



An Analysis of Maritime Lien and its Practice in India

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ABSTRACT

*A maritime lien is a cross word puzzle or riddled with exceptions, qualifications and conflicting juristic writings for many people. In fact, what may be accurate in India may not be same in the circumstances of a particular case or in different jurisdictions. Therefore, it is a matter of interpretation. "The Common law principle is that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid." Its origin is *lex mercatoria* that is mercantile law. Admiralty law has recognized maritime lien since period of long time and to understand it we need to refer to English law. Apart from its definition, there are different kinds of liens in practice in India such as particular lien, general lien, statutory lien, possessory lien and maritime lien. Importance of maritime lien and its enforcement procedure is explained in this article. It concludes with findings and current status of shipping and maritime laws in India.*

KEYWORDS : Lien, Particular Lien, General Lien, Statutory Lien, Possessory Lien, Maritime lien, enforcement procedure, admiralty courts and its jurisdictions.

Introduction of Maritime Lien

It is pertinent to note that the maritime liens constitute a distinctive and historic feature of modern admiralty law. Its root stretches far back to the maritime law of the ancient world. Transnational mercantile law (the *lex mercatoria*) governed the relations of merchants who traveled by sea with their goods in the middle Ages. Originally this customary law was orally used by merchants. Later this sea law was gradually committed to writing in the medieval sea codes, which were generally collections of judgments rendered by merchant judges, accompanied by some loosely-formulated principles thought to be useful in future cases of the same kind.

A maritime lien in admiralty law is a privileged claim upon maritime property, such as a ship, in respect of services rendered to, works done to, or the injuries caused by that property. In common law, a lien is the right of the creditor to retain the properties of his debtor until the debt is paid.

On examination it is found in juristic writings that there are two definitions of a maritime lien: (1) a right to a part of the property in the res; and (2) a privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by, that property.¹

Normally, Maritime Lien arises by the different marine transactions in the admiralty jurisdiction and creates maritime claims. It may also be created by the statute such as the ship mortgage Act.²

A lien in a simple language can be described as, 'A lien is a right in one man to retain that which is in his possession belonging to another until certain demand on him, by the person in possession is satisfied.'

Example - A delivers a rough diamond to B, a jeweler, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

Maritime liens became clearly defined in the civil law as maritime privileges (*privilègesmaritimes* in French) and this character was recognized in common law courts. Sir John Jervis in *The Bold Buccleugh*, accordingly defined "maritime lien" in the following terms in 1851.³

"Having its origin in the rule of the Civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story... explains that process to be a proceeding *in rem*... This claim or privilege travels with the thing, into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

It is pertinent to note that as a privilege, the maritime lien was rec-

ognized to be a right in the property of another. It may say in other words *jura in re aliena*. Gorell Barnes, J., in *The Ripon City*, declared⁴:

"... a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another - a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing."

Introduction of maritime lien is concluded by quoting the following judgment:

"Where a bailee has expended his labour and skill in the improvement of chattel delivered to him, he has a lien for his charge in that respect. Thus the artificer to whom the goods are delivered for the purpose of being worked up in to form, or the farrier by whose skill the animal is cured of a disease, or the horsebreaker by whose skill he is rendered manageable, have lien on the chattels in respect of their charges."⁵

Research Methodology

The present article is based upon literature review and secondary data. It is applied as source for the uses of facts or information already available, and analyzing these to make a critical evaluation of the material. Material was also collected from case studies to corroborate the meanings.

The research is primarily concerned with study of legislative measures and judicial trends with special reference to the concept of "An Analysis of Maritime Lien and its Practice in India". The said article has a vast information base with regard to national & international shipping and maritime laws. The methodology accordingly involved delving into all aspects of law the theoretical, practical, legislative and judicial. The aim of this Article is to bring awareness of lien in general and in maritime area.

