in sub-section (1) of section 352A in respect of claims arising out of an occurrence, and legal proceedings are instituted in respect of claims subject to limitation, then such person may apply to the High Court for the setting up of a limitation. Fund for the total sum representing the amounts set out in the Convention or the rules made in this behalf under this Part applicable to claims for which that person may be liable together with interest thereon from the date of occurrence giving rise to the liability until the date of the constitution of the Fund.]"

……..

26. It would be contextually relevant to note the provisions of the Convention 1976 which bear upon the determination of the controversy at hand. Chapter 1 of the Convention 1976 contains 5 Articles under the caption 'The right of Limitation'. Article 4 which constitutes the sheet anchor of the submission on behalf of Defendant No.1, reads as under :

> Article 4 – Conduct barring limitation
> "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."

27. Chapter II subsumes 5 articles under the caption 'Limits of Liability'. Article 6 provides for the general limits and the method of calculation. Chapter III providing for Constitution of the limitation fund defines the governing law in Article 14 as under :

> "Article 14 – Governing Law
> Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted."

28. Protocol 1996 which amended the Convention 1976 provides for enhanced limit of liability by substituting para 1 of Article 6. Article 9 of the Protocol 1996 bears upon the aspect of the applicability of the first para of Article 6 under Convention 1976 or the first para as amended by the Protocol 1996. It reads as under :

> "1. The convention and this Protocol shall, as between the parties to this Protocol, be read and interpreted as one single instrument.
> 2. A State which is party to this Protocol but not a party to the Convention as amended by this Protocol in relation to other States Parties hereto, but shall not be bound by the provisions of the Convention in relation to States Parties only to the Convention.

> 3. The Convention as amended by this Protocol shall apply only to claims arising out of occurrences which take place after the entry into force for each State of this Protocol.
> 4. Nothing in this Protocol shall affect the obligations of a State which is a party both to the Convention and to this Protocol with respect to a State which is a party to the Convention but not a party to this Protocol."

29. In the backdrop of the aforesaid provisions contained in the Act, 1958, Convention 1976 and the Protocol 1996, an answer to the first question, formulated above, is required to be explored. We have noted that Article 4 of the Convention 1976 incorporates the principle of 'breaking of limitation', to provide that a person on account of whose personal act or omission committed with intent to cause such loss or recklessly and with knowledge that such loss would probably result, will not be entitled to limit his liability. Being the signatory to the Brussels Limitation Convention of 1957, the precursor of the Convention of 1976, India introduced Part XA to provide for limitation of liability by Act 25 of 1970. Part XA suffered significant amendments under the Amendment Act 63 of 2002, which came into force with effect from 1 February 2003. Before the said amendment, Section 352A of the Merchant Shipping Act, 1958 provided for an exception to the right to limit the liability by providing that the owner of a sea going vessel may limit his liability in respect of the claims arising from named occurrences *unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner*. It was also provided under sub-section (2) of Section 352A that the burden of proving that the occurrence did not result from his actual fault

or privity shall be on the owner. Post amendment of 2002, italicised portion does not find place in sub-section (1) of Section 352A and sub-section (2), (in the aforesaid terms) stands deleted.

30. The distinction in the matter of the nature of fault on the part of the owner and on whom the onus lay, under the Convention 1976 and the unamended provisions of Act, 1958, is of critical salience. The Convention of 1976 while providing for conduct barring limitation or breaking of limitation cast a very high degree of proof, to deprive a person liable of the right to limit the liability. Under the unamended Act of 1958, a person liable would be deprived of the right to limit the liability, if the occurrence giving rise to the claim resulted from the actual fault or privity of the owner. In contrast, the Convention of 1976 incorporates a higher degree of culpability, by providing that the loss ought to result from personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result. The latter part of Article 4 of the Convention touching upon the mental element or recklessness bordering on wantonness coupled with knowledge, in effect casts an almost impossible onus to prove to the contrary. Secondly, the onus is on the claimant who opposes the limitation of liability.

31. It is in the backdrop of the aforesaid context, the omission of the exception, from Section 352A of the Act, 1958, providing for limitation of liability is required to be appreciated. For this purpose, the rationale behind provision for the

limitation of the liability must be kept in view. The avowed purpose of limitation of liability is to protect the owner of the Vessel against large claims far exceeding the value of the ship and cargo which can be made against the Vessel and the owner all over the world in case the Vessel is involved in an occurrence causing damage to cargo, another vessel or loss of any other property or personal life or personal injury. It is in the nature of a 'defensive' action. It is a well recognized concept in admiralty jurisdiction.

32. In the case of **World Tanker Carrier Corporation V/s. SNP Shipping Services Pvt. Ltd.**[2] the Supreme Court had an occasion to expound the nature of a limitation action, in the context of the challenge to the jurisdiction of this Court in entertaining such action. The observations of the Supreme Court in Paragraphs 13 to 17 illuminate the path, and, thus, extracted below :

> "13. We have heard all these appeals together since common questions of law arise in all these appeals. The first question that requires consideration is the question of jurisdiction. In order to consider the question of jurisdiction, it is necessary first to examine the nature of a limitation action.
> 14. Describing the nature of a limitation action, Baer in his book Admiralty Law of the Supreme Court at p. 154 traces the historic origins of limitation of liability as follows :
>
> *" '[M]en would be deterred from employing ships, if they lay under the perpetual fear of being answerable for the acts of their master to an unlimited extent.' Thus wrote the renowned Dutch jurist, Hugo Grotius, in 1625. To impose liability on shipowners for acts of their masters would be 'neither consonant to natural equity ...nor ... conducive to the public good'. Referring to the law of his*

2 (1998) 5 SCC 310

own nation, Grotius continued, '[I]t is an established rule that no action can be determined against the owner for any greater sum than the value of the ship an cargo.'

Although by no means uniform, some sort of rule of limited liability on the part of the shipowner has been the law of the leading maritime nations of continental Europe since the middle ages…"

15. In 1924 several leading nations adopted the International Convention for the Unification of Certain Rules relating to the limitation of liability of owners of sea-going vessels. This is commonly referred to as the Brussels Convention of 1924. In 1957, a new convention on Limitation of Liability of Sea-Going Vessels was drafted to replace the Brussels Convention of 1924. The new convention, commonly referred to as the Brussels Limitation Convention of 1957 was signed by many leading maritime nations of the world. It is also signed by India. The convention fixes the limit of liability of an owner of a sea-going vessel on the basis of the tonnage of the vessel without regard to the Vessel's value. It was to incorporate this Convention in our statute law that Part X-A was inserted in the Merchant Shipping Act, 1958.

