

APPLICATION FOR ARREST

The procedure for commencing an action on a claim in the Admiralty jurisdiction of the High Courts is totally unlike that which prevailed in England in the year 1890, or which now prevails in England and in many other countries, and is an ordinary procedure. The Admiralty Rules of the High Courts having Admiralty Jurisdiction require that a suit shall be instituted by a plaint drawn up, subscribed and verified according to the provisions of the Civil Procedure Code 1908. The plaint must be signed and verified by the plaintiff, if he is an individual, in the case of a firm by any one of its partners and if it is a corporation by a director, the secretary or other principal officer.

In the case of a foreign plaintiff it may be necessary for it to grant a power of attorney to a person, usually, at the place where the action is to be instituted, authorising that person to institute the action with incidental powers to sign and verify all pleadings, petitions, applications etc. A foreign firm is not recognised in India and in this case all its partners will have to be nominated as the plaintiffs and must execute the power of attorney. A power of attorney in a Common-wealth country may be executed before and authenticated by a notary public. In the case of other countries it is advisable that the signature of the notary public be legalised by an Indian consular officer. Alternatively, the power of attorney may be executed before an Indian consular officer under the provisions of section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948.

The aforesaid requirement of signing and verification of the plaint has often been a major disadvantage to foreign maritime claimants by making a *quia timet* action for arrest before departure of the ship impossible.

In the title of the plaint in a suit in rem, after the name of the ship which is sued, its nationality is usually stated followed by the words "together with its engines, boats, gear, tackle, apparel furniture and papers and everything belonging to it whether on board or ashore", and a statement as to its location. Some draftsmen include in the title "The Owners and other parties interested in the first defendant ship" as the second defendants. The Plaint should be very clear as regards maritime claim/ lien. Affidavit in Support to the Plaint should be drawn up and filed along with the Plaint.

The Judge's order or an interim application for the arrest of the ship will direct that the ship be arrested at any hour of the day or night, including Sundays and holidays, and that it may not be arrested if payment of the sum stated in the order, comprising the amount of the claim in the suit and the ad valorem court fee and the sheriff's poundage, is paid on behalf of the ship or satisfactory security for the claim is furnished. The affidavit in support should state as to why the Judges Order should be allowed, this affidavit should also mention that notice to consul has been given, wherever applicable.

An undertaking from the Plaintiff securing cost and damages should be given to the court when an application for arrest of the Defendant vessel is made.

A Certificate from the Prothonotary or the registry of the High Court should be obtained prior to making an application for arrest of the vessel stating that a search of the caveat against arrest register has been taken and that no caveat are filed or has been filed, depending on the search result and if a caveat exist, a notice to the caveator has to be given.

Unless a caveat against the issue of a warrant for arrest has been entered, an application for arrest of a ship proceeded against may be applied for at any time after instituting the suit and, in a situation where the departure of the ship from the port is imminent, may be entertained even before the registry has scrutinised and admitted the plaint to the court's file.

The judge in chambers before whom the application is made may, in any case, allow the warrant of arrest to issue, though the affidavit leading to the warrant or the plaint may not contain all the required particulars and, in a suit for wages, may also waive the service of the notice to the consul of the state to which the ship belongs.

The application for arrest is normally moved *ex parte*. However, some judges in their anxiety to prevent a wrongful arrest are inclined to direct that the application be moved after notice to the master of the ship and there have been rare instances of a master, on getting wind of the proceedings, clandestinely weighing anchor and slipping out. The giving of such a notice is, however, often useful in that it may produce a speedy settlement of the claim out of court, of the furnishing of security or payment of money into court, along with an undertaking by an advocate appointed for the defendant ship to accept service and will thus save the plaintiff the poundage payable to the Sheriff.

Warrant of Arrest is served by the bailiff of the Sheriff/ Marshall and in a state where there is no Sheriff court allows direct service. The Sheriff shall serve the process of the Court and shall return the process to the Registry within four days from the service thereof.

