IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY AND VICE ADMIRALTY JURISDICTION

INTERIM APPLICATION(L) NO. 112 OF 2021

IN

COMMERCIAL ADMIRALTY SUIT(L) NO. 4 OF 2020

Angre Port Private Ltd ..Applicant/Plaintiff

Vs.

TAG 15 (IMO. 9705550) & Anr. ..Defendants

Mr.Prathamesh Kamat a/w Pooja Tidke, Krushi Barfiwala, Ryan Menedes i/b Parinam Law Associates, for the Applicant/Plaintiff.

Mr. Amir Arsiwala, Mr. Dhrupad Vaghani, Ms. Naveli Reshamwalla, Mr. Ajiz M. K., Farzeen Pardiwalla, Nidhi Shah i/b Economic Law Practices, for Defendant No.2.

CORAM :- B. P. COLABAWALLA, J.

Reserved on :- December 20, 2021.
Pronounced on :- January 03, 2022.

JUDGMENT:-

1. The above Interim Application is filed under the provisions of Order XIII-A read with Order XII Rule 6 of the Code of Civil Procedure, 1908 (for short the **"CPC"**) seeking a summary judgment against the 1st

Defendant Vessel in the sum of Rs.9,37,19,098/- together with interest @ 18% p.a. from 18th December, 2020 till payment and/or realization plus poundage. The basic premise on which the aforesaid relief is sought is that the Defendants have not only admitted/confirmed the dues of the Applicant/Plaintiff but in any event the claim of the Applicant/Plaintiff is really undisputed, and the Defendants have no real prospect of successfully defending the claim of the Applicant/Plaintiff. It is in these circumstances that a summary judgment is sought against the 1st Defendant Vessel. For the sake of convenience, I shall refer to the parties as they are arrayed in the suit.

2. The above suit is filed invoking the Admiralty Jurisdiction of this Court *inter alia* seeking a judgment and decree against the 1st Defendant Vessel – Tag-15 (IMO. 9705550) in the sum of Rs.9,37,19,098/- as per the particulars of claim together with further interest @ 18% p.a. from 18th December, 2020 till payment and / or realization, plus poundage. For the sake of convenience, Mr. Kamat, the learned counsel appearing on behalf of the Plaintiff, has tendered a chart indicating the breakup of the Plaintiff's claim. The said breakup is as under:

	Heads of Claim	**1st period** 13/2/2019 to 15/1/2020 (Till the filing of Suit)	**2nd Period** 16/1/2020 to 29/10/2020 (Till sale of Vessel)	**3rd Period** 30/10/2020 to 15/12/2020	**Total (in Rs.)**
I.	Port charges	Rs.10,01,000/-	Rs.7,28,728/-		**17,29,728/-**
II.	Berth Hire Charges	Rs.1,18,65,000/-	Rs.1,05,98,700/-		**2,24,63,700/-**
III.	Penal Berth Hire Charges	Rs.1,18,65,000/-	Rs.1,05,98,700/-		**2,24,63,700/-**
IV.	Salvage	Rs.1,85,00,000/-			**1,85,00,000/-**
V.	Mooring Crew		Rs.37,800/-		**37,800/-**
VI.	GST	Rs.77,81,580/-	Rs.39,53,508/-		**1,17,35,088/-**
VII.	Interest	Rs.43,63,125/-	Rs.88,91,660/-	Rs.18,94,296/-	**1,51,49,082/-**
VIII.	Legal Costs				**16,40,000/-**
				GRAND TOTAL:	**9,37,19,098/-**

3. The suit as originally filed was only against the 1st Defendant Vessel and in fact the decree/judgment that is sought in the above Interim Application is also against the 1st Defendant Vessel only. Since the owners of the 1st Defendant Vessel (Tag Offshore Ltd.) went into liquidation, one Mr. Sudip Bhattacharya was appointed as the Liquidator of Tag Offshore Ltd. He was thereafter brought on record as Defendant No.2, pursuant to an order passed by this Court on 29th January, 2020.

4. The brief facts giving rise to the present controversy are this.

On 13th February 2019, the 1st Defendant Vessel entered the Plaintiff's Port and started occupying berth space. The Plaintiff supplied the necessary berthing charges (as per its Tariff Booklet) to the said Vessel and thereafter raised invoices from time to time.

5. On 4th March 2019, one EXIM Bank Ltd, a secured creditor of Tag Offshore Ltd., (the owner of the 1st Defendant Vessel), invoked the Admiralty jurisdiction of this Court by filing Commercial Admiralty Suit (L) No. 15 of 2019 against the 1st Defendant Vessel and obtained an order of arrest. The said Vessel continued under arrest and day by day was incurring berthing charges and port dues (in addition to other dues and charges) as the same was occupying the berth at the Plaintiff's port.

6. On 24th April 2019, insolvency proceedings were initiated against Tag Offshore Ltd. (owners of the 1st Defendant Vessel) by one R.H. Petroleum Ltd. under section 9 of the Insolvency and Bankruptcy Code, 2016 (for short the **"IBC, 2016"**). Pursuant thereto, one Mr. Pramod Mulgund was appointed as the Interim Resolution Professional (**"IRP"**) for Tag Offshore Ltd.

7. Since, neither EXIM Bank nor the IRP took any measures to

provide supplies, stores, bunker etc. to the said Vessel/ its crew, severe unrest broke out amongst the crew on board the 1st Defendant Vessel. Ultimately, on 7th May, 2019, the crew abandoned the said Vessel.

8. Thereafter, on 30th May 2019, the Committee of Creditors (for short the **"CoC"**) of Tag Offshore Ltd. resolved to appoint Mr. Sudip Bhattacharya as the Resolution Professional (**"RP"**). The appointment of Mr. Sudip Bhattacharya (as the **RP** of Tag Offshore Ltd.) was confirmed by the NCLT vide its order dated 28th June 2019.

9. In the interregnum, on 16th June 2019, on account of strong winds and currents brought on by the monsoon, the 1st Defendant Vessel began drifting away from the Plaintiff's berth. The said Vessel broke her mooring rope, floated away and posed a serious threat to the port, its navigational channels, and the nearby village. In short, it was causing a serious navigational hazard and a danger to the life and property of the villagers nearby as well as their fishing boats. In view of this event, the Plaintiff immediately engaged and deployed a nearby tug, called TUG SHAMBHAVI for salvaging and bringing back the 1st Defendant Vessel to safe harbour. It is the case of the Plaintiff that Mr. Sudip Bhattacharya (who was the **RP** of Tag Offshore Ltd at the time) did not provide any

assistance to ensure the safety of the 1st Defendant Vessel or for bringing it back to safe harbour. The Plaintiff even raised an invoice for the same, which according to the Plaintiff, has yet not been paid.

10. Be that as it may, on 15th July 2019, the NCLT ordered the **CoC** to secure the assets of Tag Offshore Ltd and take possession of the 1st Defendant Vessel, if necessary, and proceed in terms of Sections 51 and 52 of the Merchant Shipping Act, 1958. It also directed the **CoC** to explore the liquidation option and *inter alia* move the 1st Defendant Vessel to a safer place without creating problems for the Port Trust.

