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Court : Mumbai

Decided On : Feb-11-2014

Judge : K.R. Shriram

Appeal No. : Notice of Motion No. 1080 of 2013 In Admiralty Suit No. 77 of 2012

Appellant : M/S. Universal Marine and Another

Respondent : M/T Hartati and Another

Judgement :

1 The Plaintiffs had sought and obtained on 09-08-2012 an ex-parte order of arrest of the 1st Defendant-Vessel M.T. Hartati in respect of their alleged claim as set out in the particulars of claim at œEx. E? in the plaint. The claim was in sum of Rs. 24,75,000/- which the owners of the 1st Defendant-Vessel furnished as security without prejudice to their rights and defences. Accordingly, the Order of arrest of the 1st Defendant-Vessel was vacated by an order passed on 16-08-2012 and the vessel was directed to be released upon the owner of the 1st Defendant depositing the amount of Rs. 24,75,000/- as security with the Prothonotary and Senior Master.

2 While obtaining the Order of arrest, the Plaintiffs had in para 2 averred as under:-

œThe Defendant No. 1 is a foreign flag vessel owned by Defendant No. 2 having their address shown in cause title. The Defendant No. 1 is presently in the port

and harbour of Mumbai i.e. within the Admiralty jurisdiction of this Hon'ble Court. Besides Defendant No. 1 vessel, the Defendant No. 2 owns several other vessels which are sister vessels of Defendant No. 1. All the vessels are owned and managed by Defendant No. 2.? (emphasis supplied)

3 This para 2 was amended pursuant to leave granted by an order dated 28-06-2013.

4 The para 3 of the Plaint reads as under:-

œThat between August, 2011 to July, 2012, at the request of Defendant No. 2, the Plaintiffs under various Delivery Challans raised in the name of Master/Owner sold, supplied and delivered various ship stores/goods to Defendant No. 1 vessel and her various sisters vessels as per their requirements, whilst at the Port of Mumbai, India, which were duly received, accepted and acknowledged by Master/Owner by making an endorsement and affixing their rubber seal/stamp on the Delivery Challans without any reservations and objections. The said supplies of ship stores/goods were made to the Defendant No. 1 and her sister vessels and the Defendant No. 1 and her sister vessels have received and appropriated and benefited from said supplies of ship stores/goods.....? (emphasis supplied)

5 The para 4 of the Plaint reads as under:-

œThe Plaintiffs have raised Invoices for said goods sold, supplied and delivered to the Defendants. The invoices are received by Defendant No. 2 and no objection and reservations of any type is raised against the said invoices. Plaintiffs crave leave to refer and rely upon purchase orders, emails confirming purchase order/sale, certificates of warranty/repair etc. pertaining to each sale effected upon the Defendant No. 1 and her sister vessels.....? (emphasis supplied)

6 After obtaining the Order of arrest, the Plaintiffs had on leave being granted amended para 2 and the amended para 2 reads as under:-

œThe Defendant No. 1 vessel is a foreign flagged vessel which is currently in port and harbour Mumbai. The Defendant No. 2 is the wholly owned subsidiary of an entity known as œPT. Berlian Laji Tanker, Tbk.?, in short, BLT. The Defendant No.

2 along with BLT are the owners/beneficial owners/the entities which are in de-facto control of various vessels (including Defendant No. 1 vessel) which form part of their œfleet?. For convenience the Defendant No. 2 and BLT (who for all practical purposes are one and the same) are hereinafter jointly referred to as œOwners?. The Plaintiff sold, supplies and delivered necessaries to various vessels forming part of the Owner's fleet (including the Defendant No. 1 vessel) based upon orders received from the Defendant No. 2 from time to time.? (emphasis supplied)

7 It has to be noted that the case that the Plaintiff made out in para 2 before amendment is entirely different from the case made out post amendment.

8 The owners of Defendant No. 1 have taken out the present Notice of Motion for reducing the security of Rs. 24,75,000/- to Rs. 1,32,129.49 and the excess amount of Rs. 23,42,870.51/- be returned to Defendant No. 1 along with interest accrued thereon. During the course of argument it was submitted that the amount of Rs. 1,32,129.49 which is equivalent to about US$ 2380.71 has subsequently being paid to the Plaintiffs and, therefore, the entire security of Rs. 24,75,000/- has to be returned to the owners of Defendant No. 1.