In my research the following statutes have been referred-

The Indian Contract Act, 1872, the Constitution of India, 1949, the Carriers Act, 1865, Carrier of Goods by Sea Act, 1925, Bills of Lading Act, 1855, Administration of Justice Act, 1956; (English), Sale of Goods Act, 1893, Indian Merchant Shipping Act, 1958, Merchant Shipping Liability of Ship Owners and Others Act, 1958, York Antwerp Rules, 1950, Hague Rules, 1924, Adoption of Hague Rules, United States Goods Carrier Act, 1936, Hamburg Rules, UNO Convention of Goods by Sea Act, 1978, Hague - Visby Rules 1968, Multimodal Transportation of Goods Act, 1993, Dangerous Goods Note, 1981, Standard Shipping Note, Mercy Docks & Piers Act. The sources of this article also include Books and Journals published on the aforesaid Statutes.

The field research involved visit to Ports in India and abroad, and

discussions with various ship owners and charterers, solicitors, advocates. The author is familiar with the entire infrastructure of the Mumbai Port, JNPT, having been their Advocate over the last 10 years, and having attended and participated in numerous seminars, and international conferences. The area of practice involved all kinds of admiralty claims under the jurisdiction of the admiralty courts in India. The author has also taken instructions time to time from the eminent personalities, master of the vessels and discussed on the maritime lien's related issues while sailed on board on ships.

3 (a) Analytical Discussion on Maritime Lien

Lien is a legal interest in property, held by a creditor that secures payment of a debt or a liability. A lien may entitle the creditor to take the property or to have the property sold to raise money to pay a debt in default or a liability secured by the lien. It creates the right over the property of others. If the works and services provided by the port authorities to the vessel then the authorities have right to retain the vessel till the charges paid.

Types of Liens

The following are the different kinds of liens:

Particular Lien

Section 170 of the Indian contract Act 1872 is reproduced hereunder:

Particular Lien: "Where the Bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them".

On plain reading under this Section it is manifest that a particular lien attaches to the goods on which the bailee has performed the work. The said section empowers the bailee to retain the goods until all obligations incurred in respect of the goods are discharged. As such a particular lien cannot extend to debts that were not incurred in respect of the goods.

General Lien

General Lien of bankers, factors, wharfingers, attorneys and policy brokers, Section 171 runs as, "Bankers, factors, wharfingers, attorneys of High Court and policy brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

Under this section general lien is bestowed on Bankers, factors, wharfingers, attorneys, and policy brokers. Bankers, Factors, wharfingers, attorneys of a High Court and Policy brokers are by law in the absence of a contract to the contrary, entitled to retain, as a security for a general balance of account, any goods bailed to them. No other person besides this specified category of persons has a right to retain, as a security for such balance, goods bailed to them.

In other words the lien attaches to goods that come to them from time to time for the charges that are due to such persons for services rendered from time to time. In the case of lawyers the lien attaches to the documents, money and other instruments that come into their hands. However, by virtue of a decision of the Supreme Court in R.D. Saxena vs. Balaram Prasad Sharma⁹ an advocate/ attorney can no longer hold on to his client's case papers until his fees are paid.¹⁰

Having regards to wharfingers general lien, the law having imposed upon wharfingers the burden, as it were, of receiving and conveying goods when required, has also invested them with the power of retaining them as a general indemnity against existing debt. It is well settled that in case of lien physical possession of goods must be in the hands of bailee.

Statutory Lien

Statutory liens are those liens which are conferred by special statutes on authorities constituted under such statutes for recovery of their charges for services rendered.

The statutory lien is rises by operation of law, for example, the law

found in Sections 59 & 64 of the Major Port Trusts Act, 1963 permits to distraint or arrest of a vessel for recovery of rates or charges due to the port authorities.⁷

Having regards on lien on trust estate, it states that the trustees are allowed a lien upon the trust estate for their expenses but no such right pertains to an agent appointed by the trustees.⁸

In the decision of the Court of Appeal in the cases continues to represent an accurate statement of the English law on the nature of the statutory right to detain and sell a ship to realize its dues before the vessel is allowed to leave the docks. Once the ship left the jetty it will be beyond the control of authorities. It will be difficult to recover the dues from the vessel, if she is not in possession.