11. Finally, on 26th September 2019, the NCLT ordered liquidation of Tag Offshore Ltd. and confirmed Mr. Sudip Bhattacharya as its Liquidator. It is the case of the Plaintiff that since its invoices remained unpaid, it finally approached this Court by filing the above suit on 20th January, 2020 against the 1st Defendant Vessel. On the very same date, this Court also ordered arrest of the said Vessel.

12. On 28th January 2020, Mr. Sudip Bhattacharya filed Interim Application No. 1 of 2020, *inter alia*, seeking modifications/ recall of the order of arrest dated 20th January 2020. Pertinently, Mr. Sudip Bhattacharya, in the said Application, confirmed that if the 1st Defendant

Vessel is not sold, its value will diminish, and the said Vessel will incur charges such as port charges and manning costs aggregating to USD 3,000/- per day which would further get added to the liquidation costs. This Court, by its order dated 29th January 2020, granted limited relief to Mr. Sudip Bhattacharya by allowing him to sell the 1st Defendant Vessel subject to certain terms and conditions. By the said order, Mr. Sudip Bhattacharya was also permitted to intervene in the above suit and the Plaintiff was directed to add Mr. Sudip Bhattacharya as a party Defendant in these proceedings. This is how Mr. Sudip Bhattacharya is joined as Defendant No.2 in the above suit. I must mention that despite this Court allowing Defendant No.2 to sell the 1st Defendant Vessel, he was unable to do so.

13. In these circumstances, on 26th February 2020, the Plaintiff filed Interim Application No. 2 of 2020, *inter alia* seeking sale of the 1st Defendant Vessel. The ground on which sale was sought was that there was a severe risk of deterioration of the said Vessel which had been lying unmanned for a long period of time and the Plaintiff's maritime lien was likely to be prejudiced. On 9th March 2020, an order came to be passed in the said Application wherein the contentions of the Plaintiff that it had been incurring expenses since February 2019 were noted. This Court also

recorded the undertaking and statements of Defendant No.2, who on instructions, stated that all costs / expenses incurred by the Plaintiff from 24th April 2019 till the 1st Defendant Vessel leaves the berth, including Berthing and Port charges as well as Salvage charges, shall be treated by the Liquidator as liquidation costs or IRP costs as contemplated under Section 53 (1) (a) of the IBC, 2016. It was further stated by Defendant No.2 that as far as the Berth and Port charges are concerned, there was no dispute. As far as the Salvage charges were concerned, Defendant No.2 stated that the same would be treated as liquidation costs or IRP costs, subject to scrutiny regarding its quantum by Defendant No.2. The aforesaid statements were accepted by this Court as undertakings given by Defendant No.2.

14. Thereafter, on 30th April 2020, this Court directed Defendant No.2 to appoint a crew manning agency in relation to the 1st Defendant Vessel. On and from 29th May 2020, cyclone "Nisarga" began developing off the Arabian Sea and was moving towards the western coast of India where the Plaintiff's Port is located. The Plaintiff duly alerted and called upon Defendant No.2 to immediately make arrangements *inter alia* for crew and material to secure the 1st Defendant Vessel. During the discussions between the Plaintiff and Defendant No.2, Defendant No.2

indicated that he was not able to send the crew and/or ropes to secure the 1st Defendant Vessel. The Plaintiff, after discussing the terms of the requirement and costs, engaged Shore Watch Personnel/ Mooring Crew for attending rope and safety for the said Vessel for a total of seven days.

15. Finally, on 9th July 2020, this Court directed sale of the 1st Defendant Vessel. Pursuant thereto, on 22nd September 2020, this Court opened the bids received from the prospective buyers in presence of Defendant No.2 and the other stakeholders of the said Vessel/ **CoC** of Tag Offshore Ltd. After hearing the advocates for the Defendants and EXIM Bank, this Court confirmed the sale of the 1st Defendant Vessel in favour of J. T. Marine Services Pvt Ltd, for a consideration of Rs.10,75,00,000/-. Defendant No.2 as well as EXIM Bank, who appeared through counsel, on instructions, stated that they had no objection, if the 1st Defendant Vessel was sold to the highest bidder. Accordingly, this Court directed the successful bidder to deposit the sale consideration of the said Vessel in this Court within a period of 4 weeks. Once the sale consideration was deposited by the successful bidder, the Prothonotary and Senior Master also issued a Bill of Sale dated 29th October 2020, confirming the sale of the said Vessel in favour of the said M/s. J. T. Marine Services Pvt. Ltd. Pursuant thereto, M/s. J. T. Marine Services

Pvt. Ltd., has also taken possession of the 1st Defendant Vessel.

16. In this factual backdrop, Mr. Kamat, the learned counsel appearing on behalf of the Plaintiff, submitted that the Plaintiff has been raising its invoices on the 1st Defendant Vessel from time to time. Despite raising these invoices and though no dispute has been raised in relation thereto, no payment has been made by the Defendants. Mr. Kamat took me through Exhibit "E" of the Plaint which are the invoices for the period starting from 13th February 2019 (the date when the 1st Defendant Vessel first arrived at Plaintiff's port) to 15th January 2020 (the date of filing of the above suit). For the period from 16th January, 2020 to 31st August, 2020, the invoice is annexed at Exhibit "VV" and for the period from 1st September, 2020 to 30th September, 2020 is annexed at Exhibit "XX" of the Plaint. Finally, the invoice for the period from 1st October, 2020 till 29th October, 2020 (the date when the 1st Defendant Vessel was sold), is annexed at Exhibit "ZZ" to the Plaint. Mr. Kamat submitted that if one goes through the invoices annexed to the Plaint, they include Berth Hire charges, Penal Berth Hire charges, Port charges and Salvage charges. He submitted that a small amount of Rs. 37,800/- is also included in these invoices towards the payment made to the Mooring Crew to secure the 1st defendant Vessel during the cyclone "Nisarga". Mr. Kamat submitted that none of these invoices have been disputed either by the owners of the

1st Defendant Vessel (i.e. Tag Offshore Ltd) or Defendant No.2 (the Liquidator appointed for Tag Offshore Ltd). Mr. Kamat submitted that in fact, Defendant No.2 has admitted that Berth and Port charges as well as the Salvage charges are payable to the Plaintiff as recorded by this Court in its order dated 9th March, 2020 (Exhibit "UU" to the Plaint). Mr. Kamat submitted that in the said order, a categorical statement of Defendant No.2 is recorded that Berth and Port charges of the Plaintiff are not disputed by Defendant No.2. Even as far as the Salvage charges are concerned, Mr. Kamat submitted that the fact that salvage operations were carried out is not disputed and a statement was made by the Liquidator (Defendant No.2) that the same would be treated as liquidation costs or IRP costs subject to scrutiny regarding its quantum. Mr Kamat submitted that Salvage operations have been duly carried out as reflected in Exhibit-Y to the Plaint and the amount claimed thereunder is as per the invoice issued by the Salvor (Vedant Ship Management) and which is annexed at Exhibit-Z to the Plaint. He submitted that when one reads the said report (dated 16th June 2019) along with the invoice raised by the Salvor (dated 25th June 2019), it is clear that the Plaintiff is also entitled to be paid for the Salvage operations carried out in relation to the 1st Defendant Vessel. He, therefore, submitted that a judgment and decree be passed in favour of the Plaintiff and against the sale proceeds

of the 1st Defendant Vessel in the sum of Rs.9,37,19,098/- together with interest @ 18% p.a. from 18th December 2020 till payment and/or realization.

