
(2015) 01 MAD CK 0237

In the Madras High Court

Case No : Application No. 7903 of 2014 in C.S. No. 805 of 2014

Akash Dredging and Marine Services (P) Ltd.

APPELLANT

Vs

Owners and Parties interested in the Dredger CSD MARG
CAUVERY

RESPONDENT

Date of Decision : 12-01-2015

Acts Referred:

Merchant Shipping Act, 1958 — Section 407, 7

Citation : (2015) 1 CTC 827 : (2015) 2 MLJ 272

Hon'ble Judges : R. Subbiah, J.

Bench : Single Bench

Advocate : S. Vasudevan, for the Appellant; T. Poornam and A. Karunakaran,
Advocates for the Respondent

Judgement

1. The present Application has been filed by the Applicant/Plaintiff to grant an Order of Arrest of the Defendant-Dredger CSD MARG CAUVERY, lying at the Karaikal Port, India or wherever available together with her engines, gears, tackles, apparel, plant, machinery, furniture and fittings and paraphernalia pending disposal of the Suit. The Suit has been filed by the Plaintiff for the following reliefs:

"(i) For recovery of a sum of Rs. 6,47,67,717/- with interest at the rate of 18% per annum from the date of Plaint till the date of realization in full;

(ii) For arrest and sale of the Defendant-Dredger CSD MARG CAUVERY in as is where is condition, now lying at the Karaikal Port, India, or wherever available together with her engines, gears, tackles, apparel, plant, machinery, furniture and fittings and paraphernalia;

(iii) For a direction to adjust the sale proceeds of the Defendant-Dredger CSD MARG CAUVERY against the Suit claim of the Plaintiff; and

(iv) For costs of the Suit."

2. The averments made in the Plaint, in brief, are as follows:

"(a) The Plaintiff is a Private Company incorporated under the Companies Act, 1956, having its Administrative Office at Block B, Kakatiya Nagar, Habsiguda, Hyderabad. The Defendant is the Owners and Parties interested in the Dredger CSD MARG CAUVERY, which is a Dredging Vessel presently lying at the Karaikal Port, India.

(b) The Plaintiff is carrying on business of excavation, Dredging and other allied works in all Ports in India. The Owners of the Defendant-Dredger are M/s. Marg International Dredging Pte. Ltd., a Company registered under the laws of Singapore. The Dredging Vessel CSD MARG CAUVERY has been chartered to M/s. Marg Limited, Chennai under Demise Charter/Bareboat charter and flying the flag of Republic of Comatose. Though M/s. Marg Limited is the Owner of the Dredging Vessel, they have authorized the Employees of Karaikal Port to sign all letters and communications through the Employees of Karaikal Port, in view of the fact that the entire Operation, Manning, Repair and Maintenance of the Dredging Vessel CSD MARG CAUVERY was communicated, looked after by both Karaikal Port and M/s. Marg Limited as the Directors in both the Companies are one and the same and the Karaikal Port being the subsidiary of M/s. Marg Limited. For all practical purposes M/s. Mark Limited was in Control, Management of the Defendant-Dredging Vessel CSD MARG CAUVERY.

(c) The Owners of the Defendant-Dredger entered into an Agreement for the period from 1.4.2010 to 31.3.2011 with the Plaintiff by which it required services of the Plaintiff for Operation, Manning, Repair and Maintenance of CSD MARG CAUVERY for the purpose of deep excavation, dredging related works, in Port/Harbour at Karaikal Port. The Plaintiff is entitled to payment as per Clause 2 of the said Agreement. The scope of the Owners of the Defendant-Dredger are referred to Clause 4 of the said Agreement. As per Clause 15 of the Agreement, the parties are at liberty to terminate the Agreement dated 1.4.2010 and upon termination, the Plaintiff is entitled for payment on pro-rata basis for the completed work and the Plaintiff shall hand over the Dredging Vessel CSD MARG CAUVERY together with all other items as mentioned in Clause 15.