Possessory Lien

A possessory lien is a common law right founded on possession to detain property until a debt which has occurred from service to the property is discharged.⁹ For example, till the time goods are in possession of the master of the vessel, he has right of lien. Similarly, if goods are kept in the railways clock room against the receipt issued, the clerk has right to retain the goods till realization of its charges.

Maritime Lien

Legal Characteristics of a Maritime Lien are as follows - It may be as:

- a privileged claim or charge,
- upon maritime property,
- for service rendered to it or damage done by it,
- accruing from the moment of the events out of which the cause of action arises,
- traveling with the property secretly and unconditionally, and
- Enforced by an action in rem.

At this juncture it is pertinent to note that Article 4 of International Convention on Maritime Liens, 1993, which came into force on 5-9-2004, lists following maritime liens in order of priority.

- Wages of a crew and master.
- Claims for loss of life or personal injury.
- Claims for salvage reward.
- Claims for canal and pilotage dues.
- Claims in tort for physical loss or damage.

Under this convention, in case if the funds available from value of a ship are not enough to meet all her liabilities, wages of master, officer and crew and claims for loss of life and personal injury rank equally with each other, and share in proportion to each other's claim. Only then, entitlement of other maritime lien holders is considered. Restitution is in order of priorities as listed above, unless local laws accept other priorities.

Under Article 2 of the 1993 Convention, mortgages and or hypothecations, which are registered against a ship, are enforceable in accordance with law of the flag state, but maritime liens listed in article 4 take priority and follow the vessel notwithstanding any change of ownership or of registration or of flag.

It is pertinent to note that apart from lien, a maritime lien is a lien created by admiralty or other federal law in a vessel or other "maritime property."

3(b) Property on to which maritime lien attaches

Depending on the type of lien, a maritime lien may attach to a vessel, a vessel's electronics, furniture, boats, fishing gear, certain types of fishing rights and permits, machinery, spare parts, fuel and other equipment, cargo, fish and property that has been salvaged from navigable waters. Some types of lien apply to leased and borrowed equipment placed on board a vessel, and some do not. Maritime liens do not apply to shore-based property such as wharves, piers and floats. Once a lien attaches to an item on a vessel, it will usually remain attached even if the item is removed from the vessel. Therefore one has privilege or claim over the said property.

A Vessel may be subject to more than one lien at a time

For example, the owner of a vessel subject to a mortgage lien may (i) fail to pay for fuel and services rendered to his vessel, which would give rise to a "lien for necessities," (ii) may fail to pay crew, giving rise to a lien for seamen's wages, and (iii) may cause an accident with the vessel, giving rise to a lien for personal injury or property damage. All these liens and other maritime and non-maritime liens may co-exist.

If there is more than one maritime lien

Admiralty law confers priority on the order of payment of different types of lien from the proceeds of a foreclosure sale. Holders of higher priority liens are to be paid in full before holders of lower priority liens may collect anything. Within priority ranks, the last lien to attach to the vessel is usually to be paid first, though liens may be grouped by year, season or voyage. In general, common liens are paid off in the following descending order: liens for seaman's wages, and for maintenance, salvage liens; liens securing accident claims; liens for necessities rendered before a preferred ship mortgage lien attaches; liens for goods and services rendered after any preferred ship mortgage lien attaches¹⁰.

Having regard to the law of priorities, any party before instituting an admiralty suit for maritime claims, should be aware of its priorities. This is because in any such suit, others who have a maritime claim can participate without filing a separate suit and claim priority if they are entitled to, leaving very little or nothing for the plaintiff. Therefore, it is advisable; before institution of the suit for a maritime claim that one should know where he stands in priority list.

3(c) Enforcement of Maritime Lien – Practice and Procedure

The Ship owner generally has a right to retain the goods in his possession until the freight upon them and sometimes other charges also, have been paid. This right is called a lien. It does not give the Ship Owner any property in the goods nor does it enable him to sell them even though the retention of them may be attended with expense. It is simply a right to keep possession and to resist all claims to take them away and it avails against the true owner of the goods although he may not be the person liable for the freight or other charges.