17. On the other hand, based on the grounds/arguments set out hereafter, Mr. Arsiwala, the learned counsel appearing on behalf of Defendant No.2, submitted that there was no merit in any of the arguments canvassed by Mr. Kamat. The following four grounds/arguments were canvassed by Mr. Arsiwala to deny relief to the Plaintiff:-

I. The above suit itself is not maintainable in light of the bar contained in Section 33(5) of the IBC, 2016;

II. The above suit is barred by the principles of *res judicata*. In other words, the Plaintiff, having already filed its claim before Defendant No.2 (the Liquidator of Tag Offshore Ltd), was not entitled to file and prosecute the present suit as the amounts claimed before the Liquidator as well as in the present suit arose from the same cause of action;

III. Without prejudice to the aforesaid arguments, the Plaintiff is not entitled to any amounts towards Penal Berth Hire as the same is in the nature of a penalty,

and in terms of Section 74 of the Contract Act, 1872, the Plaintiff would be required to prove actual loss for which only reasonable compensation can be claimed. This, therefore, can never form the subject matter of a summary judgment under Order XIII-A of the CPC;

IV. At least, the claim towards Salvage charges was not payable because the same was rejected by Defendant No.2 and the adjudication done by Defendant No.2 in relation thereto being *quasi*-judicial in nature, the same claim now could not be agitated in the present suit without challenging the said adjudication under the provisions of the IBC, 2016. Further, no particulars of the Salvage charges have been given by the Plaintiff to Defendant No.2, and therefore, the aforesaid claim in any event would have to be proved by the Plaintiff and cannot form the subject matter of a summary judgment under Order XIII-A of the CPC.

ARGUMENT – I SUBMISSIONS:-

18. The first argument canvassed by Mr. Arsiwala was that the present suit was not maintainable in view of the provisions of Section 33(5) of the IBC, 2016. In support of this argument, Mr. Arsiwala submitted that it is an admitted position that the Defendant No. 1 Vessel is owned by a company called Tag Offshore Ltd. One of the unsecured

creditors of Tag Offshore Ltd filed an application under Section 9 of the IBC, 2016 being Company Petition No. 54 of 2019. By an order dated 24th April 2019, the said Petition was admitted and the Corporate Insolvency Resolution Process of Tag Offshore Ltd (the Corporate Debtor) began. As there seemed little hope for its revival, the **CoC** of the Corporate Debtor chose to seek its liquidation by way of a resolution passed at its meeting held on 17th July 2019 with a 76.30% voting share. This decision was approved by the National Company Law Tribunal, Mumbai Bench (**"NCLT"),** by its order dated 26th September 2019. This order passed by the NCLT was under Section 33 of the IBC, 2016. In other words, by this order, Tag Offshore Ltd. (the Corporate Debtor) was ordered to be wound up. Once Tag Offshore Ltd was ordered to be wound up, Section 33 (5) of the IBC, 2016 also came into effect prohibiting the institution of any suit against Tag Offshore Ltd (the Corporate Debtor). Mr. Arsiwala submitted that a combined reading of Sections 33, 35, 36, 53, and 238 of the IBC, 2016 make it clear that the bar of jurisdiction is for the purposes of protecting the assets of the Corporate Debtor, including the 1st Defendant Vessel which belonged to Tag Offshore Ltd. (the Corporate Debtor). That is the express intention of the Legislature, was the submission.

19. Mr. Arsiwala submitted that in the facts of the present case,

the above suit was filed on 20th January 2020 which is much after the order passed by the NCLT on 26th September, 2019 winding up Tag Offshore Ltd. Therefore, the present suit was instituted much after the owner of the 1st Defendant Vessel, i.e. Tag Offshore Ltd (the Corporate Debtor), was ordered to be wound up. Mr. Arsiwala therefore submitted that for this reason alone, the present suit is not maintainable considering the clear provisions of Section 33(5) of the of the IBC, 2016.

20. It was the further submission of Mr. Arsiwala that merely because the suit was originally instituted by the Plaintiff only against the 1st Defendant Vessel, would not be of any assistance to overcome the jurisdictional bar. As per Section 12 of the *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017* (for short the **"Admiralty Act"**), the provisions of the CPC would apply to Admiralty Suits. This would include the provisions of Order I Rules 3 & 9 of the CPC which make it mandatory for the Plaintiff to join all necessary parties. Defendant No.2, being the Liquidator of the owner of the 1st Defendant Vessel, would be a necessary party to the present suit, was the submission. He, therefore, submitted that the suit itself not being maintainable, there was no question of granting any summary judgment in favour of the Plaintiff. He, therefore, submitted that the Interim

Application be dismissed on this ground alone.

FINDINGS ON ARGUMENT – I:

21. I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the above Interim Application. The first argument canvassed by Mr. Arsiwala is that the present suit is not maintainable considering the bar contained in Section 33(5) of the IBC, 2016. To understand this argument, it would be apposite to reproduce the provisions of Section 33 of the IBC, 2016. Section 33 reads thus:

> **"33. Initiation of liquidation**.—(1) Where the Adjudicating Authority,—
>
> (*a*) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under Section 12 or the fast track corporate insolvency resolution process under Section 56, as the case may be, does not receive a resolution plan under sub-section (6) of Section 30; or
>
> (*b*) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein,
>
> it shall—
>
> (*i*) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;
>
> (*ii*) issue a public announcement stating that the corporate debtor is in liquidation; and
>
> (*iii*) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (*i*), (*ii*) and (*iii*) of clause (*b*) of sub-section (1).

Explanation.—For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

(3) Where the resolution plan approved by the Adjudicating Authority under Section 31 or under sub-section (1) of Section 54-L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (*i*), (*ii*) and (*iii*) of clause (*b*) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (*i*), (*ii*) and (*iii*) of clause (*b*) of sub-section (1).