(d) After signing the Agreement dated 1.4.2010, the Plaintiff had periodically rendered the services of Operation, Manning, Repair and Maintenance of the Dredging Vessel CSD MARG CAUVERY. The Plaintiff has been raising invoices for the work done as per Clause 2 of the payment terms. The Owners of the Defendant-Dredger have also been making payment as and when the invoices were raised and prior to payment, the work done was verified by the representatives of the Defendant and survey carried by them. Subsequently, by an Addendum dated 1.4.2011 to the contract dated 1.4.2010, the contract was further extended in respect of the Defendant-Dredging Vessel CSD MARG CAUVERY for a further period from 1.4.2011 to 31.3.2012. Likewise, by subsequent Addendum dated 31.3.2012, the period was extended from 1.4.2012 till 31.3.2013. Again by Addendum dated 28.3.2013, the period was extended

from 1.4.2013 to 31.3.2014. In the said Addendums, there are not many changes in respect of the original terms of contract. In the last Addendum dated 28.3.2013 alone, the following changes were made:

"1. In the payment Clause No. (2) to include the following:

(a) However, for the period when the Operator is not required to perform the Reclamation Management as specified in Point No. 3 under Annexure then the Operator will be eligible only for a consolidated lumpsum payment of Rs. 30,00,000/- per month inclusive of Service Tax for such period.

(b) The contract period specified in Clause 3 is hereby extended for one year from 1.4.2013 till 31.3.2014.

(c) Save the above all other terms and conditions under the Work Order shall remain unaltered and in force.

(d) As amended in force as on the date of this Addendum and the Addendum shall apply, bind and govern the parties to this Addendum and it shall accordingly form an integral part of the Work Order.

(e) The Plaintiff has been carrying out the work entrusted to them without committing any breach and has been sending invoices duly certified by the authorized representatives of the Owners of the Defendant-Dredging Vessel CSD MARG CAUVERY for the purpose of payment for them. The Owners of the Defendant-Dredger have also been making payment. As on 1.3.2013, the value of the work done was for Rs. 6,39,15,521.52. In respect of such work done, a sum of Rs. 3,05,04,537/- was paid leaving a balance of Rs. 3,34,10,984.52. The said amount was duly acknowledged by the Owners of the Defendant-Dredger and payable upto 31.3.2013, which was communicated by the Plaintiff through e-mail dated 26.7.2013. Even after acknowledging the liability, the Owners of the Defendant-Dredger failed to pay the admitted amount. The Plaintiff also communicated through various e-mails including one dated 23.11.2013 and demanded the Defendant to make the payment else expressed their difficulty to carry on the work as the Crew were refusing to work. This has resulted in the Crew of the Dredger refusing to work on board the Dredging Vessel CSD MARG CAUVERY. Ultimately, in October 2013, the entire work of Operation, Manning, Repair and Maintenance of the Defendant-Dredger came to an abrupt halt for the reasons best known to the Owners of the Defendant-Dredger. However, the Plaintiff has been rendering services even after 1.3.2013 since the contract was to end only on 31.3.2014. As on date, a sum of Rs. 5,35,27,039/- was due towards the principal alone. A sum of Rs. 43,60,339/- became due towards interest alone upto 31.3.2013, which was communicated by e-mail dated 19.9.2013 to the Owners of the Defendant-Dredger. Now, as per the Statement of Account filed along with the Plaint, the balance amount due and payable by the Owners of the Defendant-Dredger works out to Rs. 6,46,67,717/-. The Plaintiff has been writing several letters and reminders to the Owners of the Defendant-Dredger requiring payment. The Plaintiff has also sent a Lawyer's

notice through their Advocate on 12.9.2014, but till date, there is no response from the Owners of the Defendant-Dredger.

(f) The Owners of the Defendant-Dredging Vessel CSD MARG CAUVERY are facing financial crisis and are unable to pay many of their creditors including the Plaintiff. The Plaintiff has got a maritime claim over the Defendant-Dredging Vessel CSD MARG CAUVERY for the service rendered viz., Operation, Manning, Repair and Maintenance of the Defendant-Dredger apart from doing the dredging operations. Hence, the present Suit."

3. Pending Suit, the Plaintiff has filed the present Application in A. No. 7903 of 2014 seeking arrest of the Defendant-Dredger Vessel. When the said Application came up for hearing on 5.12.2014, this Court has passed an Interim Order for arrest of the Defendant-Dredging Vessel CSD MARG CAUVERY. On appearance, the Owners of the Dredger viz., M/s. Marg International Dredging Pte. Ltd., has filed a Counter. The sum and substance of the averments made in the Counter filed by M/s. Marg International Dredging Pte. Ltd., is as follows:

"(a) M/s. Marg International Dredging Pte. Ltd., Singapore, is admittedly the registered Owner of the Defendant-Dredging Vessel. The registered Owner has not entered into any contract, Agreement or arrangement with the Plaintiff and no amount whatsoever is payable by the registered Owner to the Plaintiff much less the sum of Rs. 6,47,67,727/- as claimed in the Plaint. The registered Owner of the Defendant-Dredging Vessel entered into a Demise/Bareboat charter with M/s. Marg Limited. The said Charter expired. Upon expiry of the said Demise Charter with M/s. Marg Limited, the registered Owner entered into a fresh Bareboat/Demise Charter on 24.11.2014 with one M/s. Pelagia Marine Services Pte. Ltd.