16. The right of an owner to bring a limitation action is governed by Part X-A of the Merchant Shipping Act, 1958. The whole purpose of limitation of liability is to protect an owner against large claims, for exceeding the value of the ship and cargo, which can be made against him all over the world in case his ship meets with an accident causing damage to cargo, to another vessel or loss of personal life of personal injury. A limitation action, though it is normally filed in the admiralty jurisdiction of a court, is somewhat different from an ordinary admiralty action which normally begins with the arrest of the defaulting vessel. The vessel itself, through its master is a party in the admiralty suit, and the Plaintiff must have claims provable in admiralty against the vessel. In the case of an action for limitation of liability, it is the personal right of the owner of the vessel to file a limitation action or to use it as a defence to an action against him for liability. It is a "defensive" action

> against claims in admiralty filed by various claimants against the owner of the vessel and the vessel. A limitation action need not be filed in the same forum as a liability action But it must be a forum having jurisdiction to limit the extent of such claims and whose decree in the form of a limitation fund will bind all the claimants.
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> 17. In case of Volvox Hollandia[3] the English Court describing the nature of a limitation action observed that the purpose of limitation proceedings is, of course, to obtain a decree in rem against all claimants for a single sum limited to the amount of a limitation fund. Referring to the Brussels Convention of 1957, the Court referred to Article 4 which provides that the rules relating to the constitution and distribution of the limitation fund, if any and all rules of procedure shall be governed by the national law of the State in which the Fund is constituted.

33. If considered through the aforesaid prism of the rationale behind incorporating the statutory provisions providing for limits of liability, the omission by the Indian Parliament to provide for the exception to the right to limit the liability becomes crystal clear. On first principles, the omission to incorporate a provision breaking limitation deserves to be given due weight.

34. Mr. Narichania would urge that notwithstanding the omission of exception incorporating a provision for breaking limitation, Article 4 of the Convention 1976 must be deemed to have been incorporated in the Act of 1958 and there is no absolute right to limit the liability. It was urged that in the event it is held that the Plaintiff has an absolute right to limit the liability, the Defendant No.1 who has

3 (1988) 2 Lloyds; LR 361

suffered huge loss on account of a reckless action on the part of the Plaintiff, would be deprived of the opportunity to show that the said reckless act was with intent to cause such loss or with the knowledge that such loss would result therefrom. Mr. Narichania was at pains to persuade the Court to hold that the judgment of **Murmansk Shipping Company (supra)** requires a reconsideration.

35. In the case of **Murmansk Shipping Company (supra),** this Court, inter alia, considered the very question which is sought to be agitated by the Defendant :

> (iii) Whether the ship-owner's statutory right to limit liability under Part XA is absolute and without reference to any proof of loss resulting from a personal act or omission of the ship owner (referred to in admiralty pariance as "conduct barring limitation") ?

36. After an elaborate analysis, S.C.Gupte, J. came to the conclusion that the right to limit liability is absolute. The observations in paragraphs 33 to 41, 47 and 48 incorporate the very submissions, which were sought to be, by and large, reiterated before this Court, and the reasons which weighed with the Court in repelling those submissions. They read as under :

> "33. That brings us to the nub of the controversy in the present suit, namely, whether the shipowner's right to limit liability is absolute and without reference to any proof of loss resulting from his personal act or omission. The controversy may be briefly outlined thus: The 1957 convention allowed the shipowners to limit liability (Article 1.1) in respect of claims arising from certain occurrences "*unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner*". It further provided (Article 1.6) that the question upon whom lied the burden of proving whether or not the occurrence

resulted from the actual fault or privity of the owner would be determined by the *lex fori*. Indian Law, whilst adopting these Articles, i.e. the MS Act as it stood prior to the 2002 amendments, provided (Section 353 A(1)) that the owner of a sea-going vessel may limit his liability in respect of claims arising from named occurrences "*unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner*". It also provided (Section 352 A(2)) that the burden of proving that the occurrence did not result from his actual fault or privity shall be on the owner. The 1976 convention makes a departure from the earlier convention. It provides (Article 4) that a person liable shall not be entitled to limit his liability "*if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result*". In other words, the 1976 convention does two things. In the first place, it casts a very heavy onus (or indeed, an almost impossible one, as some English judgments describe it), namely, to show that not only did the loss result from the owners' personal act or privity, but that such act or omission was committed either (a) with intent to cause such loss or (b) recklessly and with knowledge that such loss would probably result. Secondly, it does not leave the incidence of the onus of proof on the l*ex fori*, but, going by the very nature of the proof required, it casts that onus squarely on the defendant or claimant asserting a claim for loss against the shipowner. Indian Law, on the other hand, i.e. the MS Act after the 2002 amendments, does not make any express provision for defeating the right to limit liability upon proof that the shipowner's personal act or omission was responsible for the loss or for addressing the question of incidence of such onus. The Plaintiff claims that since there is no reference to any proof that the loss resulted from the owner's personal act or omission in Indian Law now, the shipowner's right to limit is absolute or without reference to any such proof. The Defendants, on the other hand, contend that such proof is implicit in Indian Law. The Defendants submit that since the MS Act, as amended, refers (Section 352B) to the amount to which the owner may limit his liability in *accordance with the provisions of the contention*, it incorporates by reference all

provisions of the 1976 convention including, of course, Article 4 thereof, which refers to the proof of the owner's act or omission causing the loss. In other words, the Defendants' case is that by reason of this reference in Section 352B, Indian Law, i.e. the MS Act as amended, is on par with the 1976 convention and restricts the owner's right to limit liability if the proof referred to in Article 4 of the 1976 convention is offered against the owner. Issue No.4 requires me to decide who is right – whether the Plaintiff contending in favour of the shipowner's absolute right to limit or the Defendants rooting for such right being subject to the proof of the loss resulting from the shipowner's act or omission.