Lien is confined to particular shipment. The right is confined to the freight payable on the particular shipment of goods. The Ship Owner cannot retain goods for other freights due from their owner upon other transactions unless the agreement to that effect has been made expressly or unless such an agreement must be inferred from the course of business between the parties, or from a general usage in the trade.

The Ship owner in enforcing his lien for freight may retain all the goods in respect of which that is payable, until the whole has been paid, or he may deliver by instalment and require the freight on each instalment to be paid concurrently with delivery.

A Maritime Lien has the claim or privilege upon Maritime res (thing) in respect of services done to it or injury caused by it. Such lien does not import or require possession of res, for its claim or privilege on the res to be carried into effect by legal process. A Maritime Lien travels with the res into whosoever's possession it may come, even though such res may have been purchased without notice of the lien or may have been seized by the Sheriff under the Writ of fieri facias¹¹ issued at the instance of execution creditors.

There can be no Maritime lien upon res which is not a ship or her apparel or cargo and if the lien is attached to Maritime res and those res is sold by the owner there is no lien against the proceeds of sale since the lien travels with the res.

In *Optima case*¹ it is laid down that the Maritime lien can be preserved if the sale takes place under the directions of the court.

Under English law a maritime lien can be enforced by an action in rem by the arrest of a ship in the following cases.

- Damage caused to a ship due to Collision on high seas.
- For the recovery of the amounts due on Bottomry & Respondentia

bonds. Wages of seamen and disbursements made by the masters.

- (c) Wages of seamen and disbursements made by the masters. Maritime liens would attach only to those disbursements which are in the form of necessities supplied to a ship for example supplies of coal to a ship, oil, etc.
- Necessaries supplied to ship.
- Salvage.

Only the liens aforementioned can be enforced by an action in rem, i.e., by the arrest of ship, all other Maritime Liens can be enforced by the action in personam i.e. in proceedings against the owners.¹²

On examination, as to action which can be enforced in rem is referred in Sections 4 to 8 of the Admiralty Courts Act, 1861. In this connection, also refer to the Judgment of His Lordship Mr. Justice S. M. Shah in *Kamlakar Mahadeo Bagat vs. Scindia Steam Navigation Co. Ltd*¹³, in that case it was held that the High Court of Bombay on its Admiralty side has exclusive jurisdiction to entertain a suit in respect of damage caused by the ship to property on High Seas. The Claim for such damage can be preferred in High Court of Admiralty at Bombay by proceeding in rem i.e., by arresting a ship.¹⁴ In that case the Plaintiffs shipped certain goods from Bombay to the consignees in Colombo. The Indian agents of the owners of the ship issued the Bill of Lading at Bombay for the goods on board the ship. The goods were delivered by the ship owner at Colombo without the production by the consignees of the Bill of Lading and without any authority from the Plaintiffs or the Plaintiffs' Bank at Colombo. The Plaintiffs filed a suit in the Bombay High Court on its admiralty side against the ship for its arrest. It was held by virtue of section 6 of the Admiralty Courts Act, 1861 that the High Court of Bombay had jurisdiction to entertain a suit. In passing here it may be pointed out that the High Court at Bombay on its Admiralty side has jurisdiction to entertain and try both actions in rem as well as in personam.

Clause 32 of the Letters Patent of the Bombay High Court confers Admiralty Jurisdiction on the Bombay High Court as far as the State of Maharashtra is concerned.

Lien only gives a right to detain the goods and not to sell the goods except in certain cases i.e. trade usage or when statutory power is given to inn keepers, carriers, bailees for reward and to ship owners.¹⁵ There are no statutory provisions either in the Merchant Shipping Act or relevant Indian Statute in India for the Ship Owners to sell the goods; therefore it would be necessary to take permission of the Court to sell the goods in order to preserve the lien.