(5) Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

> Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.**"**

(emphasis supplied)

22. What sub-section 5 of Section 33 contemplates is that subject to Section 52, when a liquidation order is passed against the Corporate Debtor, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor. Section 52 deals with the rights of the secured creditor in liquidation proceedings. The proviso to Section 33(5) stipulates that a suit or other legal proceeding may be instituted by the Liquidator, on behalf of the Corporate Debtor, with the prior approval of the Adjudicating Authority. When one reads Section 33(5), it is ex-facie clear that the said provision prohibits the institution of a suit or other legal proceeding against the Corporate Debtor only. It does not in any way prohibit the institution of a suit or other legal proceeding against a ship/Vessel owned by the Corporate Debtor when invoking the Admiralty Jurisdiction of this Court. I say this because under the Admiralty Act, the Vessel is treated as a separate juristic entity which can be sued without joining the owner of the said Vessel to the proceeding. The action against the Vessel under the Admiralty Act, is an action in *rem* and a decree can be sought against the Vessel without suing the owner of the said Vessel. Under the Admiralty Act, a ship, or a Vessel, as commonly referred to, is a legal entity that can be sued without reference to its owner. The purpose

of an action in *rem* against the Vessel is to enforce the maritime claim against the Vessel and to recover the amount of the claim from the Vessel by an admiralty sale of the Vessel and for payment out of the sale proceeds. It is the Vessel that is liable to pay the claim. This is the fundamental basis of an action in *rem*. The Claimant/Plaintiff is not concerned with the owner, and neither is the owner a necessary or a proper party. In other words, the presence of the owner is not required for adjudication of the Plaintiff's claim. It is for this very reason that there is no requirement to serve the writ of summons on the owner of the Vessel and the service of the warrant of arrest on the Vessel is considered adequate. For the purposes of an action in *rem* under the Admiralty Act, the ship/Vessel is treated as a separate juridical personality, an almost corporate capacity having not only rights but also liabilities (sometimes distinct from those of the owner). The fundamental legal nature of an action in *rem,* as distinct from its eventual object, is that it is a proceeding against the *res*. Thus, when a Vessel represents such *res* as is frequently the case, the action in *rem* is an action against the Vessel itself. The action is a remedy against the corpus of the offending Vessel. It is distinct from an action in *personam* which is a proceeding inter-parties founded on personal service on the Defendant within jurisdiction of the Court, leading to a judgment against the person of the Defendant. In an action

in *rem,* no direct demand is made against the owner of the *res* personally. What I have briefly stated above is succinctly explained by this Court in its decision in the case of **Raj Shipping Agencies v/s Barge Madhwa & Anr [2020 SCC OnLine Bom 651].**

23. The aforesaid decision in **Raj Shipping Agencies v/s Barge Madhwa (supra)** has also examined the inter-play between the provisions of the Admiralty Act and the IBC, 2016. After examining the provisions of both the Acts, this Court has succinctly harmonized the provisions of the Admiralty Act viz-a-viz the provisions of the IBC, 2016. The discussion on the harmonious construction between the Admiralty Act and the IBC, 2016 can be found from paragraph 78 onwards of the said decision. In fact, at paragraph 123, the Court has opined that the bar under Section 33(5) of the IBC, 2016 applies to suits against the Corporate Debtor and this necessarily means that it is a suit in *personam*. An action in *rem* is not against the Corporate Debtor but against the Vessel. The Vessel is a distinct juridical entity and the action proceeds without reference to the owner who is not a party to the suit when filed. Liquidation of the Corporate Debtor does not affect the ownership of the *res* so as to defeat a maritime claim in respect of the Vessel. The *res* continues to be in the ownership of the Corporate Debtor and the

Liquidator merely acts as a custodian. The status of the *res* does not change. Hence, the action in *rem* can be entertained even at the stage of liquidation of the Corporate Debtor as the claim is against the *res* and not against the Corporate Debtor. By arrest of the Vessel, the Plaintiff would become a secured creditor to the extent of the value of the *res* only but not a secured creditor of the Corporate Debtor's other assets. Hence, this will not affect other secured creditors of the Corporate Debtor. However, by not permitting the action in *rem* and arrest of the Vessel, the rights in *rem* given to a maritime claimant under the Admiralty Act would be defeated and denied. The entire purpose of these rights (whether a maritime lien or a maritime claim) is to enable such a claimant to have his claim perfected in law by arrest of the Vessel. If a claimant is not permitted to do so, then his right in *rem* may stand extinguished and be lost forever.

24. I find that the decision in **Raj Shipping Agencies v/s Barge Madhwa (supra)** clearly answers the aforesaid argument canvassed by Mr. Arsiwala on the maintainability of the present suit. He has been unable to distinguish the aforesaid judgment for me to take a different view. I am, therefore, clearly of the opinion that the objection regarding the maintainability of the present suit holds no substance and

the same is rejected.

ARGUMENT – II SUBMISSIONS:-

25. The second argument canvassed by Mr. Arsiwala was that the above suit is barred under the principles of *res judicata*. In other words, the Plaintiff having already filed its claim before Defendant No.2 (the Liquidator of Tag Offshore Ltd), the Plaintiff was not entitled to file and prosecute the present suit as the amounts claimed before the Liquidator as well as in the present suit arose from the same cause of action. As far as this argument is concerned, Mr. Arsiwala submitted that this issue is being raised without prejudice to the ground taken by Defendant No. 2 that the present suit is barred by virtue of Section 33(5) of the IBC, 2016. In support of this argument, Mr. Arsiwala submitted that in the facts of the present case, there is no qualitative difference between the claim made against Tag Offshore Ltd. (the Corporate Debtor) and the claim made against the 1st Defendant Vessel because the claim is based on the same cause of action. The claim made by the Plaintiff against Tag Offshore Ltd. (the Corporate Debtor), is based on an invoice dated 17th October, 2019 [page 42 of the Plaint]. This invoice overlaps with other invoices which form part of the claim in the present suit. However, it is an admitted position that the cause of action in the present suit is for

unpaid Port / Berthing / Salvage charges etc, incurred by Tag 15 (the 1st Defendant Vessel), which is the same cause of action for the claim filed by the Plaintiff with Defendant No. 2 (the Liquidator of Tag Offshore Ltd). It is also submitted that the failure of the Plaintiff to make Defendant No.2 a party to the present suit was a fatal failure which was only rectified by the subsequent intervention of Defendant No.2. Admittedly, the Plaintiff submitted its claim with Defendant No.2 in his capacity as Liquidator of the Corporate Debtor. This claim was submitted within the statutory period of 30 days from 26th September 2019. As per Sections 35, 38, 39, 40, and 41 of the IBC, 2016, the claims submitted to the Liquidator are processed and adjudicated upon. In the present case, it is an admitted position that the Plaintiff submitted a claim in the amount of Rs.3,72,99,376/- being the amount alleged to be outstanding and payable by the Corporate Debtor as on the liquidation commencement date. Defendant No.2 admitted the claim of the Plaintiff only to the extent of Rs.1,72,99,376/-. This was for the simple reason that the Plaintiff had claimed an amount of Rs.2,00,00,000/- towards reimbursement of Salvage charges but had not provided any supporting documentation for the same. Mr. Arsiwala submitted that the cause of action for the claim submitted by the Plaintiff to Defendant No. 2 was for Port charges, Berth Hire charges, Mooring charges, Penal Birth Hire charges, and Salvage

charges relating to the 1st Defendant Vessel. In other words, the claim filed by the Plaintiff with Defendant No. 2 was based on the same cause of action as in the present suit, was the submission.