34. We have already noted that unlike the unamended Part XA of the MS Act which made a specific provision in Section 352A about the shipowner's entitlement to limit being subject to a proof that the occurrence did not result from his actual fault or privity, the amended part XA has no such specific provision. We only have to see if the words "in accordance with the provisions of the Convention" used in amended Section 352B incorporate Article 4 of the 1976 convention restricting the right to limit upon proof of a personal act or omission referred to therein, in amended part XA. Incorporation of an existing law into a later Act is a legislative device often adopted by the legislature. When an earlier Act or certain provision/s of the Act is/are incorporated by reference into a later Act, the provisions so incorporated become part or parcel of the later Act. This is broadly referred to as legislation by incorporation. Sometimes, instead of incorporating a particular previous statute or any provision of it, the later Act simply refers to the earlier statute on the subject generally. The distinction between a mere reference or citation of one statute into another and incorporation is well known. In the case of the latter, the earlier statute or provision becomes a part and parcel of the later Act as if it had been "bodily transposed into it" so that a repeal or amendment of the earlier statute or provision does not affect the later Act. The incorporated earlier Act remains frozen in the later Act to what it was when it was incorporated. In the former case, however, any modification,

repeal or re-enactment of the earlier statute (referred to or cited) will also have effect for the later statute (in which it is referred). This distinction, however, need not bother us in the present case, since the word "convention" in the expression "in accordance with the provisions of the convention" in Section 352B is defined in the MS Act as "the Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time". Thus, irrespective of whether it is termed as incorporation, or a mere reference or citation, amendments in the convention would also have effect insofar as Section 352B is concerned. What we simply need to consider in this case is whether, by means of reference to the 1976 Convention in Section 352B of the MS Act, Article 4 of the 1976 Convention is, as suggested by the Defendants, made part of Part XA of the MS Act. If it is so made, there is no denying that amendments made from time to time to that Article would also form part of the MS Act.

35. The arguments of the Defendants in support of incorporation of Article 4 of the 1976 Convention by reference in Section 352 B may be summed up as follows :

(i) On a plain reading of S. 352B, it is clear that Article 4, along with Article 6 of 1976 Convention, is incorporated in it. There is no warrant or justification to whittle down the plain language of S. 352 B to exclude Article 4.

(ii) Article 4, which deals with the well-known concept of 'conduct barring limitation' which has been a part of the admiralty law for a long time, is a substantive and crucial provision of the 1976 Convention. The Convention itself does not countenance (Article 18(1)) any exception or reservation by any State party to the substantive provisions of the Convention other than Article 2, paragraphs 1(d) and (e). In accordance with Article 18(1), our Parliament, whilst incorporating Article 2(1) in the domestic law, did exclude Articles 2(1)(d) and (e). It is inconceivable that the Parliament, whilst legislating the amendments of the MS Act expressly to implement and give effect to the 1976 Convention, would exclude Article 4.

(iii) The intention of the Parliament is manifest in this behalf from the Statement of Objects and Reasons (SOR) of Bill No. LXVI of 2002 (which was finally enacted into the Amendment Act 63 of 2002 which *inter alia* amended Part XA of the MS Act). The SOR expressly refers to barring of limitation of liability upon proof that the loss resulted from a personal act or omission of the shipowner.

(iv) In any event, the Court must interpret the MS Act in a manner so as to give full effect to the 1976 Convention. In interpreting domestic statutes the Court must avoid confrontation with the comity of nations and choose an interpretation which accords with an international convention to which the country is a party. Even if there were to be a lacuna or ambiguity in the law adopting the Convention, such lacuna must be filled or ambiguity cleared so as to make the domestic law accord with the Convention.

36. Let us first see, if the plain language of Section 352B suggests incorporation of Article 4. Section 352 B is worded as follows :

*"352B **Limitation of liability**.- The amount to which any person referred to in sub-section (1) of section 352A may limit his liability in accordance with the provision of the Convention and in cases where the provision of the Convention are not applicable, the limit shall be in accordance with the rules made in this behalf prescribe."*

37. At the outset it needs to be noted that Section 352B, though somewhat inelegantly worded and contains obvious grammatical errors, deals with the amount or limit of liability which a shipowner (or other person referred to in Section 352A) may ask for, whilst constituting a limitation fund. It does not deal with the entitlement to limit liability, but only the quantum of the limitation fund. It has nothing to do with claims which can be subjected to limitation or the exceptions to them, which are matters dealt with in Section 352A. It also does not deal with when and how a limitation fund is constituted. That is dealt with by Section 352C, whilst Section 352E deals with the scope of an application for constitution of a fund, the

provisions of which *inter alia* bear on the jurisdiction of the Court constituting a fund. (Article 4, on the other hand, deals with circumstances in which the person liable cannot limit his liability.) Secondly, it is plain that Section 352B deals with two situations, whilst determining the quantum of the fund : (a) Where the provisions of the 1976 Convention apply and (b) where they do not apply. The first part of the Section, namely, the words "The amount to which a person …..... may limit his liability in accordance with the provisions of the Convention" applies to cases covered by (a). The second part, quite obviously, applies to cases covered under (b). In cases covered by (a), the amount of the fund (i.e. the amount to which a person may limit his liability) shall be determined in accordance with the Convention, whilst in cases under (b) the amount shall be determined in accordance with the rules made in that behalf. The plain language of Section 352B, thus, does not suggest incorporation of Article 4. What it instead does is to incorporate the provisions of Chapter II of the Convention, which provide for the manner of working out limits of liability, into the MS Act.

