

Chapter 1

HISTORY AND ADMIRALTY JURISDICTION OF THE HIGH COURTS

For the first Admiralty jurisdiction came to be invested in the Recorder's Court at Bombay which was established by a Charter dated 20th February, 1798. The Recorders' Court, however, was substituted by the Supreme Court of Judicature at Bombay which was established by Letters Patent issued under the Charter of 1823. The Supreme Court of Judicature at Bombay was invested with the same jurisdiction on its Admiralty Side as the jurisdiction which was exercised by the High Court of Admiralty in England.

The Indian High Courts Act was passed by the British Parliament on the 6th August, 1861 and was titled as an act for establishing high courts of judicature in India. This legislation contained only 19 sections only.

Its main function was to abolish the supreme courts and the Sadar Adalats in the three Presidencies and to establish the high courts in their place. The records and document of the various courts became the records and documents of the High Court concerned. It gave power authority in Her Majesty to issue letters patent under the great seal of the United Kingdom, to erect and establish High courts of judicature at Calcutta, Madras and Bombay.

Each High court was to consist of a chief justice and as many puisne judges not exceeding fifteen as her majesty might think fit to appoint. Each high court was to have and exercise all such civil and criminal admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction and original and appellate.

The High Court was to have superintendence over all courts subject to its appellate jurisdiction. It got power, authority to call for return, to transfer any

suit or appeal from one court to another and to make and issue general rules for regulating the practice and proceedings of such courts.

The charter for the Calcutta High Court was issued on May 14, 1862 and was published in Calcutta on the 1st July 1862 establishing the high court from the next day. The charter for the High Courts of Bombay and Madras were issued on June 26, 1862 and these courts were inaugurated on the 14th and 15th August 1862.

The Supreme Court of Judicature at Bombay which was established in 1823 as aforesaid was superseded by the High Court of Judicature at Bombay established by the Letters Patent of 1862. Clause 31 of the Letters Patent dealt with admiralty and Vice admiralty jurisdiction. The Letters Patent of 1862 were once again superseded by Letters Patent of 1865 and Clause 32 of these Letters Patent provided:

"And we do further ordain that the High Court of Judicature at Bombay shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice Admiralty, and also such jurisdiction for the trial and adjudication of prize clauses and other maritime questions arising in India as may now be exercised by the said High Court."

In the year 1890, Colonial Courts of Admiralty Act, 1890 was enacted. Section 2(1), section 3 and section 7 of the said Act read thus:--

"2. Colonial courts of Admiralty.---(1) Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other Civil jurisdiction and such Court

in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority the expression "Court of law" for the purposes of this section includes such Governor."

3. Power of Colonial legislature as to Admiralty jurisdiction.---The legislature of a British possession may by any Colonial law:---

(a) declare any Court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction; and

(b) confer upon any inferior or subordinate Court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit;

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Court conferred upon a Colonial Court of Admiralty.

7. Rules of Court.--

(1) Rules of Court for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said Court in the exercise of its Ordinary Civil Jurisdiction respectively are made:

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been

approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act, and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied, or added to without the approval required by this section.

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full Court, or by any Judge or Judges thereof, and subject to any rules, where the Ordinary Civil Jurisdiction of the Court can in any case be exercised by a Single Judge, any jurisdiction conferred by this Act may in the like case be exercised by a Single Judge."

By Act No. 16 of 1891 i.e. Colonial Courts of Admiralty (India) Act, 1891, the High Court of Bombay along with the High Court of judicature at Fort William in Bengal and at Madras were declared to be Colonial Courts of Admiralty. The preamble of the said Act stated "Whereas it is provided by the Colonial Courts of Admiralty Act, 1890 that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty." The High Court of Bombay being the Court of record which had unlimited civil jurisdiction was also declared to be Colonial Court of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom.