9 It is the case of Defendant No. 1 that the particulars of claim at œEx. E? provides a list of 36 invoices as outstanding. Only the invoices at items 32, 33 and 34 pertain to 1st Defendant-Vessel and the rest belonged to vessels which are not owned by the owners of 1st Defendant-Vessel. Therefore, the 1st Defendant-Vessel is not a sister ship of the other vessels mentioned in œEx. E? to the plaint and therefore, the Plaintiffs were not entitled to an order of arrest of the 1st Defendant-Vessel in any case for alleged supplies made to the other vessels.

10 During the course of arguments, Counsel for Defendant No. 1 agreed that Defendant No. 2 also belongs to BLT group though in affidavit-in-rejoinder it is not admitted that BLT owns Defendant No. 2. He hastened to add, that does not make Hartati Shipping PT Limited, the owners of 1st Defendant-Vessel, liable in respect of claims against the vessels owned by other companies belonging to BLT. He further clarified that he was appearing only for Defendant No. 1. The Counsel submitted that the vessels mentioned in œEx. E? to the plaint at serial nos. 1 to

31, 35 and 36 are not sister vessels of 1st Defendant-Vessel and in any case the Plaintiffs have not made out a case for lifting of corporate veil. He added, for a vessel to be called a sister vessel she has to be owned by the same person who is liable for the maritime claim and who was, when the claim arose, owner of the ship in respect of which the maritime claim arose. In this case each vessel was owned by a different legal entity and therefore, even if all these separate legal entities are subsidiaries of another legal entity, the ships owned by each of these legal entities do not become sister ships.

11 Mr. Pratap, Counsel for the Defendant No. 1, relied on Article 3 (2) of the International Convention on Arrest of Ships, 1999. Article 3 (2) (a) of the Convention provides as under:-

œ2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose.

a. owner of the ship in respect of which the maritime claim arose?.

12 Therefore, the vessels not being owned by the same person who is liable for the maritime claim do not become sister ships and what is important is the registered owner of the vessels should be the same entity.

13 On the issue of lifting of corporate veil, Mr. Pratap, submitted that the Plaintiffs have to first allege in the plaint that each of the vessel was being owned in the name of different companies with a view to mask a fraud rather than show the true face of the corporation. Mr. Pratap, states that this fraud cannot just be merely alleged but there has to be a connection to show that the intention of owning the vessel in different companies name was to mask a fraud. He further submitted that foundation for this allegation has to be first made in the plaint and there is no such averment in the plaint. First time allegation of fraud has been made only in the affidavit-in-reply dated 09-12-2013 filed by Plaintiffs, which at para 12, provides as under:-

œI further state and submit that various apparently 'independent' entities have been set up for the purposes of defrauding creditors and insulating the assets of the œBLT? Group from clauses. This is borne out by the fact that BLT group is facing insolvency proceedings and its assets (including its vessels) are being attached by creditors the world over.?

14 Mr. Pratap, further submitted that the arrest Order was obtained on the basis that all vessels were owned by Defendant No. 2, whereas that averment has been proved to be false by virtue of the amendment sought to the plaint and the reply filed to the Notice of Motion. He further submitted that the 1st Defendant-Vessel was bought by Hartati Shipping on 12-11-2008 and claims of the Plaintiffs pertains to the period from August, 2011 to August, 2012 and, therefore, the Plaintiffs certainly knew and would have known while filling the suit as to who were the real registered owners of all the vessels. He submitted that the Plaintiffs have deliberately made false statement suppressing material facts and obtained the order of arrest on the basis of false averments in the plaint. He further submitted that the Plaintiffs, if it has to go against the assets/ships owned by a group of companies on the basis of beneficial ownership has to show that all the companies were formed to defraud the creditors while obtaining the Order of arrest.