38. Apart from the considerations noted above, there are several other internal aids offered by the provisions of Part XA themselves for this particular interpretation of Section 352B. Part XA, as noted above, evidently seeks to make 1976 Convention a part of our municipal law with such modifications as the Parliament deems fit. Chapter I of the 1976 Convention deals with "the right of limitation". It has four Articles : (1) Article 1 providing for "persons entitled to limit liability", (2) Article 2 dealing with "claims subject to limitation", (3) Article 3 dealing with "claims excepted from limitation" and (4) Article 4 which provides for "conduct barring limitation" or circumstances in which liability cannot be limited. Section 352A comprehensively deals with "the right of limitation". It is an amalgam of Articles 1, 2 and 3. Notably, Article 4 is excluded. In contrast to Article 2 of the Convention, which makes the right to limit liability *inter alia* subject to Article 4 (namely, conduct barring limitation), Section 352A does not make limitation subject to any conduct barring limitation. This may at once be

contrasted with the unamended Section 352A which expressly provided for the entitlement of shipowners to limit liability being subject to the exception, namely, where "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner." Section 352A as amended refers to Section 352B insofar as "limits of liability" are concerned. "Limits of Liability", which are dealt with in Chapter II of the Convention, notably Articles 6 to 9 thereof, are comprised in Section 352B of the MS Act. In cases to which the Convention applies, such limits shall be in accordance with the Convention. A further indication that Section 352B merely deals with limits, that is to say, the quantum, comes in Section 352D of the MS Act. Section 352D provides that, *"Where a vessel or other property is detained in connection with a claim which appears to the High Court to be founded on a liability to which a limit set by Section 352B applies."* A clear indication that what Section 352B does is to prescribe or set the limit. Lastly, it is important to note that if the expression *"may limit his liability in accordance with the provisions of the Convention"* in Section 352B were to be read as an omnibus clause incorporating *all* provisions of the Convention, all other Sections of Part XA would simply be regarded as redundant, for then every provision of the Convention could effectively get incorporated into the MS Act by that simple expedient. A plain reading of the provisions of Part XA would militate against such an interpretation. The Parliament has taken care to incorporate specific provisions of the Convention regarding particular aspects of limitation of liability by enacting them fully with modifications and used advisedly, as I have explained below, the device of incorporation by reference only in respect of 'limits of liability'.

39 Another important internal aid in the MS Act, is Part XB of that Act introduced by the same amending Act, namely, Amendment Act 63 of 2002. Part XB which was substituted by the Amendment Act 63 of 2002, was to enact the provisions of International Convention on oil pollution damage which India was party to, into the MS Act. That convention had provisions on 'conduct barring limitation' similar to the 1976 convention. In

contradistinction with Part XA, the Amending Act enacted the particular provisions of 'conduct barring limitation' forming part of the relevant corresponding Articles of the International Convention on Civil Liability for Oil Pollution Damage, 1992 into Part XB of the MS Act. Sections 352I (6) and 352J(2) of Part XB provides that no claim for compensation for pollution damage against persons referred to therein may be made "**unless the incident causing such damage occurred as a result of their personal act or omission committed or made with intent to cause such damage or recklessly and with knowledge that such damage would probably result".** The conspicuous absence of a similar provision in Part XA, amended by the same Amending Act, clearly supports the view that the corresponding provision of 'conduct barring limitation' contained in the 1976 convention is not enacted into our law.

40. The net result of the foregoing discussion is that the plain reading of the provisions of the MS Act (as amended) does not suggest incorporation of Article 4. It rather suggests exclusion of Article 4.

41. Let us now consider the argument that the Parliament could not have meant exclusion of Article 4. We must, at the outset, note that whilst interpreting a statute, the intention of the legislature must be gathered, so far as is practicable, from the words used in the statute itself. If the meaning of the statute is plain and clear, nothing further needs to be considered. "The first and primary rule of construction", as Gajendragadkar, J. said in **Kanailal Sur Vs Paramnidhi Sadhukhan**[4] "is that the intention of the legislature must be found in the words used by the legislature itself." If, on the other hand, the language used in the statute is ambiguous or capable of two meanings, then the Court is called upon to use various aids of interpretation and invoke other rules of construction. This is so even for a law enacted to give effect to an international convention or treaty such as Part XA of the MS Act. The primary guide for interpreting the provisions of amended Part XA of the MS Act is the language employed in it and not the provision of the 1976 Convention, to give effect to which the amendments were introduced in

4 1958 SCR 360

Part XA. The Supreme Court in **V/O Tractoroexpert, Moscow Vs M/s Tarapure and Co.**[5] had this to say :

"16. Now, as stated in Halsbury's Laws of England Vol. 36, p. 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law.

17. We may look at another well-recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention, which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had in municipal law (See Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd. 1933 AC 402.)"

47. Obviously, the 1976 Convention operates to restrict the rights of citizens and others and also modifies the existing municipal law of India. Making of a law, therefore, under the authority of Entry Nos. 10 and 14 of List 1 of the Seventh Schedule read with Article 253, by the Parliament is necessary to give effect to the Convention. The Convention would apply in India only to the extent and subject to such modifications as the Parliament may provide whilst giving effect

5 AIR 1971 Supreme Court 1

to the Convention by amending our municipal law, namely, the MS Act. Once this is clear, it must be held as a necessary corollary that the Parliament is not bound to follow the restricted mandate reserved in the Convention itself for the member states to derogate from its provisions. The Parliament may certainly overstep and disregard that mandate. Any such conscious overstepping or disregard will have its full play. There is no principle of statutory interpretation which requires us to then interpret the legislation of the Parliament so that it accords with the Convention.

48. The Defendants contend that absurd consequences would result from the absence of Article 4 in Indian law. They submit that in the absence of Article 4, a shipowner could go scotfree and get to limit his liability despite having caused loss through a personal act or omission committed either (a) with intent to cause such loss or (b) recklessly and with knowledge that such loss would probably result. This may, at the first blush, seem an attractive argument. A closer scrutiny, however, dispels such impression. If one compares the provisions of the two Conventions, i.e. the 1957 Convention (on which the original Part XA of the MS Act was based) and the 1976 Convention (on which the amended provisions of Part XA are based), three striking features emerge : Firstly, the quantum of limitation in 1957 Convention is raised manifold in the 1976 Convention. Secondly, persons seeking to limit liability are given what is described by Courts as a virtually unbreakable right to limit. Whereas, for defeating the right to limit, the inquiry under the 1957 Convention envisaged whether or not the occurrence (giving rise to the loss) resulted from the actual fault or privity of the owner, the 1976 requires a proof not only that the loss resulted from a personal act or omission of the person seeking to limit but that such act or omission was committed (a) with intent to cause such loss, or (b) recklessly *and* with knowledge that such loss would probably result. It is not hard to imagine that this would be a near impossible onus for a person opposing the owner's application to limit liability. Thirdly, the right to limit under the 1976 Convention is clearly a presumptive right so that the onus (and an extremely heavy one at that, as noted above) is cast upon those seeking to defeat that right, unlike in the case of the 1957 Convention where the onus was to be determined by *lex fori* (the Indian law casting a negative onus, i.e. onus to show that the loss was not caused by