The Colonial Court of Admiralty Act of 1890 equated the High Courts of Bombay, Calcutta and Madras to the High Courts of England with regard to admiralty jurisdiction. Admiralty jurisdiction in India was governed by Admiralty Courts Act 1861 applied by (English) Colonial Courts of Admiralty Act 1890 and adopted by Colonial Courts of Admiralty (India) Act 1891. This

state of affairs continued due to legislative inaction. Further Section 3 of the 1890 Act empowered the Colonial Legislature to enact law to declare any Court of unlimited jurisdiction to be a Colonial Court of Admiralty. As per this provision the Indian Legislature enacted the Colonial Courts of Admiralty established under the 1890 Act at Calcutta, Bombay and Madras. Their powers and jurisdiction were continued in the 1915 and 1935 Government of India Acts. The Admiralty jurisdiction of the High Courts continued even after the promulgation of the Constitution by virtue of Art.372 which provided for the continuance of existing laws. Though the Admiralty jurisdiction was extended to a considerable extent in England, it continued to be the same in India as per the 1861 Act, today the Admiralty jurisdiction in India is governed by the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

Common law legal systems of the United States and Britain are in contrast to civil law legal systems which prevail in continental Europe and trace back to old Roman codified law. Even in England, however, admiralty courts were/are separate from common law courts, and generally follow civil law principles. Most of the common law countries (including Pakistan, Singapore, India, and many other Commonwealth of Nations countries) follow English statute and case law. India still follows many Victorian-era British statutes such as the Admiralty Court Act 1861 [24 Vict c 10]. Whilst Pakistan now has its own statute, the Admiralty Jurisdiction of High Courts Ordinance, 1980 (Ordinance XLII of 1980), it also follows English case law. One reason for this is that the 1980 Ordinance is partly modelled on old English admiralty law, namely the Administration of Justice Act 1956. The current statute dealing with the Admiralty jurisdiction of the England and Wales High Court is the Supreme Court Act 1981, ss. 20-24, 37. The provisions in those sections are, in turn, based on the International Arrest Convention 1952. Other countries which do not follow the English statute and case laws, such as Panama, also have established well-known maritime courts which decide international cases on a regular basis. Admiralty courts assume jurisdiction by

virtue of the presence of the vessel in its territorial jurisdiction irrespective of whether the vessel is national or not and whether registered or not, and wherever the residence or domicile or their owners may be. A vessel is usually arrested by the court to retain jurisdiction. State-owned vessels are usually immune from arrest.

In *M. V. Elisabeth and another v. Harwan Investment & Trading Co. and another*, the question before the Apex Court was whether the High Court in India was invested with admiralty jurisdiction to order the arrest of the vessel in respect of a cause of action relating to outward cargo. While dealing with the said contention, the Apex Court referred to the history of the admiralty law and the various paragraphs, particularly 14, 17, 20, 25, 26, 30, 44, 48, 49, 56, 58, 59, 65, 66, 67, 68, 72, 75, 78, 80, 83, 85, 88, 89 and 101 throw immense light on the extent and power of admiralty jurisdiction possessed by the High Courts.

What is clearly laid down by the Apex Court in *M.V. Elisabeth* in respect of admiralty jurisdiction is that despite its peculiarity of original growth, it nevertheless is a part of the totality of jurisdiction vested in the High Court as the superior Court of record and is not a distinct and separate jurisdiction as was once the position in England before the unification of codes. The Colonial Courts of Admiralty Act, 1890 and Colonial Courts of Admiralty (India) Act, 1891 conferred admiralty jurisdiction on Indian High Courts by reason of their being courts of unlimited jurisdiction. The two Acts of 1890 and 1891 did not confer any separate or distinct jurisdiction but by passage of these acts equated the Indian High Courts to the position of English High Courts for the exercise of admiralty powers within their jurisdiction. The jurisdiction is not confined to the High Courts who were conferred power and jurisdiction under the Act of 1891 alone.