15 In support of his submissions, Mr. Pratap, first relied upon the œMaritime Trader? (1981), Vol. 2, LLR 153. In that case the arrest of the vessel, Maritime Trader was held to be wrongful on the basis that the only vessels which might be arrested in respect of a maritime claim were the particular ship in respect of which the claim arose and any other ship in the same ownership. In that case arrest was sought of a ship beneficially owned by demise charterers and the Court held that it was not a sister ship of the ship they had chartered. The facts in that case were that MTS were the owners of the vessel Maritime Trader. All the shares in MTS were owned by another company MTO. The Plaintiffs in that case had given on charter their vessel to MTO. A number of claims of the Plaintiffs arose out of the charter and the Plaintiffs issued a writ against the vessel Maritime Trader on the contention that the Maritime Trader was beneficially owned in respect of all the shares therein by MTO. The Court held as under:-

œAll the shares in MTS are owned by MTO. The question is whether at the time when the action was brought Maritime Trader was beneficially owned as respects all the shares therein by MTO, the person who would be liable on the claim in an action in personam. The starting point is the fundamental principle of company law that a shareholder has no property legal or equitable in the assets of the company.

Following that principle, MTO, who owned all the shares in MTS has no property in Maritime Trader which was one of the assets of MTS. My attention was drawn to the decision of Mr. Justice Pennycuick in Rodwell Securities v. The Inland Revenue Commissioners, (1968) 2 All E.R. 257, and in particular to a short passage on p. 260 in which that learned Judge said:

According to the legal meaning of the words a company is not the beneficial owner of the assets of its own subsidiary. The legal meaning of the words takes account of the company structure and the fact that each company is a separate legal person.

From that starting point there is no way in which it can be said that Maritime Trader was œbeneficially owned as respects all the shares therein? by MTO, unless the corporate veil can be lifted. I would not hesitate to lift that veil if the evidence suggested that it obscured from view a mask of fraud rather than the true face of the corporation.

I have already referred to the fact that Maritime Trader has been owned by MTS since she was built nearly five years ago. When Antaios was chartered to MTO on Mar. 25, 1980, Maritime Trader had been in the registered ownership of MTS for over four years. There was no device or sham designed to defraud the plaintiffs. If, when the plaintiffs agreed to charter Antaios to MTO, they had been concerned about the assets of MTO, they would or could have found out that Maritime Trader was not a part of those assets.

The Court in all cases can and in some cases should look behind the registered owner to determine the true beneficial ownership. I do not dissent from that view. In that case there was much to be investigated in order to see whether each change of ownership was genuine or a sham. Circumstances may justify the lifting

of the corporate veil or more than one veil, if that is necessary, to reveal the truth. But I also agree with Mr. Justice Slynn that the onus is upon the plaintiffs to show that the person against whom it is sought to invoke the Admiralty jurisdiction by arresting his ship is the person who beneficially owns all the shares in that ship and that he is the person who is liable in an action in personam.

The evidence upon which I have to decide that matter does not raise even a prima facie case that the ship Maritime Trader was purchased by MTS in 1976 in order that it would not be available as security for a judgment against MTO. If, of course, the parent company, MTO, is unable to pay its debts and is wound up, one of the assets of the company will be its shareholding in MTS. The value of those shares must depend upon the assets and liabilities of MTS, about which I have no evidence. Mr. Saville asked the rhetorical question, œWhat is wrong with using the company structure to limit liability?? To that question he said that the answer must be, œNothing, unless it is a sham?. I agree.? (emphasis supplied)

16 I totally agree with this judgment which goes to show that there is nothing wrong with a person owning different ships in the names of different companies unless it is a sham. The onus is on the Plaintiffs to show that the company structure is a sham and a mask to play a fraud on the public.

In this case that is not even the Plaintiffs stand as could be seen in the plaint as originally filed and even after amendment.

17 Mr. Pratap also relied upon the œEvpo Agnic? (1988), Vol. 2, LLR 411. He relied on the said judgment to buttress his submission that the Plaintiffs have to show evidence that the owners of all the vessels to whom supplies have been made throughout are the same. In other words the ships should be in the same ownership and that the Plaintiffs did not have the right to arrest a ship which was a ship of a sister company of the owners of the ship against whom the Plaintiffs had a claim.