> his fault or privity, indubitably on the person seeking to limit). These three features together form a distinct pattern and contain each other's rationale. Based on these, courts in various jurisdictions have given summary judgments and limitation decrees to shipowners and others." (emphasis supplied)

37. The aforesaid observations, in my considered view, lay down the correct position in law. In view of the elaborate consideration, it may be superfluous to supplement the aforesaid reasons. However, I deem it appropriate to test the sustainability of the course which Mr. Narichania wants the Court to adopt on the touchstone of well recognized principles of interpretation. In substance, the submission of Mr. Narichania is that though the Indian Parliament, in its wisdom, considered it appropriate not to provide for a clause of 'breaking limitation' or deprive the person liable of the right to limit the liability, in the event the occurrence took place on account of the fault or privity on the part of such person, yet the Court should consider that Article 4 incorporating 'Conduct Barring Limitation' is implicit in the provisions of Section 352A and be read as part thereof.

38. The cardinal principle of interpretation is to find the intention of the legislature from the words employed by the legislature. If the language is clear and unambiguous, the intent of the legislature reflected in the words of the legislation must be given effect to without adding or subtracting any words thereto. The endeavour of the Defendant No.1 is to impress upon the Court to supplant the words of the legislation. Such a course of action, as an interpretative tool, is simply impermissible.

39. A useful reference in this context, can be made to the judgment of the Supreme Court in the case of **Rohitash Kumar and Ors. V/s. Om Prakash Sharma and Ors.**[6] wherein after referring to the previous pronouncements, the Supreme Court expounded the principles of interpretation as under :

> "Addition and subtraction of words
>
> 27. The Court has to keep in mind the fact that, while interpreting the provisions of a statute, it can neither add, nor subtract even a single word. The legal maxim "*A verbis legis non est recedendum*" means, "from the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the stature, and it is not open to the court to *add and amend*, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabrics, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a statute, or read words into it which are not part of it, especially when a literal reading of the same produces an intelligible result. (Vide Nalinakhya Byasck V/s. Shyam Sunder Haldar[7], Sri Ram Ram Narain Medhi V/s. State of Bombay[8], M. Pentiah V Muddala Veeramallappa[9], Balasinor Nagrik Coop. Bank Ltd. V/s. Babubhai Shankerlal Pandya[10] and Dadi Jagannadham V/s. Jammulu Ramulu[11], SCC pp. 78-79, para 13).
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> 28. The statute is not to be construed in the light of certain notions that the

6 (2013) 11 SCC 451
7 AIR 1953 SC 148
8 AIR 1959 SC 459
9 AIR 1961 SC 1107
10 (1987) 1 SCC 606
11 (2001) 7 SCC 71

> legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the court to twist the clear language of the enactment in order to avoid any real or imaginary hardship which such literal interpretation may cause.
>
> 29. In view of the above it becomes crystal clear that under the garb of interpreting the provision, the Court does not have the power to add or substract even a single word, as it would not amount to interpretation, but legislation." (emphasis supplied)

40. In the said case, the Supreme Court also expounded the principle that hardship or inconvenience caused to a party, in a given case, cannot be used as basis to alter the meaning of the language employed by the legislature, if there is no ambiguity. The Supreme Court stated the principle as under :

> "Hardship of an individual
>
> 23. There may be a statutory provision, which causes great hardship or inconvenience to either the party concerned, or to an individual, but the Court has no choice but to enforce it in full rigour. It is a well settled principle of interpretation that hardship or inconvenience caused cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare perusal of the statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice. [Vide CIT (Ag) V Keshab Chandra Mandal[12] and D.D.Joshi V. Union of India[13]].
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> 24. In Bengal Immunity Co. Ltd. V. State of Bihar[14] (SCC p. 685, para

12 AIR 1950 SC 265
13 (1983) 2 SCC 235
14 AIR 1955 SC 661

43), it was observed by a Constitution Bench of this Court that, if there is any hardship, it is for the legislature to amend the law, and that the court cannot be called upon to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the court has to give effect to it, however, inequitable or unjust the result may be. The words, "*dura lex sed lex*" which mean "the law is hard but it is the law" may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.

25. In Mysore SEB v. Bangalore Woolen Cotton & Silk Mills Ltd. [15] (AIR p. 1139, para 27) a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. In Martin Burn Ltd. V. Corpn. Of Calcutta[16], this Court, while dealing with the same issue observed as under : (AIR p. 535, para 14)

"14. …. A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what is considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not."

26. Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein is unequivocal."

(emphasis supplied)

41. A profitable reference can also be made to a recent pronouncement of the Supreme Court in the case of **Saregama India Ltd. V/s. Next Radio Limited and Ors**[17], wherein the Supreme Court proscribed the course of supplementing the words

15 AIR 1963 SC 1128
16 AIR 1966 SC 529
17 (2022) 1 SCC 701

of the legislature where they are clear and unambiguous. The observations in paragraph 21 read as under :

> 21. It is a settled principle of law that when the words of a statute are clear and unambiguous, it is not permissible for the court to read wourds into the statute. A constitution Bench of this Court in *padma sundara Rao V. State of T.N.*[6]has observed : (SCC p. 542, paras 12 & 14)
>
> *"12. … the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said.*
>
> *14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary."* *(emphasis supplied)*

42. The aforesaid exposition of law is a complete answer to the submissions sought to be canvassed on behalf of Defendant No.1. Neither the Court can loose sight of the conscious omission of the provisions of 'breaking of limitation', while amending Part XA by the Amendment Act 63 of 2002. Nor the Court can import the provisions contained in Article 4 of the Convention of 1976 providing for 'Conduct barring limitation', as it would amount to supplanting the legislation. From this standpoint, I do not find any justifiable reason to take a different view of the matter than the one which this Court was persuaded to take in the case of **Murmansk**

Shipping Company (supra). I am, therefore, impelled to hold that the right to limit liability under Part XA of the Act of 1958 is absolute and without reference to the question of fault or privity on the part of the person who is liable and seeks to limit the liability.