(b) M/s. Marg International Dredging Pte. Ltd., Singapore is and has been the Owner of the Defendant-Dredging Vessel at all material times viz., when the alleged maritime claim arose and on 5.12.2014 when the Order of Arrest was passed. But, the registered Owner is not liable for the alleged claim made by the Plaintiff in the present Suit. The Charter between the registered Owner viz., M/s. Marg International Dredging Pte. Ltd., and the charterer viz., M/s. Marg Limited had expired much earlier to the filing of the Suit. On 5.12.2014, the date on which the Order of Arrest was passed, M/s. Marg Limited ceased to be the Demise Charterer of the Defendant-Dredging Vessel. Even assuming without admitting that the Demise Charterer viz., M/s. Marg Limited is liable for the claim of the Plaintiff, the present Suit would not be maintainable as M/s. Marg Limited is no longer the Demise Charterer or Owner of the Defendant-Dredging Vessel as on 5.12.2014. As on date, the Owner of the Defendant-Dredging Vessel is M/s. Marg International Dredging Pte. Ltd., and the Demise Charterer is M/s. Pelagia Marine Services Pte. Ltd. As neither the registered Owner nor the present Demise Charterer are liable for the alleged claim of the Plaintiff, the present Suit is not maintainable and the Order of Arrest passed by this Court on 5.12.2014 is liable to be vacated.

(c) Neither the registered Owner nor the present Demise Charterer are parties to the said Agreement or addendum mentioned in the Plaint. The Plaintiff has raised invoices only on M/s. Marg Limited, which was a Demise Charterer at the relevant time. Therefore, it would be clear that neither the registered Owner nor the present Demise Charterer are liable in respect of the claim made in the Plaint. Thus, they sought for the dismissal of the Application and for vacating the Order of Arrest."

4. Counter Affidavit has been filed on behalf of M/s. Pelagia Marine Services Pte. Ltd., wherein it has been stated that presently, M/s. Pelagia Marine Services Pte. Ltd. is the Demise Charterer/Disponent Owner of the Defendant-Dredging Vessel pursuant to a Charter Party Agreement dated 24.11.2014 between the Disponent Owner and M/s. Marg International Dredging Pte. Ltd., the Owner of the Defendant-Dredging Vessel. Admittedly, M/s. Marg Limited with whom the Plaintiff had a contract for Operation, Manning, Repair and Maintenance of the Defendant Vessel is not the Owner of the Defendant-Dredging Vessel as on date and was also not the Owner of the Vessel on the date when the present Suit was filed or when the Order of Arrest dated 5.12.2014 was effected. The Owner and the Disponent Owner entered into a Demise Charter on 24.11.2014. Neither the Owner nor the Disponent Owner are personally liable to the Plaintiff in respect of the alleged claim of the Plaintiff. Therefore, the Order of Arrest dated 5.12.2014 obtained by the Plaintiff is wrongful. Now, the Disponent Owner is being put to grave financial loss and hardship due to the Order of Arrest passed by this Court on 5.12.2014. The Owner viz., M/s. Marg International Dredging Pte. Ltd., Singapore is and has been the registered Owner of the Defendant Vessel at all material time including when the alleged maritime claim arose and on 5.12.2014, when the Order of Arrest was passed and continues to be the registered Owner of the Defendant Vessel as on date. Now, M/s. Pelagia Marine Services Pte. Ltd., became the Disponent Owner of the Vessel on and from 24.11.2014. Hence, it is not open to the Plaintiff to seek arrest of the Defendant Vessel in respect of which M/s. Marg Limited is neither the registered Owner/Demise Charterer nor Disponent Owner at the relevant point of time. Thus, they sought for the dismissal of the Application and sought to vacate the Interim Order of Arrest.