18 Mr. Pratap also relied upon the MAWAN (1988), Vol. 2, LLR 459 to submit that for a claim against the vessel the person who will be liable to the Plaintiff in personam was the registered owner and if the action is brought against another

vessel the Plaintiff has to show that the company who was liable in personam also owned the shares in the vessel against which the interim action is commenced. In that case, Defendant-Vessel Stanley Bay became a total loss while she was carrying the Plaintiffs cargo. The Plaintiffs sought to recover that loss from a sister ship of Stanley Bay, MAWAN. After writ was issued but before she was arrested, MAWAN was sold. The new owners of MAWAN which was renamed as MARA had applied for setting aside the writ of summons and warrant of arrest and return of security. While setting aside the Order of arrest, the Court gave its reasons as under:-

œThe plaintiffs' case is more complex. Mr. Ruttle placed before the Court a schedule which gave in outline a history of the two ships Stanley Bay and Mara. The fact that they were built to the same design and were in that sense sister ships is not relevant to the issue on this motion. The first relevant fact is that in 1983 the owners of the two ships, Botelho Shipping Corporation of the Philippines sold Stanley Bay to Chang Chun Shipping Co. Ltd. and Mara to Chang Bai Shan Shipping Co. Ltd. Both those companies had been registered in November, 1981. Their registered addressed were 601, Prince's Building, Charter Road, Hong Kong and they had the same directors, namely Nomitor Ltd. and Willserve Ltd. Both of the ship-owning companies have a nominal share capital of Hong Kong $1000 divided into 1000 shares. Only two shares have been issued by each company, one to Wilgrist Nominees Ltd. and one to Wilvester Ltd. These latter two companies have the same registered addresses as Chang Chun and Chang Bai Shan. Wilgrist Nominees has a nominal share capital of $1000 divided into 1000 shares, of which only 200 have been issued. Those issued shares are held as to 90 by Mr. Ian MacCallum, as to 50 by Mr. Ella Cheung, as to 25 by Mr. Neil James. Those four gentlemen are solicitors and partners in the firm of Wilkinson and Grist, who practice at 601, Prince's Building, Hong Kong.

Mr. Ruttle, on behalf of the plaintiffs, opposed this motion with a characteristically attractive argument. But when he was invited to identify œthe relevant person? for the purposes of s. 21 he declined the invitation, save that he said that it was the person or company who was the beneficial owner of Mawan. I intend no disrespect for his able argument when I say that its substance can be distilled into one

sentence. He submits that, if one looks at all the connecting links between the shareholders, the directors and management of Chang Chun and Chang Bai Shan, it becomes crystal clear that the beneficial ownership of these two ships is vested in the same person or company and that, therefore, they are truly sister ships despite the efforts of the owners to conceal that fact.

That approach involves not merely lifting a corporate veil but also sweeping aside all the corporate structure. In 1952 when the Convention Relating to the Arrest of Seagoing Ships was signed at Brussels the High Contracting Parties agreed that a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. At the time when that agreement was reached, limited liability companies were well known. It must have been in the minds of all the parties to that agreement that ship owners would seek to reduce the possibility of the arrest of œtheir? ships by incorporating œone ship companies?. They have done so.?

19 Mr. Pratap submits that, therefore, the vessels are not sister ships and at best could be termed as owned by sister companies and Plaintiffs will have to make a case for lifting of corporate veil in which they have failed.

20 In contrast, Mr. Vishal Sheth, Counsel for the Plaintiffs submitted, (a) that owner of the ship referred to Article 3 (2) (a) cannot be restricted to only the registered owner but be extended to beneficial owners as well. He submitted that the owner of the ship in the 1999 arrest convention does not mean only registered owner but would include beneficial owner as well and for that purpose corporate veil could be pierced; and (b) for piercing corporate veil there is no need to allege or prove fraud.

21 In support of his second submission that fraud need not be alleged or proved, he first relied upon the judgment of Supreme Court of India in the matter of Life Insurance Corporation of India v. Escorts Limited and others reported in A.I.R. 1986, Supreme Court 1370 where in para 90, the Apex Court said:-

œGeneral and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since, that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.?