The State Reorganisation Act, 1956 was enacted to provide for the reorganisation of the States of India. The existing States were divided or

expanded and the new States came to be formed from the appointed day i.e. 1st November 1956. Under section 8 of the Act of 1956 a new Part A State to be known as the State of Bombay came to be formed comprising the territories stated therein which inter alia included the territories of the existing State of Kutch. Part V of the Act of 1956 deals with High Courts. Section 49 provides that the High Courts exercising jurisdiction immediately before the appointed day shall be deemed to be High Courts of New States and accordingly High Court of Judicature at Bombay became empowered to exercise its jurisdiction in respect of new State of Bombay by virtue of section 52 of the Act of 1956. Sections 49 and 52 which are relevant for the present purposes read thus:--

49. (1) The High Courts exercising immediately before the appointed day jurisdiction to relation to existing States of Bombay, Madhya Pradesh and Punjab shall, as from the appointed day, be deemed to be the High Courts for the new States of Bombay, Madhya Pradesh and Punjab respectively.

52. The High Court for a new State shall have, in respect of any part of the territories included in that new State, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Commissioner's Court for an existing State.

The State of Bombay which came to be formed in the year 1956 under the Act of 1956 was further reorganised under the Bombay Reorganisation Act, 1960 (Act of 1960). The appointed day of the said Act is 1st of May 1960. Under section 3 of the Act of 1960, State of Gujarat was formed comprising some of the territories of Bombay and the residuary State of Bombay was named the State of Maharashtra. The territories which form the State of Gujarat include Kutch district. Section 3 reads thus:

3. (1) As from the appointed day, there shall be formed a new State to be known as the State of Gujarat comprising the following territories of the State of Bombay, namely:---

(a) Banaskantha, Mehsana, Sabarkantha, Ahmedabad, Kaira, Panch-Mahals, Baroda, Broach, Surat, Dangs, Amreli, Surendra nagar, Rajkot, Jamnagar, Junagadh, Bhavnagar and Kutch districts; and

(b) the villages in Umbergaon taluka of Thana district, the villages in Nawapur and Nandurbar talukas of West Khandesh district and the villages in Akkalkuwa and Taloda talukas of West Khandesh district, respectively specified in Parts I, II and III of the First Schedule; and thereupon, the said territories shall cease to form part of the State of Bombay, and the residuary State of Bombay shall be known as the State of Maharashtra.

(2) The villages in Umbergaon taluka specified in Part I of the First Schedule shall form a separate taluka of the same name and be included in Surat district, and the remaining villages in the said taluka shall be included in, and form part of, Dahanu taluka of Thana district; and the villages specified in Parts II and III of the First Schedule shall respectively be included in, and form part of, Sangadh taluka of Surat district and Sagbara taluka of Broach district."

The separate High Court for the State of Gujarat was established under section 28 of the Act of 1960 which also provide that High Court of Bombay shall become the High Court for the State of Maharashtra. The High Court of Gujarat, under section 30 of the said Act was conferred jurisdiction in respect of the territories included in the State of Gujarat having the same powers and the jurisdiction which the High Court of Bombay had in respect of the said territories immediately before the appointed date.

The historical development of admiralty jurisdiction and procedure is of practical as well as theoretical interest, since opinions in admiralty cases

frequently refer to the historical background in reaching conclusions on the questions at issue. The special jurisdiction of admiralty has a maritime purpose, different from the common law. It is not exclusively rooted in the civil law system, although it includes substantial derivations there from. It has a strong international aspect, but may undergo independent changes in several countries. Certain universal features exist in all countries that have admiralty law and such international features are given serious consideration by admiralty courts. By the end of the seventeenth century the admiralty jurisdiction in England was restricted, it was not as extensive as compared to other European maritime countries due to a long standing controversy in which the common law courts with the aid of the Parliament had succeeded in limiting the jurisdiction of admiralty to the high seas and as such excluded admiralty jurisdiction from transactions arising on waters within the body of a country.