43. The aforesaid finding bears upon the challenge to the action on the count that the same is not permissible at an interim stage. The edifice of the objection was sought to be built on the premise that Rule 1105 of the Bombay High Court (Original Side) Rules, 1980 provides that any Application for limitation of liability filed under Part XA of the Act, 1958 shall be by way of a Suit as contemplated in Chapter L-X of the Rules, 1980.

44. Mr. Narichania would urge that, of necessity, the question of limitation of liability must be decided post trial. Notice of Motion seeking limitation of liability, if allowed, would amount to grating a final relief at an interim stage without adjudication of the Suit.

45. Indeed Rule 1105 provides that an Application for limitation shall be by way of a Suit. Yet the aforesaid submission, though attractive at the first blush, does not pass judicial muster. As indicated above, once it is reckoned that the right to limit liability is absolute and *de hors* the question of fault or privity, on the part of the owner who approaches the Court to limit liability, the inquiry would be restricted to the question as to whether the application satisfies the conditions stipulated in Section

352A of the Act, 1958 and the quantum of amount to which the liability should be limited as envisaged by Section 352B of the Act, 1958. In a given case, where there is a dispute as to the very applicability of Section 352A, different considerations may come into play. However, where the Defendant/Claimant opposes the Application for limitation, be it at an interim stage, on the ground that the Plaintiff is not entitled to limit liability on account of fault or privity, in my view no adjudication which merits trial arises. In the case at hand, apart from contesting the absoluteness of the right to limit liability, the only issue which the Defendant No. 1 endeavored to dispute was the tonnage of M.V.Nordlake.

46. Mr. Narichania submitted that the claim of the Plaintiff that M.V.Nordlake's weight is 16202 MTS is not supported by a document of unimpeachable character. Taking the Court through the intrinsic evidence of the certificate, Mr. Narichania would urge that no implicit reliance can be placed on the said claim of tonnage. Correct tonnage of M.V.Nordlake is necessarily a matter for trail.

47. Mr. Rajyadhyaksha joined the issue by canvassing a submission that the tonnage of M.V.Nordlake is an admitted fact. There is an admission in the pleadings of the Defendant No. 1. The plaint in ADMS 23 of 2011 contains a clear and explicit admission that gross registered tonnage of M.V.Nordlake is 16202 tonnes. In view of the said admission, it is now not open to Defendant No. 1 to put the said issue in controversy.

48. The Plaintiff has annexed the International Tonnage Certificate (1969) issued by Republic of Cyprus, Ministry of Communications and Works Department of Merchant Shipping, which shows gross tonnage of M.V.Nordlake at 16202 tonnes. The certificate seems to have been issued on 01/06/2009, before the date of occurrence. I am not persuaded to delve into the infirmities, like it does not bear the signature and seal etc., which according to Mr. Narichania dent the veracity of the certificate. Apparently, the certificate seems to have been issued by the Competent Authority of the country of which flag M.V.Nordlake was flying.

49. Moreover, Mr. Rajyadhyaksha was justified in banking upon an admission on the part of the Defendant No. 1 in Plaint in ADMS 23 of 2011. Paragraph No. 2 thereof reads as under-

> The 1st Defendant vessel is a Motor Vessel flying the flag of Cyrus and registered at a port outside India. As far as the Plaintiff is aware, the 1st Defendant vessel is owned by the 2nd Defendant viz. MS M.V.Nordlake GMbh, a company incorporated under foreign laws having its place of business at the address mentioned in the cause title above. The gross registered tonnage of the 1st Defendant Vessel is 16,202 Tonnes. The 1st Defendant Vessel is a fully cellular container vessel.

50.. Evidently, all the particulars correspond with the averments of the Plaintiff in the instant suit. There is a clear, unequivocal and unqualified assertion that the gross tonnage is 16202 Tonnes. Since it is an admission in pleadings, it stands on a

higher footing than the evidentiary admission and can very well form the basis for a finding.

51. Reliance placed by Mr. Rajyadhyaksha on the judgment of Supreme Court in the case of **Nagindas Ramdas V/s. Dalpatram Iccharam**[18] is well founded. In the said case, it was observed that "admissions if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than the evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong".

52. The situation which thus obtains is that the the only factual dispute sought to be putforth on behalf of Defendant No.1 stands determined by its own admission in pleadings in the companion suit. Mr. Narichania made an attempt to impress upon the Court that the Defendant No.1 deserves an opportunity to explain away the said admission, if it is construed to be one. In view of the nature of the said admission, coupled with the certificate relied by the Plaintiff, in the instant suit, I am not inclined

18 (1974) 1 SCC 242

to accede to this submission.

53. Undoubtedly, Rule 1105 of the Rules, 1980 mandates that an application for limitation of liability shall be by way of a suit. The Applicant has instituted a suit. Once the suit is instituted, it is not imperative that the order to limit liability can only be after a full fledged trial. The Court is not precluded from passing a decree at an intermediate stage without the trial running its full course. An instance in point is, a decree based on admission. In the case at hand, as indicated above, the primary resistance to the application for limitation of liability is founded on an incorrect impression that the right to limit the liability is not absolute. The Defendant No.1 professes to urge the ground of fault. The second ground sought to be canvassed before the Court was the tonnage of the Vessel.

54. The first point stands concluded against the Defendant No.1 by the judgment in the case of **Murmansk Shipping Company (supra)** and for the reasons noted above. The second stands concluded by the own admission of the Defendant No.1. In the facts and circumstances of this case, in my view, there is no impediment in ordering limitation of liability at an interim stage and in this Notice of Motion.

55. Another challenge to the tenability of the action for limitation of liability was based on an order passed by this Court on 25 April, 2012. The Court noted that the Defendant, Plaintiff herein, did not press for relief in terms of prayer clause (a), which read thus :

> "(a) Upon the Defendants providing security or guarantee of Rupees 20,01,86,113 (Rupees Twenty Crores) as provided for under Section 352B of the Merchant Shipping Act, 1958, this Court be pleased to order release of the 1st defendant vessel from the order of arrest under Section 352D of the Merchant Shipping Act, 1958."