26. Mr. Arsiwala submitted that it is pertinent to note that as per Regulation 16 of the *Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016*, claims are filed as on the liquidation commencement date (which in the present case would be 26th September 2019). Thus, the claim filed by the Plaintiff would be deemed to be the claim of the Plaintiff against the Corporate Debtor as on the liquidation commencement date. It is an admitted position that the Plaintiff has not challenged the partial rejection of its claim by filing an Appeal under Section 42 of the IBC, 2016. Mr. Arsiwala submitted that the role of the Liquidator and the nature of adjudication by him under the IBC, 2016 has been explained by the Hon'ble Supreme Court in the case of ***Swiss Ribbons Private Limited v. Union of India*** **[(2019) 4 SCC 17]**. He submitted that in paragraph 90 of this decision, the Supreme Court has clearly held that when the Liquidator determines the value of a claim submitted by a creditor, then, that determination is a decision which is quasi-judicial in nature and can be challenged before the Adjudicating Authority under Section 42 of the IBC, 2016. Thus, in the present case, Defendant No. 2 has made a quasi-judicial

determination of the debt owed to the Plaintiff on account of the services rendered to the 1st Defendant Vessel as on 26th September 2019. In these circumstances, Mr. Arsiwala submitted that:

(i) The larger principles of *res judicata* are a matter of public policy and apply even to quasi-judicial determinations or decisions made under special statutes – **[*Smt Ujjam Bai v. State of Uttar Pradesh* [AIR 1962 SC 1621]**;

(ii) The claim of the Plaintiff for Port charges, Berth Hire, Penal Berth Hire, Mooring charges, and Salvage charges in relation to the 1st Defendant Vessel have already been considered by Defendant No.2 and quantified at Rs.1,72,99,376/- as on 26th September, 2019. This is a quasi-judicial determination which the Plaintiff has not challenged by way of an Appeal under Section 42 of the IBC, 2016 and has therefore attained finality;

(iii) If this Court entertains the present suit and adjudicates upon the claim made by the Plaintiff, then, the same

will amount to reviewing the decision of Defendant No.2. Mr. Arsiwala also placed reliance on Sections 63 & 231 of the IBC, 2016 to contend that these provisions specifically prohibit Civil Courts from entertaining any suit or proceeding in respect of which the NCLT has jurisdiction. The NCLT would otherwise have had jurisdiction under section 42 of the IBC, 2016 to entertain a challenge to the partial rejection of the claim of the Plaintiff, and therefore, this Court cannot allow the Plaintiff to re-agitate its claim through the present proceedings;

(iv) Even otherwise, the Plaintiff has already adopted the remedy under the IBC, 2016 by filing a claim with Defendant No.2. Therefore, the Plaintiff is estopped from pursuing the inconsistent remedy of filing the present Admiralty Suit. Mr. Arsiwala submitted that the Supreme Court in the case of ***Transcore v. Union of India*** **[(2008) 1 SCC 125]** has held that there are three elements to the Doctrine of Election, namely, (1) existence of two or more remedies, (2) inconsistencies

between such remedies, and (3) choice of one of them. All three elements can be found in the present case, was the submission;

(v) The Plaintiff first submitted its claim to Defendant No.2 in accordance with the provisions of the IBC, 2016. Being dissatisfied with the partial rejection of that claim, but not challenging the same through an Appeal, the Plaintiff instead proceeded to file the present suit under the Admiralty Act. The effect of filing the present suit and seeking an order of arrest and sale of the 1st Defendant Vessel was to take it out of the liquidation estate thereby depriving the general pool of creditors. Therefore, the two remedies are inconsistent;

(vi) The Doctrine of Election has also been explained by the Supreme Court in the recent case of ***Union of India v. N. Murugesan*** **[(2021) SCC Online SC 895].** Having accepted the remedy under the IBC, 2016 to recover its dues, the Plaintiff cannot now seek to pursue

the present suit for the same purpose, was the submission of Mr. Arsiwala.

27. For all the aforesaid reasons, Mr. Arsiwala submitted that the present suit is barred by the principles of *res judicata* and hence there was no question of granting any relief to the Plaintiff in the above Interim Application.

FINDINGS ON ARGUMENT – II:-

28. As mentioned earlier, the second argument canvassed by Mr. Arsiwala was that the suit is barred by the principles of *res judicata*. This argument proceeded on the basis that (i) there is no qualitative difference between the claim made against the Corporate Debtor and the claim made against the 1st Defendant Vessel because the claim is based on the same cause of action. Firstly, I do not think that this argument is correct, in view of the decision pronounced by this Court in the case of **Raj Shipping Agencies v/s Barge Madhwa (supra).** In the said decision, this Court has clearly made a distinction between the claim made against the Vessel which is an action in *rem* and the claim made against the owner of the Vessel (in the present case the Corporate Debtor – Tag Offshore Ltd.), and which is a claim in *personam*. Be that as it may,

the aforesaid argument was pressed on the basis that the Plaintiff has submitted an invoice dated 17th October, 2019 to Defendant No.2. That invoice was adjudicated by Defendant No.2 and was only partly allowed. The Plaintiff herein has not challenged the said adjudication under the provisions of the IBC, 2016. This being the case, the claim agitated by the Plaintiff in the present proceedings is therefore barred by the principles of *res judicata*, was the submission. I am unimpressed with this argument also for multiple reasons. Firstly, a limited adjudication done by Defendant No.2 has no impact on the present Admiralty Suit. The adjudication done by Defendant No.2 would be *qua* the Corporate Debtor. Under the provisions of the IBC, 2016, admittedly, Defendant No.2 would have no jurisdiction to adjudicate any claim against the 1st Defendant Vessel. That apart, Section 11 of the CPC lays down the principles of *res judicata*. Section 11 reads thus:-

> "11.Res judicata.-
>
> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> **Explanation I**- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
>
> **Explanation II**.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right

of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

29. As can be seen from the said Section, the principles of *res judicata* would apply when the matter in issue in a previously instituted suit is directly and substantially in issue in the subsequent suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. In other

words, for the subsequent suit to be barred by the principles of *res judicata*, the matter directly and substantially in issue in the subsequent suit (i) has been directly and substantially in issue in the former suit; (ii) must be between the same parties, or between the parties under whom they or any of them claim, litigating under the same title; and (iii) the former suit has been heard and finally decided on merits. What follows therefrom is that the principles of *res judicata* would not apply if (a) there is no decision on merits; or (b) if it is between different parties. The view that I take is also supported by a decision of the Supreme Court in the case of **Erach Boman Khavar v/s Tukaram Shridhar Bhat & Anr [(2013) 15 SCC 655].** The relevant portion of this decision reads thus:-

> **"39.** From the aforesaid authorities it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been a conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits. It is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation.**"**