5. A detailed reply Affidavit was filed by the Plaintiff and the crux of the reply Affidavit is as follows:

"M/s. Marg Limited is the Holding Company and M/s. Marg International Dredging Pte. Ltd. is its wholly owned subsidiary i.e., M/s. Marg Limited is holding 100% of the share capital of M/s. Marg International Dredging Pte. Ltd. The Chairman and Managing Director of M/s. Marg Limited and also the Director of M/s. Marg International Dredging Pte. Ltd. is one and the same person. The deponent to the Counter Affidavit viz., one Rabindra Kumar Samal, is the Company Secretary of M/s. Marg Limited and is said to be the Authorized Signatory of M/s. Marg International Dredging Pte. Ltd. The alleged Agreement dated 24.11.2014 entered into between the registered Owner viz., M/s. Marg International

Dredging Pte. Ltd. with M/s. Pelagia Marine Services Pte. Ltd., is not a charter party Agreement or a Demise Charter. The said Agreement dated 24.11.2014 is a fabricated one for the purpose of this case with an ulterior motive to avoid the Plaintiff's legitimate debt. The Owners of the Defendant-Dredger are playing a fraud not only on the creditors like the Plaintiff but also producing such fabricated and fraudulent documents to this Court with a view to misguide this Court to get the Order of Arrest dated 5.12.2014 lifted. The Order of Arrest was granted on 5.12.2014 and served on the Dredger on 6.12.2014. Whether the Dredging Vessel CSD MARG CAUVERY is owned by M/s. Marg Limited or M/s. Marg International Dredging Pte. Ltd., Singapore is a question to be decided only during trial. There is no need to even lift the Corporate Veil to see, who is exactly the actual Owner. The Dredging Vessel cannot be released at this stage on the bald and baseless averments contained in the Counter Affidavit." 6. The Owner M/s. Marg International Dredging Pte. Ltd. has also filed a Rejoinder to the Reply Affidavit filed by the Plaintiff, reiterating the averments made in the Counter.

7. I have heard the submissions made on either side and perused the entire materials available on record.

8. (I) Learned Counsel appearing for the Plaintiff submitted that the Plaintiff has got maritime claim over the Defendant-Dredging Vessel CSD MARG CAUVERY for the service rendered by them viz., Operation, Manning, Repair and Maintenance of the Defendant-Dredger apart from doing the dredging operations. The amount due to the Plaintiff was also acknowledged by the Owners of the Defendant-Dredger and payable upto 31.3.2013 which was communicated by the Plaintiff by e-mail dated 26.7.2013. In this regard, learned Counsel appearing for the Plaintiff has also invited the attention of this Court to the said e-mail. As per the invoices raised till 31.3.2013, the Owners of the Vessel are liable to pay a sum of Rs. 5,35,27,039/-. Therefore, there is a clear maritime claim as against the Owner of the Defendant-Dredging Vessel. When there is a clear maritime claim, the Plaintiff is legally entitled for arrest of the Vessel. In this regard, learned Counsel appearing for the Plaintiff relied upon the Judgment reported in M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , wherein it has been held as follows:

"57. ... A Maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. (See The Bold Buccleugh, 1852 (7) Moo PCC 267)." (II) Further, the learned Counsel appearing for the Plaintiff by relying upon the Judgment reported in Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others, , submitted that if the Plaintiff establishes a prima facie arguable best case, the admiralty action must proceed to trial. In the instant case, there is an admitted liability by M/s. Marg Limited, which could be seen from the acknowledgement of liability dated 26.7.2013. Further, on the date of arrest i.e., on 5.12.2014, the Dredging Vessel

was under the Demise Charter with M/s. Marg Limited and the Order of Arrest is therefore in full compliance with 1999 Arrest Convention Article 3(1)(b). Therefore, the Plaintiff has made out an arguable best case. If the Order of Arrest is vacated, the Plaintiff would be put to irreparable loss. Thus, learned Counsel appearing for the Plaintiff submitted that the Interim Order of arrest of the Vessel is liable to be made absolute.

(III) Apart from the above submission, the learned Counsel appearing for the Plaintiff has also made a detailed submission in respect of the statement made in the Counter Statement filed by M/s. Marg International Dredging Pte. Ltd. with regard to the Ownership of the Vessel. Before dealing with the submission of the learned Counsel appearing for the Plaintiff, it would be appropriate to extract the sum and substance of the statement made in the Counter. The sum and substance of the statements made in the Counter are as follows:

"(a) The registered Owner viz., M/s. Marg International Dredging Pte. Ltd., has not entered into any contract, Agreement or arrangement with the Plaintiff and hence, no sums whatsoever are payable by the registered Owner much less the sum of Rs. 6,47,67,727/- as claimed in the plaint.