22 He later relied upon the unreported judgment of the Division Bench of this Court in the matter of Lufeng Shipping Company Limited v. M.V. Rainbow Ace and Anr. (Appeal (L) No. 228 of 2013 in Admiralty Suit No. 29 of 2013). The Counsel submitted that the said matter also was regarding arrest of a ship by piercing the corporate veil where the beneficial owner of the vessel sought to be arrested was also beneficial owner of Respondent company. He relied on para 13 which reads as under:-

œIn this case it is not the case of the appellant that the applicant company has been created so as to only defeat the maritime claims against the Respondent No. 2 company. In the present facts it is not the case of the appellant that the applicant company is a subsidiary of the Respondent No. 2 company when possibly it could be said that the holding company is the beneficial owner of the subsidiary company. In cases where two independent companies are both 100% subsidiary of a common holding company then it may be possible to contend that the beneficial owner of both the companies is the common holding company. These are not the facts in the present case as the applicant company and the Respondent No. 2 company are not subsidiaries of one common holding company or have subsidiary and holding company relationship inter se.?

23 According to Mr. Sheth in every case, therefore where there is a common holding company, the claim against one subsidiary of that holding company can be enforced against the asset of another subsidiary company or the holding company. He submitted that if it is true that two independent companies are both 100%

subsidiaries of a common holding company then it means that beneficial owner of the companies is the common holding company and hence no fraud need to be even alleged later or proved and the Court can order the arrest of the vessel belonging to a subsidiary company for a claim against the vessel owned by another company.

24 I disagree with Mr. Sheth. The Division Bench has not held what Mr. Sheth is suggesting. An odd observation of the Court when such issue was not raised or decided does not become a binding precedent. In the matter of State of Orissa and Ors. vs. M.D. Illiyas (2006) 1 SCC 275, the Apex Court held as under:-

œReliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See: State of Orissa v. Sudhansu Sekhar Misra and Union of India v. Dhanwanti Dev i). A case is a precedent and binding for what it explicitly decides and no more.?

25 He also relied upon the matter reported in A.I.R. 1988 Supreme Court 1737 “ State of U.P. and others v. Renusagar Power Co. and others, in support of his contention that the frontiers for lifting the corporate veil is unlimited and the Plaintiff need not allege any fraud.

26 He also relied upon another judgment reported in 2005 (2) Mh. LJ 700 “ Lok Housing and Constructions Ltd. and Anr. vs Everest Industries Ltd. and anr. This judgment is absolutely irrelevant to matter in hand as that matter related to rejection of plaint under Order 7, Rule 11. of the C.P.C., 1908

27 The Plaintiffs's Counsel's reliance on the matter of LIC v. Escorts to suggest there is no need to plead fraud is misplaced. That case related to lifting of corporate veil under the scheme framed under the Foreign Exchange Regulation Act, 1973 to determine who the shareholders are. The Apex Court while disposing of the appeal observed that the lifting of corporate veil was necessary to discover the nationality and origin of the shareholders because under the scheme for investment in shares of Indian companies for non-residence companies itself provided for lifting of the corporate veil. The facts in that case were totally different and had no similarity even remotely to the case in hand. That judgment is not at all applicable to the present case.

28 Even the judgment in Rainbow Ace is of no assistance to Mr. Sheth. Paras 9, 10 and 11 in the judgment of the Division Bench of this Court in the matter of Rainbow Ace reads as under:-

œ9) While interpreting the above provision, the Supreme Court in Liverpool and London S.P and I Association Ltd. v. Sea Success 2004 (9) SCC 512 while holding that Arrest Convention 1999 would be applicable to India even though India is not a signatory thereto has held that the same would be subject to a) domestic law which may be enacted by Parliament and b) for enforcement of the contract involving public law character. Therefore the issue to be examined is whether the Indian corporate law accepts the proposition that in the absence of allegation of fraud, it is open to ignore the independent corporate identity of a limited company and to lift the corporate veil to identify the shareholder as owner of the property of the limited company.