56. The aforesaid act on the part of the Plaintiff amounts to abandonment of the right to seek limitation of liability, urged Mr. Narichania. In contrast, Mr. Rajyadhyaksha submitted that the prayer clause (b) in the said Notice of Motion was, in the alternative and without prejudice to the aforesaid prayer clause (a), and, therefore, it cannot be urged that the Plaintiff herein had given up the right to seek limitation of liability. According to Mr. Rajyadhyaksha, a without prejudice action implies that the matter has not been decided on merits and fresh proceedings were not barred.

57. To bolster up this submission, reliance was sought to be placed on a judgment of the Supreme Court in the case of **Superintendent (Tech I) Central Excise, IDD Jabalpurand Ors. V/s. Pratap Rai**[19] wherein the import of the term 'without prejudice' was explained as under :

> "7. In short, therefore, the implication of the term "without prejudice" means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred……."

58. The context in which the aforesaid prayers were made in Notice of Motion

19 ()1978) 3 SCC 113

No.1525 of 2011 cannot be lost sight of. The prayer in the said application was primarily for the release of the Vessel. In that context, a reference was made to the right to get the vessel released upon furnishing security as envisaged by Section 352D of the Act, 1958. In the circumstances, especially when the said application was made in Suit No.23 of 2011, instituted by the Defendant No.1 herein, whilst M.V.Nordlake was under the order of arrest, the Plaintiff cannot be deprived of a statutory right to limit liability by instituting a suit, even if it is assumed that the non-pressing of prayer clause (a), extracted above, at that stage, was the conscious act. I am, therefore, persuaded to hold that there is no embargo either under the provisions of the Code or Rules 1980 to entertain the application for limitation of the liability.

58. Evidently, the claim of Defendant No.1 / Plaintiff in ADMS No.23 of 2011 is primarily covered by clause (a) of sub-Section (1) of Section 352A of the Act, of 1958. The Plaintiff has, thus, succeeded in establishing that it has a right to limit the liability. This propels me to the aspect of the quantum to which the liability is to be limited.

60. As noted above, para 1 of Article 6 of the Convention 1976, which provided for the method of computation of the limit of liability came to be substituted by Protocol 1996, which prescribes the enhanced limit of liability. Mr. Narichania would urge that Article 6, as amended by Protocol 1996, must govern the computation of the liability.

61. In opposition to this, Mr. Rajyadhyaksha stoutly submitted that it is the date

of occurrence which is of determinitive significance. On the date of occurrence, Protocol 1996, which amended Para 1 of Article 6 of Convention 1976, was not brought into force in India. Resultantly, the limit of liability must be in accordance with Article 6 of the Convention of 1976.

62. The parties are not at issue over the fact that the Protocol 1996 came into effect in India on 21 June, 2011. Mr. Narichania would urge that under Section 352B, (extracted above) the person liable may limit his liability in accordance with the provisions of the Convention. Therefore, the quantum of liability should be determined in accordance with the provisions of the Convention which obtained as of the date of the Application. Attention of the Court was invited to Clause (b) of Section 352 under which 'Convention' means Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time. Thus, Protocol 1996, according to Mr. Narichania would automatically stand incorporated into Part XA of the Act, 1958.

63. To bolster up the submission that it is the date of application and not the date of occurrence, which governs the quantum of limit of liability, Mr. Narichania placed reliance on the following observations in the case of **Murmansk Shipping Company (supra)**, :

> "All these references show that they naturally deal with the provisions of the Convention for the time being in force i.e. as they may exist, when sought to be applied in such amended form as the case may be."

55. According to Mr. Narichania, since the action for limitation of liability was filed in the month of January 2014, much after Protocol 1996 came into effect, the limit set out in Protocol 1996 should apply and not the limit originally prescribed under Convention 1976.

64. Mr. Rajyadhyaksha, on the other hand, laid emphasis on the provisions contained in Article 9(3) of the Protocol 1996, which provides that the Convention 1976, as amended by the Protocol 1996, shall apply only to claims arising out of the occurrences which took place after the entry into force for each State of the said Protocol. Therefore, for all the occurrences which took place before the Protocol 1996 came into force in India i.e. 21 June 2011, the provisions contained in original Article 6 of the Convention 1976 would apply.

65. Mr. Narichania would urge that the aforesaid submission runs counter to the foundational premise of the Plaintiff's case that all the provisions of the Convention 1976, especially Article 4, do not get embodied in the Indian law, unless specifically incorporated. By the same token, according to Mr. Narichania, Article 9(3) of the Protocol 1996 would not govern the situation.

66. It is trite, treaty or International Protocol or Convention does not become effective or operative on its own force, unless it is brought into force in the manner known to law either by domestic legislation or executive instructions certifying the acceptance.

67. Indisputedly, in the case at hand, Protocol 1996 came into force in India on 21 June 2011 i.e. after about six months of the date of occurrence. It would be contradiction in terms if the definition of 'Convention' under Section 352 is read to mean Convention 1976 as amended from time to time, irrespective of its acceptance and enforcement by India in the manner known to law. Such an interpretation would run counter to well settled principle of incorporation of treaty obligations in domestic law. **Murmansk Shipping Company (supra)** adverts to this position. The most critical difference in the case of **Murmansk** and this case is that in the case of **Murmansk**, the occurrence took place after the Protocol 1996 was given effect to in India.

68. In the case of **m.v. "Eleni (IMO No.9460277) V/s. Hanwha General Insurance Co. Ltd.**[20] another learned Single Judge of this Court adverted to these facets of incorporation of Convention 1976 and Protocol 1996 in the domestic law as under :

> "34. On the point as to MS. Act applicable or not, it has to be noted that India although has signed the 1976 Convention and the 1996 Protocol, the entire Convention has not been enacted as a part of domestic law. Part XA of the MS Act sets out provisions pertaining to limitation of liability. Only some of the provisions of the Convention as amended have been incorporated into the MS Act. This shows the Parliament did not want to include those provisions of the Convention which are not incorporated in Part XA of the MS Act. Notable among the exceptions are the follows :

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(a) The Article 4 of the Convention which refers to conduct barring limitation, or breaking limitation as is more commonly understood.

(b) The free standing right to limit liability set out in Article X of the Convention. Thus, limitation of liability can only be invoked in the event legal proceedings are instituted in respect of claims subject to limitation as provided in Section 352C (1).

(c) Article 13 of the Convention has not been incorporated into the domestic legislation in its entirety. Only the second part of Article 13(2) [the mandatory provisions] and Article 13(3) is incorporated with some changes.