A suit against a foreign ship owned by a foreign company not having a place of residence or business in India is liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of the cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. Courts having admiralty jurisdiction is not limited to what was permitted by the Admiralty Court, 1861 and the Colonial Courts of Admiralty Act, 1890. Prior to the decision of *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd.*, Goa, the courts exercising Admiralty Jurisdiction statutorily in India were the three High Courts at Calcutta, Madras and Bombay. The High Courts of the other littoral states of India, viz. Gujarat, Karnataka, Kerala, Andhra Pradesh and Orissa, do not possess Admiralty jurisdiction, albeit there have been instances of the High Courts of Gujarat, Andhra Pradesh and Orissa having entertained Admiralty causes apparently on a perfunctory consideration of the various States Reorganisation Acts enacted by the Indian Parliament and presumably without the benefit of a full argument. However, after the decision of the Supreme Court in *m.v Elisabeth-v- Harwan*

Investment & Trading Pvt Ltd) interpreting under A.225 the High Courts in India is superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers.

The Admiralty jurisdiction of the High Courts at Calcutta, Madras and Bombay were the same as the Admiralty jurisdiction of the High Court in England at the time of the enactment by the British Parliament of the Colonial Courts of Admiralty Act 1890 and is, under subsection (2) of the said Act, and subject to the provisions thereof, over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and exercised in the like manner and to as full an extent as the High Court in England having the same regard as that court to international law and the comity of nations. The subsequent extension of the Admiralty jurisdiction of the High Court in England by statutes passed after that date by the British Parliament, the Administration of Justice Act 1920, re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, is not shared by the said three High Courts. After India attained independence, the Indian Parliament has so far not exercised its powers to make laws with respect to Admiralty and thus the three Indian High Courts were to apply Admiralty laws as it was applied by the English Court of Admiralty as defined in the Admiralty Court Act, 1861. The scope and nature of the Admiralty jurisdiction exercised by the High Courts in India have been examined and ascertained in *Kamlakar v. The Scindia Steam Navigation Co. Ltd; Rungta Sons Ltd. v. Owners and Master of Edison*; *National Co. Ltd. v. M. S. Asia Mariner*; *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa*

The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution, as stated in Art.

225, does not mean that a matter which is covered by the Admiralty Court Act, 1861 cannot be otherwise dealt with by the High Court, subject to its own Rules, in exercise of its manifold jurisdiction, which is unless barred, unlimited. To the extent not barred expressly or by necessary implication, the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Courts as superior courts. It is true that the Colonial statutes continue to remain in force by reason of Art. 372 of the Constitution of India, but that do not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

It was because of the unlimited civil jurisdiction that was already vested in these High Courts that they were declared to be Colonial Courts of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom. The High Courts were declared competent to regulate their procedure and practice in exercise of admiralty jurisdiction in accordance with the Rules made in that behalf. There is, therefore, neither reason nor logic in imposing a fetter on the jurisdiction of those High Courts by limiting it to the provisions of an imperial statute of 1861 and freezing any further growth of jurisdiction. This is even truer because the Admiralty Court Act, 1861 was in substance repealed in England a long time ago.

Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. What the Act of 1890 did was not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Courts

over places, persons, matters and things to that of the English High Court. There is no reason to think that the jurisdiction of the Indian High Courts have stood frozen and atrophied on the date of the Colonial Courts of Admiralty Act, 1890.

Yet there appears no escape from it, notwithstanding its unpleasant echo in ears. The shock is still greater when it transpired that this state of affairs was and is due to lack of legislative exercise.

Viewed in the background of enactment of 1890 it would be too artificial to confine the exercise of power by the High Courts in Admiralty to what was contained in 1861 Act. Even otherwise for deciding the jurisdiction exercised by the High Court in India founded on jurisdiction exercised by the High Court of England it is not necessary to be governed by the decisions given by English Courts. Law is pragmatic in nature to problems arising under an Act and not by abdication or surrender, 1890 Act is an unusual piece of legislation expansive in scope, wider in outlook, opening out the wings of jurisdiction rather than closing in. The authority and power exercised by the High Court in England, the width of which was not confined to the statute but went deep into custom, practice, necessity and even exigency.