It states that for maritime lien the Admiralty Court Act, 1861, read with the International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 1926 read with Brussels Arrest (Of Seagoing Ships) Convention 1952 and Brussels Maritime Liens Convention 1967 clearly indicate that a claim arising out of an agreement relating to the use and/or hire of the ship although a maritime claim would not be liable to be classified as maritime lien.¹⁶

Findings under admiralty laws

When we talk in Indian perspective, it is pertinent to note that India proposes to replace its existing Admiralty Law, which is administered concurrently only by the three Chartered High Courts of Bombay, Calcutta and Madras as embodied in the following Statutes:

- The Admiralty Courts Act, 1840,
- The Admiralty Offences (Colonial) Act, 1849,
- The Admiralty Jurisdiction (India) Act, 1860,
- The Admiralty Court Act, 1861,
- The Colonial Courts of Admiralty Act, 1890,
- The Colonial Courts of Admiralty (India) Act, 1891.

The Admiralty Bill 2005 was passed by the parliament and the same would never become an Act and it is lapsed by efflux of time. Since India is in need of new admiralty laws instead of old and obsolete laws. It is required to repeal the above Acts as also the provisions of Letters Patent, 1865 of the three High Courts of Bombay, Calcutta and

Madras (Clauses in so far as they apply to Civil Admiralty Jurisdiction), by introduction of an uniform and single Statute. Albeit, the other Acts, connected with Maritime Law will continue to be in force as mentioned hereafter.

3(d) Currently practice of Maritime Laws in India

It has to be noted that India has in place other laws, which directly or indirectly affect Maritime Contracts and Maritime Transport business. Some of the Major Laws which are in place are the following:-

The Indian Carriage of Goods by Sea Act, 1925; based on Hague Rules (1924), (which has been amended to incorporate the amendments of the rules necessitated by reason of the Protocol signed at Brussels on 23rd February 1968 and 21st December 1979.

The Multimodal Transportation of Goods Act, 1993 (which covers the provisions of the United Nations Convention on Multimodal Transport of Goods, 1980);

- The Bills of Lading Act, 1856;
- The Merchant Shipping Act, 1958;
- The Indian Ports Act, 1908;
- Major Port Trusts Act, 1963;
- The Carriers Act 1865;
- The Indian Contract Act, 1872;
- Sale of Goods Act, 1930; and many other statutes.

Besides the above statutory provisions, India has ratified a number of International Conventions such as Ships Limitation Convention of 1957 and 1976, the Warsaw Convention of 1929 and 1955 and as aforesaid framed the Indian Carriage of Goods by Sea Act.

However, in spite of these laws, to resolve maritime disputes which arise in the various claims, the Indian Courts have necessarily to rely on laws as developed internationally, particularly the Judgments of English Courts for deciding various disputes before it, in as much as, a substantial part of the Maritime Law requires to be interpreted by reference to these foreign judgments.

If the shipping and maritime law is passed in the Indian Parliament then the Indian Admiralty Law and Practice will be more or less on par, with the Admiralty Law practiced internationally by all major States in the world.

4. Conclusion

The purpose of this article is to bring awareness on shipping and maritime law relating to maritime lien to advocates, solicitors and law practitioners, etc. The readers are aware that India passed the Bill 2005 on Admiralty Law and the same is lapsed. Therefore, it is time for those who are concerned with shipping industry must expose their views and push efforts to pass the bill on shipping and maritime law so that our nation will have our own shipping law instead of law under 'letters patent'.

Having regards to the following enactments are hereby required to repeal for their long existence in Indian legal system-

- the Admiralty Offences (Colonial) Act, 1849;
- the Admiralty Jurisdiction (India) Act, 1860
- the Admiralty Court Act, 1861;
- the Colonial Courts of Admiralty Act, 1890;
- the Colonial Courts of Admiralty (India) Act, 1891;

the provision of letters Patent, 1865 in so far as they apply to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts.

Instead of all these obsolete Acts, India needs to amend shipping and maritime law to bring uniformity on admiralty issues.

There are difficulties arising when suit for maritime claim filed by the person who has last priority and fund is not enough to meet till last. In such circumstances, the first and second person in priority will get their shares as per law of priority and the person who sued will get nothing. Therefore law is required to bring uniformity so that all aggrieved persons will get their shares in proportion specially who initiate legal proceeding.

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