30. In the facts of the present case, the claim of the Plaintiff adjudicated by Defendant No.2 was only pertaining to one invoice for the period 24th April 2019 to 26th September 2019. This invoice can be found at page 42 of the Plaint and is dated 17th October 2019. In this adjudication, Defendant No.2 allowed the claim of the Plaintiff for (i)

Berth Hire charges, from 24th April 2019 to 26th September 2019 @ USD 500/- per day; (ii) Penal Berth Hire charges for the very same period also at USD 500/- per day; and (iii) Port dues for the said period for an aggregate amount of USD 6,600/-. The claim for Salvage costs/operations was rejected by Defendant No.2. The claim of the Plaintiff with reference to any other periods, was never submitted nor adjudicated by Defendant No.2. In these circumstances, even if I were to assume that this adjudication would amount to attracting the bar of *res judicata*, then, at the highest, the Plaintiff in the present suit, may not be permitted to recover Salvage charges as the same has been adjudicated upon by Defendant No.2 and rejected. This however does not mean that any other claim is also hit by the principles of *res judicata*. It is also important to note, and I must mention, that the claim for Salvage charges has not been rejected by Defendant No.2 on merits. The claim has been rejected on the basis that not enough supporting documentation is provided to substantiate the claim under the heading "Salvage charges".

31. In the facts of the present case, it is not in dispute that the 1st Defendant Vessel stayed at the Plaintiff's berth from 13th February 2019 (i.e. the date when the Vessel came into the port of the Plaintiff) till 29th October, 2020 (i.e. the date when the said Vessel was sold pursuant to

orders of this Court). It is, therefore, clear that the period from 13th February 2019 to 23rd April 2019 and 27th September 2019 to 29th October 2020 were not the subject matter of adjudication by Defendant No.2 at all. What is also important to note is that by an email dated 15th October 2019, Defendant No.2 sought charges (with break up) for the period from 24th April 2019 to 26th September 2019 only and it is for this reason that the invoice dated 17th October 2019 was submitted to Defendant No.2 for the aforesaid period. This being the case, I am unable to accept the argument that the entire claim of the Plaintiff is barred by the principles of *res judicata* or constructive *res judicata*. One of the other factors that I have to also consider is that on 9th March, 2020, a statement was recorded on behalf of Defendant No.2 that all costs/expenses incurred by the Plaintiff from 24th April 2019 till the 1st Defendant Vessel leaves the berth, including the Berth and Port charges as well as Salvage charges, shall be treated by the Liquidator as liquidation costs or IRP costs as contemplated under Section 53 (1) (a) of the IBC, 2016. It was further stated that as far as Berth/Port charges are concerned, there was no dispute. As far as the Salvage charges were concerned, it was stated that the same would be treated as liquidation costs or IRP costs subject to scrutiny regarding its quantum by the Liquidator. It is pertinent to note that this statement has been made after the so-called adjudication by

Defendant No.2 and which was prior to the order passed on 9th March 2020 recording the statement on behalf of Defendant No.2 as set out above. If in fact, Defendant No.2 was of the opinion that the claim for Salvage charges was barred by the principles of *res judicata*, Defendant No.2 would not have made a statement that Salvage charges *"would be treated as a liquidation costs or IRP costs subject to scrutiny regarding its quantum by the Liquidator"*. I, therefore, fail to see how Defendant No.2 can today canvass that the entire claim made in the above suit is barred by the principles of *res judicata* or constructive *res judicata*. This is apart from the fact that the claim made in the above suit and in the above Interim Application is not against Defendant No.2 but only against the 1st Defendant Vessel. Considering that the claim made in the present suit is not against Defendant No.2 at all but against the sale proceeds of the 1st Defendant Vessel and which continues to be an action in *rem,* any adjudication done by Defendant No.2 regarding a claim made by the Plaintiff against Defendant No.2, cannot attract the principles of *res judicata* qua the present suit, which is seeking a decree only against the 1st Defendant Vessel. I am therefore clearly of the view that the claim in the present suit is not barred by the principles of *res judicata*.

32. Before parting on this issue, I must mention that as far as the

argument of Mr. Arsiwala regarding the Doctrine of Election is concerned, I find that the said argument, in the facts and circumstances of the present case, is wholly misconceived. The Doctrine of Election cannot and does not arise in the facts and circumstances of this case at all. This being the position, I do not see any reason to deal with the decisions relied upon by Mr. Arsiwala on the Doctrine of Election.

ARGUMENT – III SUBMISSIONS:-

33. The third argument canvassed by Mr. Arsiwala was that in any event the Plaintiff was not entitled to any summary judgement in relation their claim for Penal Berth Hire. In this regard, Mr. Arsiwala submitted that the Plaintiff has sought "Penal Berth Hire" @ of USD 500 per day from 24th April, 2019 onwards. He submitted that the Plaintiff claims to be entitled to this amount based on its Tariff Booklet and specifically Cl. III of Section A thereof [page 130 of plaint]. Cl. III of Section A of the Tariff Booklet contains the heading "Penal Berth Hire" and prescribes three eventualities when it is leviable @ USD 1000 per day. It is the case of Defendant No. 2 that this "Penal Berth Hire" is nothing but a "penalty" in terms of Section 74 of the Contract Act, 1872, and therefore the Plaintiff is required to prove the actual loss for which

reasonable compensation can be claimed. For this reason, "Penal Berth Hire" charges cannot be awarded to the Plaintiff by way of a summary judgment under Order XIII-A of the CPC, was the submission.

34. Mr. Arsiwala then submitted that that the Plaintiff has sought to rely upon overlapping invoices. The invoices at pages 30 to 41 of the plaint do not contain any charges for Penal Berth Hire. These invoices pertain to the period between 1st February,2019 to 2nd May, 2019. However, for the first time, the invoice dated 17th October, 2019 [page 42 of the plaint] sought Penal Berth Hire from 24th April, 2019 to 26th September,2019. The subsequent invoice dated 27th December 2019 [page 44 of the plaint] sought to retrospectively impose Penal Berth Hire from 13th February, 2019 to 31st February, 2019, which is contrary to the invoices at pages 30 to 41, and at page 42. For this reason, the present case requires further scrutiny and cannot be the subject matter of an Application for summary judgment under Order XIII-A of the CPC, was the submission. Mr. Arsiwala further submitted that Section 74 of the Contract Act, 1872, has been interpreted by the Supreme Court in **Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd [(2003) 5 SCC 705]**, and in **Kailash Nath Associates v. Delhi Development Authority [(2015) 4 SCC 136]**. Relying on these decisions, Mr.

Arsiwala submitted that it is the unequivocal position of law that where a liquidated amount is stated to be payable by way of damages, the same can only be payable "*if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court*". The Tariff Booklet does not contain anything to suggest that "Penal Berth Hire" is a genuine pre-estimate of damages fixed by both parties. The Plaintiff would therefore be required to prove the same as per law. On the other hand, the Tariff Booklet uses the phrase "Penal" to describe this amount. It is submitted that the Tariff Booklet is solely prepared by the Plaintiff and the Defendants have no negotiating power. Therefore, the rule of *contra proferentem* would apply and this Court ought to be inclined towards interpreting Cl. III of Section A of the Tariff Booklet as a clause stipulating a penalty. In such a case, Mr Arsiwala submitted that the Plaintiff would have to prove the amount, and would not be entitled to summary judgment under Order XIII-A of the CPC.