In a suit *in rem* the Writ of Summons or the Warrant of arrest shall be served on the property against which the suit is brought; Where the property is ship or cargo on board, service shall be effected by affixing the original Writ of Summons or the Warrant of arrest for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure, and leaving a duplicate thereof affixed in its place, when removing the original Writ of Summons or the Warrant of arrest; Where the property is cargo which has been landed or transhipped, service shall be effected by placing the original Writ of Summons or the warrant of arrest for a short time on the cargo and leaving a duplicate thereof upon the cargo, when removing the original Writ

of Summons or the warrant of arrest; Where the cargo is in the custody of a person who will not permit access to it, service shall be made upon the custodian; Where the property is freight, service shall be effected by serving on the cargo in respect of which the freight is payable or on the ship in which the cargo was carried, in the manner hereinabove prescribed in this rule for service on a cargo or on a ship.

The effect of arrest is that it constitutes the ship or other property as security in the hands of the court for the claim in the action and this security cannot be defeated by the subsequent insolvency of the owner of the arrested property. The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment.

Once the warrant for arrest has been executed, the property is arrested and is in the custody of the Sheriff/ Marshal on behalf of the court. Interference by any party with the arrest process such as removing the property to be arrested with knowledge that an arrest has been issued is a contempt of court, this includes any interference with the custody of the property after arrest such as moving the property within the jurisdiction without authority, or removing it from the jurisdiction, as was held in *The "Jarlinn"* [1965] 1 W.L.R. 1098 and also in *The "Abodi Mendi"* [1939] 178.

A warrant of arrest on a ship covers everything belonging to it as part of its equipment, even items which are physically detached from it, but not items which do not belong to the ship owner such as the personal property of the master and crew or the luggage of a passenger.

A ship may be arrested but the cargo on board her is not under arrest, or cargo is arrested but the ship in which it is laden is not. If a ship is to be arrested while she is in the course of discharging her cargo, the Sheriff/ Marshal will not stop the discharge operations unless the arrest is in respect of

the cargo. When cargo is arrested the ship owners can request the Sheriff/Marshal to take the appropriate steps to enable the ship to be discharged.

When arrest of a ship in a port causes considerable and continuing disruption to the operation of the port and the port authority had to turn away other ships so harming its reputation and causing its financial loss in such circumstances the court has inherent jurisdiction to allow a party to intervene if the effect of an arrest is to cause that party serious hardship or difficulty or danger. The court may pass directions to remove the ship to a safe berth in such other place as he shall think appropriate.

A person who, maliciously and without reasonable and probable cause procures the arrest of a ship by Admiralty proceedings is liable to pay damages to the person aggrieved. A separate suit has to be filed for wrongful arrest proving malicious cause. Wrongful arrest may result in a condemnation of the claimant for damages only where the court is satisfied that the arrest was motivated by *mala fides* (bad faith) or *crassa negligentia* (gross negligence). Merely unjustified (i.e. erroneous) arrest would not normally entitle the defendant to claim damages, although he might then be able to recover costs.

The safeguarding of ownership/private property rights when ships are arrested in rem by the Admiralty Court are built into the rules of the High Court having admiralty jurisdiction for ship arrest. For example, a party wishing to prevent the arrest of property in an action in rem may, by filing a praecipe in the prescribed form, obtain the entry of a caveat against arrest in the caveat book kept in the Admiralty Registry/ Prothonotary & Senior Master of the High Court. Although the entry of the caveat does not prevent arrest of the res, the caveator, on a subsequent motion after arrest, may obtain the discharge of the arrest warrant and the condemnation of the arresting party in damages, if the latter is unable to show "good and sufficient reason" for having arrested.

Where a foreign ship registered in a port of a country having a consulate in jurisdiction of the High Court where arrest application is sought /is to be arrested in India in an action in rem for wages, prior notice of the arrest must be given to the consul concerned.

To institute an Admiralty action the plaintiff must file a praecipe for the search of the caveat registry to find out if any caveat against arrest of the vessel is filed and to obtain a Prothonotary Certificate to that effect and at the time of application for arrest of a vessel the Plaint should be lodged, the draft of the Judges Order, affidavit in support to Judges Order, undertaking as per rule of the High Court should be with the court file. A notice to consul may be required prior to making an application for arrest of a vessel as per rule of the High Court and an averment to that effect should be made in the affidavit.