10) The Supreme Court in Indo wind Energy Ltd. V Wescare (India) Ltd. 2010(5) SCC 306 has held that each company incorporated under the Companies Act has a separate and distinct legal entity from its shareholders and other companies. Therefore, the mere fact that the two companies have common shareholders or

common Board of Directors will not convert the two companies into a single entity. Similarly as far back as in 1955 Supreme Court in Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay AIR 1955 SC 74 held that the companies does not buy any interest in the property of the company. This was on the basis that an incorporated company has an identity different and distinct from that of its shareholders. The submission of the appellant that the concept of beneficial owner by itself implies the concept of lifting the corporate veil and in support of which reliance is placed upon the decision of the Apex Court in M.V. Elisabeth and ors. Vs. Harwan Investment and Trading Pvt. Ltd. 1993 Supp. (2) SCC 433 as well as the decision in Liverpool and London S.P. and I Association Ltd. v. Sea Success (supra) and the Calcutta High Court decision in Owners and Parties Interested in the Vessel M.V. œDong Do? and anr. v. Ramesh Kumar and Co. Ltd. 2001 (2000) 1 CALLT 367 (H.C.).

11) We find that the submission of the appellant on the above basis is not sustainable as in none of the cases did the court permit the lifting of the corporate veil to make the shareholder of a corporate entity the owner of a property belonging to the incorporated company. In the case of M.V. Elisabeth (supra) the issue which arose for consideration was the question of jurisdiction viz. whether Andhra Pradesh High Court had jurisdiction in its admiralty jurisdiction to proceed against a foreign ship owned by a foreign company not having a place of business in India. The arrested vessel viz. M.V. Elizabeth was the vessel against which a maritime claim had arisen and no issue of lifting the corporate veil arose. In the course of Judgment the Apex Court had observed in Para 46 thereof that the jurisdiction can be invoked against a sister ship i.e. a ship in the same beneficial ownership. In the present case the arrest is being sought not of a sister ship i.e. a ship in the ownership of the same person but a ship/vessel owned by a sister company of the company against which maritime claim arose. In Liverpool and London S.P and I Association Ltd. v. Sea Success (supra) the issue for consideration was whether the non payment of insurance premium gave rise to a maritime claim. The premium was not paid in respect of vessels Sea Ranger and Sea Glory. The vessels Sea Ranger, Sea Glory and Sea Success were owned by the same owner. The vessel arrested was Sea Success. No issue of lifting the corporate veil for the purpose of arresting Sea Success arose. In the case of M.V.

Dong Do (supra) Calcutta High Court held that under the Indian Law, shareholders of a company are not the owners of the assets of the corporate entity. The Court set aside the arrest of the vessel even though it was alleged that both the vessels were ultimately owned by the companies. The Calcutta High Court negatived the aspect of beneficial ownership as extending to shareholders of an incorporated entity and as an illustration pointed out that in India various Government Companies are in existence who are independent of each other having a distinct identity. Therefore a ship belonging to Shipping Corporation of India cannot be said to be a sister ship of a ship belonging to Oil and Natural Gas Commission to enable the arrest of ship owned by one company for the maritime claim arising in respect of another company.?(emphasis supplied)

29 I am afraid, as regards his first submission that œowner? is to be read as œbeneficial owner? and not œregistered owner?, I cannot agree with the submissions of the learned Counsel for the Plaintiffs. As to how did the Plaintiffs and what is the basis on which the Plaintiffs obtained an order of arrest has to be seen. Arrest Convention 1999 is a legal instrument to establish international uniformity in a field of arrest of ships taking into account developments in related fields. Article 3 (1) relates to arrest of a ship in respect of which a maritime claim is asserted. Article 3 (2) relates to arrest of any other ship or ships other than ship in respect of which a maritime claim is asserted. Which œany other ship or ships can be? is clearly mentioned in Article 3 (2) (a)?. Those are ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the maritime claim arose a owner of the ship in respect of which a maritime claim arose. Though the Arrest Convention has not defined who the œowner? is, it certainly means a œregistered owner?. The reason why it has to be meant a registered owner is because the only person who could held be liable for a claim against the ship, is the person who owns all the shares in the ship and who would be liable on the claim in an action in personam. The only person who can be liable for action in personam is the registered owner of the vessel and no one else. If the owner should be meant to be beneficial owner, the convention would have said beneficial owner. This is because beneficial owner need not mean he is the registered owner. On the contrary registered owner or the owner in whose name the ship is registered would also be the beneficial owner unless

otherwise proved. S. 25 (b) and (c) of the Merchant Shipping Act, 1958 makes it very clear. It reads as under:

œ25. Register book. Every registrar shall keep a book to be called the register book and entries in that book shall be made in accordance with the following provisions:-

(a) .....

(b) subject to the provisions of this Act with respect to joint owners or owners by transmission, not more than ten individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial interest of any number of persons represented by or claiming under or through any registered owner or joint owner;

(c) a person shall not be entitled to be registered as owner of a fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint owners of a ship or of any share or shares therein.?

30 Therefore upto 10 individuals shall be entitled to be registered at the same time as owners but each of them may represent beneficial interest of many others who may hold a fractional part of a ship.

31 Further rules of interpretation require that a word should be given its normal, plain and natural meaning. An owner will naturally mean a person in whose name the ship is registered. A ship is not registered in the name of the beneficial owner. A beneficial owner only owns the shares in the company in whose name the ship is registered. If the beneficial owner is wound up or if an individual's assets are attached, one of the assets of the company or the individual will be the shareholding in the company in whose name the ship is registered. The ship will not be the asset of the beneficial owner company or individual. Let us assume the situation where the Plaintiffs chose to file action in personam and not in rem. Will the action in personam be filed against the owning company or the beneficial owner? The answer undoubtedly is the owning company.

32 Moreover when the 1999 Arrest Convention came into effect or was signed at Geneva, limited liabilities companies were well known and one vessel owned companies were also well known. It must have been in the mind that the convention was signed with the ship owners to seek to reduce the possibility of arrest of œtheir? ships by œincorporating one ship companies?. Therefore, the owner of the ship referred to in the convention has to be registered owner. This is more so because the convention also provides for demise charterer or manager or operator or time charterer or voyage charterer of a ship. Article 3 (2) of the 1999 Convention provides as under:-

œ3(2) Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose.

If it was to extend to ships belonging to different companies but under common holding, the convention would have said so expressly.

33 Moreover Article 3 (3) of the 1999 Arrest Convention provides as under:

œ3. Notwithstanding the provisions of paragraphs 1 and 2 of this article the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.?

34 Indian law views each company incorporated under the Companies Act as a separate and legal entity from its shareholders and other companies and the fact that the two companies have common shareholders or common Board of Directors will not convert the two companies into a single entity [INDO WIND ENERGY LTS. Vs WESCARE (INDIA) LTD. 2010 (5) SCC 306]. The apex court in Bacha F. Guzder vs Commissioner of Income Tax AIR 1955 SC 74 held that shareholders do not buy any interest in the property of the company and an incorporated company has an identity different from that of its shareholders. It is also trite that Indian law does not permit one to ignore the independent corporate identity of a limited company and to lift the corporate veil to identify the shareholder as owner

of the property of the limited company in the absence of fraud.

35 This is the legal position in many countries. It is for that reason when it comes to arrest of ships in India, Article 3 (3) of the 1999 convention must be read to provide that arrest of a ship which is not owned by the person liable for the claim shall be permissible, which means arrest of a ship in common beneficial ownership is permissible, if Indian Law would permit.

36 Indian law says shareholders are not the owners of the assets of the company. Therefore, to arrest a ship which is not owned by the person liable for the claim, which means arrest of a ship under common beneficial ownership, is not permissible unless fraud is established.

37 Here is a case where Plaintiffs have obtained an order of arrest of the 1st Defendant-Vessel. The order of arrest obtained is a very drastic step and moreover it is obtained ex-parte. An incorporated company has an independent identity and is different and distinct from that of its shareholders. The submission of the Plaintiffs that the concept of beneficial owner by itself requires the lifting of corporate veil is not sustainable. None of the case relied upon by the Plaintiffs permitted lifting of corporate veil to make the shareholders of a corporate entity the owner of a property belonging to the corporate entity. None of the judgment relied upon by the Plaintiffs support the fact that the order of arrest can be obtained of a vessel which is owned by a different entity not by the entity that owned the vessel against which the maritime claim arose just because both the entities are owned by a common holding entity.