FINDINGS ON ARGUMENT – III:-

35. The third argument canvassed by Mr. Arsiwala was that the Plaintiff is not entitled to any Penal Berth Hire charges as they were in the nature of a penalty and therefore have to be proved. Hence, the claim

for Penal Berth Hire charges, cannot form the subject matter of an Application for summary judgement, was the submission.

36. To understand this argument, one must understand on what basis the Plaintiff has charged Penal Berth Hire charges to the 1st Defendant Vessel. The charges that the 1st Defendant Vessel would incur are set out in the Tariff Booklet of the Plaintiff. It is not in dispute that any Vessel, once it engages the services of the Plaintiff – Port, would be contractually obligated to pay for those services as per the Tariff Booklet of the Plaintiff (Exhibit "KK" to the Plaint). The relevant portion of this Booklet relating to the charges for Berth Hire and Penal Berth Hire are reproduced hereunder:-

II. <u>Berth Hire</u>

Per Gross Ton Per Hours	US $	INR
Vessels not exceeding 30,000 Gross Tons	$ 0.01	
Vessels 30,001 to 60,000 Gross Tons	$ 0.015	
Vessels exceeding 60,000 Gross Tons	$ 0.025	
Minimum Charges $ 500 per vessel per day up top 30000 GRT & $ 750 per vessel per day for other. The charge is livable on each call of vessel. Berth Stay is consider from the First Line ashore (Actual time of berthing- ATB) to All cast off (Actual time of un-birthing- ATUB)		

III. Penal Birth Hire

Applicable when vessel is unable to commence cargo operations within 2 hours of all fast time	$ 1000	
Applicable when vessel is not ready to sail (i.e. fail to book outward pilot memo) after 2 hours the time of completion of cargo		
Applicable when vessel discontinues cargo operations (Loading / discharging) for vessels own reasons		

37. As can be seen from the aforesaid table, Penal Berth Hire charges, in addition to the Berth Hire charges, become payable (i) when the Vessel is unable to commence cargo operations within 2 hours of all fast time (i.e. the time after which the Vessel is completely moored and secured at the port); or (ii) when the Vessel is not ready to sail after two hours from the time of completion of cargo operations; or (iii) when the Vessel discontinues cargo operations for its own reasons. In the facts of the present case, it is not in dispute that the 1st Defendant Vessel was berthed in the Plaintiff's Port from 13th February 2019 till the same was sold on 28th October 2020. It is also not in dispute that at least one of the contingencies contemplated for levying Penal Berth Hire charges were triggered on 13th February 2019 itself. When one reads the aforesaid Tariff Booklet, it is quite clear that the charges of Penal Berth Hire are

not penal in nature per-se but are only additional charges that the Vessel would incur in the event (i) it does not commence cargo operations within two hours of the all fast time; or (ii) it is not ready to sail (i.e. fails to book outward pilot memo) after two hours from the time of completion of cargo operations; or (iii) when the Vessel discontinues cargo operations for its own reasons. There is nothing penal about it. The 1st Defendant Vessel agreed to pay these charges when it engaged the services of the Plaintiff – Port. Once the 1st Defendant Vessel contractually agreed to pay these additional charges, Defendant No.2, as the Liquidator of Tag Offshore Ltd. (the owner of the 1st Defendant Vessel), cannot resile from this contractual obligation on the specious ground that Penal Berth Hire charges are really nothing but a penalty and will therefore have to be proved. These charges are nothing but additional charges in the event the contingencies mentioned above are triggered. I am therefore of the view that Penal Berth Hire charges are not a penalty that would be required to be proved by the Plaintiff before it can seek to recover these charges.

38. I have come to this conclusion also because this is exactly how Defendant No.2 also understood the nature of Penal Berth Hire charges. As mentioned earlier, Defendant No.2 adjudicated the invoice of the Plaintiff dated 17th October 2019 (page 42 of the Plaint). This invoice

was for a total sum of Rs. 3,72,99,376/- (inclusive of GST). This amount *inter alia* was for (i) Berth Hire charges from 24th April 2019 to 26th September 2019 @ USD 500/- per day; (ii) Penal Berth Hire charges for the same period @ USD 500/- per day; (iii) Port dues amounting to USD 6,600/-; and (iv) Salvage costs/operations for securing the 1st Defendant Vessel amounting to Rs.2,00,00,000/- (Rs.2 Crores). When the aforesaid invoice was adjudicated by Defendant No.2, he accepted all the charges except the Salvage costs/operations. In other words, whilst adjudicating the aforesaid invoice, Defendant No.2 accepted Berth Hire Charges as well as Penal Berth Hire charges, for the period from 24th April 2019 to 26th September 2019. Once having accepted that these amounts are payable to the Plaintiff, Defendant No.2, cannot today argue that the Plaintiff is not entitled to any Penal Berth Hire Charges as it is nothing but a penalty which will be required to be proved.

39. Another factor that goes against Defendant No.2 is that on 9th March 2020, Defendant No.2 made a statement before this Court that as far as Berth charges and Port charges are concerned, there is no dispute. The relevant portion of the order dated 9th March 2020 reads thus:-

> "6. Learned senior counsel appearing on behalf of the Liquidator (defendant No.2), on instructions, has stated that all costs/expenses incurred by the plaintiff from 24th April, 2019 till the 1st defendant-vessel leaves the berth including the berthing/port charges as well as salvage charges shall be treated by the liquidator as liquidation costs or IRP costs as contemplated under Section 53 (1) (a) of the IBC |Code, 2016. It is stated that as far as the berth/port charges are concerned there is no dispute. However, as far as the salvage charges are concerned the same would be treated as a liquidation costs or IRP costs subject to scrutiny regarding its quantum by the liquidator. The said statements are accepted as undertakings given to this Court. For the time being, this order should suffice till the Interim Application of the plaintiff is heard and which to my mind can be heard only once the issue regarding which Act overrides the other is decided by this Court in Admiralty Suit No. 1 of 2015 and other connected matters."
>
> (emphasis supplied)

40. What is important to note is that when the aforesaid statement was made, no distinction was carved out between Berth Hire charges and Penal Berth Hire charges. When Defendant No.2 stated that *"as far as the berth/port charges are concerned there is no dispute"* it meant that it included all Berth charges/Port Charges including Penal Berth Hire charges. I say this because when it came to Salvage charges, Defendant No.2 qualified his statement by stating that "*as far as the salvage charges are concerned the same would be treated as a liquidation costs or IRP costs subject to scrutiny regarding its quantum by the liquidator*."

41. In these circumstances and for the all the reasons set out

earlier, I am unable to agree with Mr. Arsiwala's contention that the Plaintiff is not entitled to any amount towards Penal Berth Hire charges. This argument, therefore, stands rejected.