(b) Even before filing the present Suit, the Demise Charter, between the registered Owner viz., M/s. Marg International Dredging Pte. Ltd. and the charterer M/s. Marg Limited had expired and another Demise Charter/fresh Bareboat Charter was entered into with M/s. Pelagia Marine Services Pte. Ltd., on 24.11.2014. But, by suppressing all those facts, the Order of Arrest was obtained;"

With regard to the above statements found in the Counter, the learned Counsel appearing for the Plaintiff has submitted that subsequent to the date of arrest, the Plaintiff gave a reply to the Defendant on 9.12.2014, calling upon them to produce the Demise Charter entered into between the registered Owner viz., M/s. Marg International Dredging Pte. Ltd., Singapore and M/s. Marg Limited, Chennai. The said Demise Charter was provided to the Plaintiff on 12.12.2014 and from the said Demise Charter, it could be seen that the said Demise Charter commenced on 1.4.2010 and is valid for a period of 60 months i.e., till 31.3.2015. Therefore, it is apparent that the Dredger is still under the Demise Charter with M/s. Marg Limited. Only for the purpose of getting over the Interim Order of arrest of the Vessel, it has been falsely alleged by the registered Owner that on the date of Order of Arrest of Vessel viz., on 5.12.2014, the Demise Charter between M/s. Marg Limited and M/s. Marg International Dredging Pte. Ltd. had expired.

(IV) It is the further submission of the learned Counsel appearing for the Plaintiff that M/s. Marg Limited is the Holding Company and M/s. Marg International Dredging Pte. Ltd. is its wholly owned subsidiary i.e., M/s. Marg Limited is holding 100% of the share capital of M/s. Marg International Dredging Pte. Ltd. One G.R.K. Reddy, who is the Chairman and Managing Director of M/s. Marg

Limited, is also the Director of M/s. Marg International Dredging Pte. Ltd. The deponent to the Counter Affidavit viz., one Rabindra Kumar Samal, is the Company Secretary of M/s. Marg Limited and he is also the Authorized Signatory of M/s. Marg International Dredging Pte. Ltd. Therefore, whether the Dredging Vessel is owned by M/s. Marg Limited or M/s. Marg International Dredging Pte. Ltd., Singapore is a question to be decided only at the time of trial. Hence, at this juncture, absolutely there is no need to lift the Corporate Veil to see, who is exactly the actual Owner. But, prima facie, it is evidenced by Directors' Report that M/s. Marg Limited is the Owner of the Dredger by virtue of the Dredger being owned by a 100% subsidiary Company M/s. Marg Limited. Therefore, the Dredging Vessel cannot be released at this stage based on the bald statement made in the Counter Affidavit filed by the registered Owner. In this regard, learned Counsel appearing for the Plaintiff has relied upon the Judgment of the Hon'ble Supreme Court in the case of Balwant Rai Saluja and another v. Air India Ltd., C.A. Nos. 10264-10266 of 2013, dated 13.11.2013, wherein, in Para 68, it has been held as follows:

"68. In recent times, the law has been crystallized around the six principles formulated by Munby, J. in *Ben Hashem v. Ali Shayif*, 2008 EWHC 2380 (Fam). The six principles, as found at Paragraphs 159-164 of the case are as follows:

- (i) Ownership and control of a Company were not enough to justify piercing the Corporate Veil;
- (ii) The Court cannot pierce the Corporate Veil, even in the absence of third party interests in the Company, merely because it is thought to be necessary in the interests of justice;
- (iii) The Corporate Veil can be pierced only if there is some impropriety;
- (iv) The impropriety in question must be linked to the use of the Company structure to avoid or conceal liability;
- (v) To justify piercing the Corporate Veil, there must be both control of the Company by the wrongdoer(s) and impropriety, that is use or misuse of the Company by them as a device or facade to conceal their wrongdoing; and
- (vi) The Company may be a "facade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The Court would, however, pierce the Corporate Veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the Company had done."