Law of 1890 apart, can the Indian High Courts after 1950 be denied jurisdiction to arrest a foreign ship to satisfy the claim of an owner of a bill of lading for cargo taken outside the country ? Without entering into any comparative study regarding the jurisdiction of the High Court of England and the High Courts in our country the one basic difference that exists today is that the English Courts derive their creation, constitution and jurisdiction from Administration of Justice Act or Supreme Court Act but the High Courts in our country are established under the Constitution. Under Art. 225 enlarged preserves the jurisdiction, including inherent jurisdiction, which existed on the date the Constitution came into force and Art. 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but a

repository of power to reach its arms to do justice. A citizen carrying on a particular business which is a fundamental right cannot be rendered helpless on the premise that the jurisdiction of the High Courts stands frozen either by the statute of England or any custom or practice prevailing there or the High Court of England cannot exercise the jurisdiction.

The jurisdiction of the High Court of Admiralty in England used to be exercised in rem in such matters as from their very nature would give rise to a maritime lien - e.g. collision, salvage, bottomry. The jurisdiction of the High Court of Admiralty in England was, however, extended to cover matters in respect of which there was no maritime lien, i.e., necessities supplied to a foreign ship. In terms of Section 6 of the Admiralty Act, 1861, the High Court of Admiralty was empowered to assume jurisdiction over foreign ships in respect of claims to cargo carried into any port in England or Wales. By reason of Judicature Act of 1873, the jurisdiction of the High Court of Justice resulted in a fusion: of admiralty law, common law and equity. The limit of the jurisdiction of the Admiralty court in terms of Section 6 of the 1861 Act was discarded by the Administration of Justice Act, 1920 and the jurisdiction of the High Court thereby was extended to (a) any claim arising out of an agreement relating to the use or hire of a ship; (b) any claim relating to the carriage of goods in any ship; and (c) any claim in tort in respect of goods carried in any ship.

The admiralty jurisdiction of the High Court was further consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925 so as to include various matters such as any claim "for damage done by a ship", and claim 'arising out of an agreement relating to the use or hire of a ship'; or 'relating to the carriage of goods in a ship'; or "in tort in respect of goods carried in a ship".

The admiralty jurisdiction of the High Court was further widened by the Administration of Justice Act, 1956 so as to include not only the claims

specified under Section 1(i) of Part I but also any other jurisdiction which either was vested in the High Court of Admiralty immediately before the date of commencement of the Supreme Court of Judicature Act, 1873 (i.e. November 1, 1875) or is conferred by or under an Act which came into operation on or after that date on the High Court as being a court with admiralty jurisdiction and any other jurisdiction connected with ships vested in the High Court apart from this section which is for the time being assigned by rules of court to the Probate, Divorce and Admiralty Division.

Sub-section (4) of Section 1 removed the restriction based on the ownership of the ship. By reason of Clauses (d)(g) and (h) of the said Section the jurisdiction in regard to question or claims specified under Section 1(i) included any claim for loss of or damage to goods carried in a ship, any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

In the course of time the jurisdiction of the High Courts of Calcutta, Bombay, Madras, Gujarat, Hyderabad, Telangana, Karnataka, Kerala and Orissa have entertained Admiralty actions.

The Admiralty jurisdiction exercised by the High Courts in Indian Republic is now governed by the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, repealing the English Admiralty Courts Act, 1861 applied by (English) Colonial Courts of Admiralty Act, 1890 and adopted by Colonial Courts of Admiralty (India) Act, 1891 (Act XVI of 1891).

The 1861 Act was discarded by the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 on August 9, 2017.