38 In some cases the Court could look behind the registered owner to determine the beneficial ownership. It could lift the veil not once but more than once but the necessary ingredient for doing so is that the independent companies are nothing but sham to defraud the creditors. For two or more ships to be called sister ships they have to be registered under the same ownership. For two ships owned by different entities to be called sister ships, the corporate veil has to be pierced. To pierce corporate veil fraud has to be established. Fraud has to be prima face established at the time of obtaining the order of arrest. A mere bald averment in the plaint is not enough. There has to be prima face evidence which would show

that the intention of the owners to register the ships in different names was to play a fraud on the creditors or a sham to mask the true owners and it should be such that in all likelihood this allegation will be sustained during the final hearing of the Suit. Otherwise it would set a wrong trend. As illustrated in M.V. Dong DO (Supra) in India various government companies are in existence who are independent of each other having a distinct identity. In foreign jurisdictions a Shipping Corporation of India ship might get arrested for a claim against ONGC by simply showing common ownership and baldly alleging fraud and the judgments of our Courts will be used for persuasive effect.

39 In this case, the Defendant No. 1 has admitted that all the ships listed in œEx. E? in the plaint are owned by companies which are subsidiaries of a common entity. My question is what is wrong in that if somebody had business in that fashion. There is nothing wrong unless it is being done with an intention to defraud or with a view to mask the fraud or it is a sham. It is not even the case of the Plaintiffs in the plaint that BLT has created all these companies to own the individual vessel with a view to mask the fraud or to defraud the Plaintiffs or other creditors or it is a sham. It is not even alleged in the plaint as it was originally filed or even when it was amended. Even when the leave to amend the plaint was sought, there is no allegation of fraud or a sham. On the contrary, the Plaintiffs had obtained ex-parte order of arrest on the ground that Defendant No. 2 vessel owned the Defendant No. 1 vessel and several other vessels. This was later amended to state that Defendant No. 2 along with BLT are the owners/beneficial owners/the entity which are in various fields (including Defendant No. 1 vessel) formed part of their fleet. Just because BLT owns various entities/incorporated companies, and each of the entities/incorporated companies owned different ships does not make all the ships sister ships and does not entitle any claimant to seek arrest of a ship owned by particular entity for a claim against a ship owned by another entity just because both the entities are subsidiaries of a third entity. Of course, there could be an exception. The exception will be where the Plaintiff is able to prove that all the companies were formed and all the ships were registered in the ownership of the respective companies only with an intention to defraud the Plaintiffs or creditors and the registered owners of the ships are sham companies. In this case, the 1st Defendant-Vessel was purchased by Hartati Shipping Private

Limited in November, 2008 whereas the claims pertain to August, 2011 to August, 2012. This itself shows that the 1st Defendant-Vessel was not registered in the name of Hartati Shipping Private Limited as a sham or to defraud the Plaintiffs. Moreover the admitted position is that the claim relating to 1st Defendant-Vessel has been paid off by Hartati Shipping Private Limited.

40 In the circumstances, the order of arrest or retention of security furnished for release of Defendant No. 1 cannot be sustained. Notice of Motion is allowed in terms of prayer clause " (a).

41 The Prothonotary and Senior Master, High Court, Bombay is directed to forthwith recall/foreclose the fixed deposit and return the amount of Rs. 24,75,000/- furnished on behalf of Defendant No. 1 together with interest accumulated thereon to Hartati Shipping Private Limited.

42 The Defendant No. 1 in my opinion is also justified in claiming cost and is entitled to cost. The Plaintiffs are directed to pay a sum of Rs. 1,00,000/- as cost to the Advocates for Defendant No. 1. 43 The Counsel for the Plaintiffs seeks stay of the judgment.

The Judgment is stayed for a period of 1 week from today.

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