ARGUMENT – IV SUBMISSIONS:-

42. The last argument canvassed by Mr. Arsiwala was that the Plaintiff is not entitled to any amount claimed towards Salvage costs/operations. At the outset, Mr. Arsiwala fairly stated that Defendant No.2 stands by his statements made before this Court on 9th March, 2020 and Defendant No.2 does not deny that Salvage operations were carried out and nor does Defendant No.2 oppose payment of the same, subject to the Salvage expenses being proved with adequate documentation. Mr. Arsiwala submitted that the Plaintiff is claiming these alleged charges which were incurred during the course of emergency Salvage operations carried out for the safety of the 1st Defendant Vessel. Mr. Arsiwala submitted that firstly, there is a discrepancy in the amounts claimed by the Plaintiff. As per the invoice dated 17th October 2019 [page 42 of the plaint], the Plaintiff has sought an amount of Rs.2 Crores + GST @ 18% towards "*Salvage Cost for securing the vessel during broken mooring rope*". However, another invoice dated 27th December 2019 [page 44 of the plaint] seeks payment of an amount of Rs. 1.85 Crores + 18% GST for

"*Salvage Operations for Tag 15*". Thus, there is an anomaly in this regard. Mr. Arsiwala then submitted that the basis of the claim of the Plaintiff is that emergency Salvage operations were carried out at its behest to secure the 1st Defendant Vessel during a spell of bad weather. It is the case of the Plaintiff that Salvage operations were carried out by TUG SHAMBHAVI and a report was prepared by its Master [pages 85-87 of plaint]. The Plaintiff has also relied upon an invoice dated 25th June 2019 [page 88 of plaint] issued by one Vedant Ship Management in the amount of Rs. 1.85 Crores + 18 % GST. Based on these documents, Mr. Arsiwala submitted:

(i) There is no correlation between the report of the Master of TUG SHAMBHAVI and the invoice of Vedant Ship Management. Neither does the salvage report mention that TUG SHAMBHAVI is owned by Vedant Ship Management, nor does the invoice at page 88 of the Plaint mention the name TUG SHAMBHAVI;

(ii) Thus, there is nothing on record to suggest that the invoice at page 88 of the Plaint has any correlation with the salvage report at page 85, nor is there any material to substantiate the salvage report itself, which does not bear the name of the person who signed it;

(iii) The invoice at page 88 does not give any breakdown or particulars as to the computation of the amount of Rs. 1.85 Crores which has been levied/charged;

(iv) The invoices of the Plaintiff also do not correlate with each other or with the invoice of Vedant Ship Management, as set out above. There is no consistency in the amount sought by the Plaintiff with respect to Salvage operations; and

(v) The invoice of Vedant Ship Management at page 88 of the Plaint has been raised in INR, whereas the invoices of the Plaintiff mention the figures in USD. This is yet another discrepancy.

43. He, therefore, submitted that for all the above reasons, while the Plaintiff may very well have a claim on account of Salvage operations, the documents on record are not sufficient for this Court to grant a summary judgment under Order XIII-A of the CPC. This claim therefore cannot be allowed at this stage, was the submission of Mr. Arsiwala.

FINDINGS ON ARGUMENT – IV:-

44. The last argument canvassed by Mr. Arsiwala is that the Plaintiff is not entitled to any Salvage charges as claimed in the amended Plaint or in the above Interim Application. He sought to dispute this

claim on two counts. Firstly, Mr. Arsiwala submitted that the Plaintiff is not entitled to this claim because it made this claim vide its invoice dated 17th October 2019 and which was adjudicated upon by Defendant No.2. On adjudicating the aforesaid claim, Defendant No.2 rejected the claim of the Plaintiff towards Salvage charges. Not having challenged the said adjudication under the provisions of the IBC, 2016, the Plaintiff now cannot agitate the aforesaid claim before this Court. The second ground on which the aforesaid claim was sought to be disputed by Defendant No.2 was the fact that no proper documentation was produced by the Plaintiff to substantiate its claim for Salvage.

45. As far as the claim for Salvage operations are concerned, I am not inclined to grant this claim at this stage only on the ground that there is not enough documentation to substantiate the Plaintiff's claim on this count. In the Plaint, all that has been produced in support of this claim was a report dated 16th June 2019 [page 85 of the Plaint] and an invoice issued by one Vedant Ship Management dated 25th June 2019 [page 88 of the Plaint] in the sum of Rs.2,18,30,000/- (inclusive of GST). There is absolutely no breakup given as to how Vedant Ship Management has come to the aforesaid figure of Rs.2,18,30,000/- for the salvage operations carried out by it in relation to the 1st Defendant Vessel.

Further, I find that there is nothing on record to suggest that the invoice at page 88 of the Plaint has any correlation with the Salvage report at page 85, nor is there any material to substantiate the Salvage report itself, which does not bear the name of the person who signed it. In these circumstances, I am unable to grant the claim towards Salvage costs/operations under the provisions of Order XIII-A. This is a claim that the Plaintiff will have to prove at the trial of the above suit.

46. In view of the foregoing discussion, there will be a summary judgement and a decree in favour of the Plaintiff and only against the sale proceeds of the 1st Defendant Vessel in the sum of Rs.5,51,00,016/-, the breakup of which is as follows:-

Heads of Claim	**1st Period 13/02/2019 to 15/01/2020 (Till filing of the suit)**	**2nd Period 16/01/2020 to 29/10/2020 (Till the Sale of the Vessel)**	**3rd Period 30/10/2020 to 15/12/2020**	**TOTAL:-**
Port Charges	Rs.10,01,000/-	Rs.7,28,728/-		**Rs.17,29,728/-**
Berth Hire Charges	Rs.1,18,65,000/-	Rs.1,05,98,700/-		**Rs.2,24,63,700/-**
Penal Berth Hire Charges	Rs.1,18,65,000/-	Rs.1,05,98,700/-		**Rs.2,24,63,700/-**
Mooring Crew		Rs.37,800/-		**Rs.37,800/-**
GST	Rs.44,51,580/-	Rs.39,53,508/-		**Rs.84,05,088/-**
				Rs.5,51,00,016

47. There will also be a decree in favour of the Plaintiff and only

against the sale proceeds of the 1st Defendant Vessel for interest @ 18% per annum on the said sum of Rs.5,51,00,016/- from 18th December 2020 till payment and/or realization. For the reasons recorded earlier, the claim towards Salvage operations is not granted at this stage and will have to be proved at the trial of the suit. I am also not inclined to grant any interest for the period prior to 18th December 2020, or legal costs, at this stage as there is no proper breakup or substantiation supplied for the same. The Plaintiff shall, along with their claim for Salvage operations, also be entitled to agitate their claim for interest prior to 18th December 2020, and legal costs, at the trial of the suit.

48. The Interim Application is disposed of in the aforesaid terms. However, there shall be no order as to costs.

49. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[B. P. COLABAWALLA, J.]