35. The English Merchant Shipping Act 1995 sets out the 1976 Convention in Schedule 7 and the Convention has been adopted in its entirety as a part of the English Merchant Shipping Act. This is not the position under Indian law. Consequently, the English decisions and commertaries on Article 10 and Article 13 are not really relevant." (emphasis supplied)

69. The matter can be looked at from another perspective. The broad submission on behalf of Defendant No.1 that it is the date of the application which should determine the quantum to which the liability is to be limited, is fraught with infirmities. It would introduce an artificial element into determination. In contrast, the date of occurrence has an element of definitiveness. For this reason, Article 9(3) of Protocol 1996 provides that the Convention amended by the said Protocol 1996, shall apply to claims arising out of the occurrences which took place after the entry into force of the said Protocol for the concerned State. I am, therefore, inclined to hold that the limit of liability needs to be computed in accordance with the provisions of the Article 6 of the Convention 1976.

70. This takes me to the facets which bear upon the constitution of the limitation of fund. Under Section 352C, the fund shall represent the amount set out in the Convention 1976 together with interest thereon from the date of occurrence giving rise to the liability until the date of the constitution of the fund. The parties are ad-idem on the point that the rate of interest shall be the prime lending rate as of the date of occurrence. There is a consensus on the point that the prime lending rate as of the date of occurrence was 12.75% p.a.

71. On the aspect of conversion of SDR into Indian currency, during the course of the submissions, Mr. Rajyadhyaksha, on instructions, submitted that the Plaintiff is not averse to the conversion of SDR as calculated under Article 6 of the Convention 1976 into Indian rupees at the applicable rate of conversion. As regards the rate of exchange, in the case of **Murmansk Shipping Company (supra),** this Court directed that the rate of conversion of SDR into USD or INR shall be as applicable on the date of the constitution of the fund or giving of the security.

72. In my view, the date on which the fund is ordered to be constituted should be the appropriate date for reckoning the rate of exchange. I am fortified by the judgment of the Supreme Court in the case of **Forasol V/s. Oil & Natural Gas Commission**[21] In the said case, the Supreme Court was confronted with a question as to the date to be selected by the Court for converting Indian rupees in French Franc

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part of the award in respect of which no rate of exchange had been fixed either by the contract between the parties or the award. In paragraph 24 of the judgment, the Supreme Court considered five dates which compete for selection as under:

> "**24**. In an action to recover an amount payable in a foreign currency, five dates compete for selection by the Court as the proper date for fixing the rate of exchange at which the foreign currency amount has to be converted into the currency of the country in which the action has been commenced and decided.
>
> These dates are:
>
> (1) the date when the amount become due and payable;
>
> (2) the date of the commencement of the action;
>
> (3) the date of the decree;
>
> (4) the date when the court orders execution to issue; and
>
> (5) the date when the decretal amount is paid or realized."

73. After an elaborate analysis, the Supreme Court held in paragraph 53 that it would be fair to both parties for the Court to take the date of passing of the decree as date for conversion. Paragraph 53 reads as under:

> "**53**. This then leaves us with only there dates from which to make our selection, namely, the date when the amount became payable, the date of the filing of the suit and the date of the judgment, that is, the date of passing the decree. <u>It would be fairer to both the parties for the court to take the latest of these dates, namely, the date of passing the decree, that is, the date of the judgment</u>." (emphasis supplied)

74. For the foregoing reasons, the Notice of Motion deserves to be allowed.

75. Hence, the following order :

ORDER

(i) It is declared that the Plaintiff is entitled to limit its liability in respect of all losses and damages in respect of all property claims and consequential losses resulting from the collision between INS Vindhyagiri and M.V.Nordlake on 30 January 2011 under the provisions of the Merchant Shipping Act, 1958.

(ii) It is declared that the aggregate principal liability of the Plaintiff for all claims in respect of all losses and damages in respect of all property claims and consequential losses resulting from the aforesaid collision shall be in the sum of Special Drawing Rates (SDR) 27,89,234/-.

(iii) SDR shall be converted to Indian Rupees at the conversion rate as of the date of this order.

(iv) It is ordered that the principal sum of SDR 2789,234/- shall carry interest @ 12.75% p.a. from 30 January 2011 till the date of this order.

(v) It is ordered that the sum of Rs.33,98,90,000/- deposited by the Plaintiff by way of security in ADMS 23 of 2011 along with interest accrued thereon, till the date of this order, stands appropriated towards the constitution of limitation fund.

(vi) In the event the corpus formed by the amount deposited by the Plaintiff by way of security and interest accrued thereon, till date, falls short of the amount

required to constitute limitation fund, as ordered above, the Plaintiff shall deposit the short fall within a period of four weeks along with interest @ 12.75% p.a. from today till the date of deposit.

(vii) In the event the corpus so formed exceeds the limitation fund to be constituted, as ordered above, the balance amount be refunded to the Plaintiff.

(viii) Upon constitution of the limitation fund, as ordered above, the Defendants and all other claimants, who may have a claim arising from the aforesaid collision, stand restrained from exercising any right against any property or assets of the Plaintiff.

(ix) Upon constitution of the fund, the Plaintiff shall give individual notices to the parties whose suits for enforcement of claims against the Plaintiff or the Vessel M.V.Nordlake are pending in this Court or any other Court and also place advertisements in three local newspapers, two in English and one in local language, specifying a period of ninety days for filing of claims against the fund, so constituted

(x) The claims received in pursuance of such notices and advertisements shall be placed before the Court and directions shall be sought for distributing the amount constituting the fund amongst the claimants as per rules.

(xi) In the circumstances, there shall be no order as to costs.

(N.J.JAMADAR, J.)

At this stage, Mr. Narichaniya, the learned Senior Counsel for the defendant No. 1 seeks stay to the execution, operation and implementation of this order to facilitate the Defendant No.1 to prefer an Appeal.

Mr. Rajyadhyaksha, the learned Counsel for the plaintiff opposes the prayer of stay.

Having regard to the issues determined by this Court and their ramifications on the claim of the Defendant No.1, it may be expedient to stay this order.

Hence, the execution, operation and implementation of this order stands stayed for six weeks.

(N.J.JAMADAR, J.)