Thus, by relying upon the above dictum, learned Counsel appearing for the Plaintiff submitted that the Hon'ble Supreme Court has laid down six situations in which the Corporate Veil can be pierced/lifted and one of the grounds for piercing/lifting the Corporate Veil is fraud. Even if the Company was not originally incorporated with a deceptive intent and if it is used for the purpose of deception

at the time of relevant transaction, then the Corporate Veil could be pierced/ lifted. Here, in the instant case, the three documents viz., Termination Agreement dated 1.4.2014, the Agreement dated 24.11.2014 entered into between M/s. Marg International Dredging Pte. Ltd. and M/s. Pelagia Marine Service Pte. Ltd., and work Order dated 5.11.2014 issued in favour of M/s. Pelagia Marine Service Pte. Ltd., were fabricated by M/s. Marg International Dredging Pte. Ltd. and M/s. Marg Limited, Chennai to create a case as if the Agreement between M/s. Marg International Dredging Pte. Ltd. and M/s. Marg Limited, Chennai was terminated as early as on 1.4.2014 and thereafter, on 24.11.2014, the registered Owner viz., M/s. Marg International Dredging Pte. Ltd. entered into a fresh Bareboat/Demise Charter with M/s. Pelagia Marine Service Pte. Ltd., and hence, on the date of arrest of the Vessel viz., 5.12.2014, M/s. Marg Limited, Chennai was not the Demise Charterer, against whom a claim was made by the Plaintiff. Further, the learned Counsel appearing for the Plaintiff submitted that since prima facie, the Plaintiff has established the fraud played by the Defendant and its Holding Company M/s. Marg Limited, the piercing/lifting of the Corporate Veil has to be done at the time of trial when oral evidence is let in by the parties and at the stage of considering Interlocutory Application, there is no need to lift the Corporate Veil.

(V) It is the further submission of the learned Counsel appearing for the Plaintiff that since the registered Owner of the Vessel viz., M/s. Marg International Dredging Pte. Ltd., is a 100% subsidiary of M/s. Marg Limited and since the Plaintiff has made out an arguable best case, the Vessel cannot be released from the arrest at this stage. In support of his contention that Corporate Veil can be pierced/lifted only at the time of trial, the learned Counsel appearing for the Plaintiff has produced copy of the Judgment passed by the Hon"ble Supreme Court in C.A. Nos. 8988 and 8989 of 2012 dated 12.12.2012, wherein the Hon"ble Supreme Court set aside the Order passed by the learned Single Judge and the Division Bench of the Bombay High Court in the Interlocutory Application pending the Suit.

(VI) Further, the learned Counsel appearing for the Plaintiff has submitted that the registered Owner of the Vessel has produced an alleged Termination Agreement dated 1.4.2014 pursuant to the Notice given by the Plaintiff stating that the contract was terminated between the registered Owner viz., M/s. Marg International Dredging Pte. Ltd., and M/s. Marg Limited by mutual consent. But, the contention of the said Agreement is totally contrary to the statement made in the Counter filed by the registered Owner, wherein they have stated that the Demise Charter between the parties had expired. Thus, learned Counsel appearing for the Plaintiff submitted that if really the alleged Termination Agreement dated 1.4.2014 has been genuine, the pleading in the Counter would have been that the Demise Charter had been terminated by consent and not expired. However, furnishing of this Termination Agreement dated 1.4.2014 by the Defendant to the Plaintiff without even asked for it in the notice to produce, would clearly expose the fraud perpetrated by the Defendant. In this regard,

learned Counsel appearing for the Plaintiff has also invited the attention of this Court to Clause 17 of the Bareboat Charter Hire Agreement entered into between M/s. Marg International Dredging Pte. Ltd. and M/s. Marg Limited and submitted that even before the Expiry Agreement period, if any one of the party intends to terminate the Agreement, then 30 days" prior Notice is necessary. But, a perusal of the Termination Agreement dated 1.4.2014 would show that no such notice was given, which would show only to get over the Order of Arrest, this document was created by the registered Owner. Thus, the learned Counsel appearing for the Plaintiff submitted that the three documents viz., Termination Agreement dated 1.4.2014, the Agreement dated 24.11.2014 entered into between M/s. Marg International Dredging Pte. Ltd. and M/s. Pelagia Marine Service Pte. Ltd., and work Order dated 5.11.2014 have been fabricated by the Defendant and its Holding Company M/s. Marg Limited to create a case on the date of passing of the Order of the Arrest of the Vessel i.e., on 5.12.2014, M/s. Marg Limited, Chennai is not a demised Owner against whom the claim was made by the Plaintiff. If the Dredging Vessel sails away and if the Defendant succeeds in trial by establishing fraud, the Plaintiff will be left with no remedy to recover their huge claim. Thus, the learned Counsel appearing for the Plaintiff prayed for the Interim Order of arrest dated 5.12.2014 to be made absolute.

9. (I) Per contra, learned Counsel appearing for the Defendant/registered Owner viz., M/s. Marg International Dredging Pte. Ltd. submitted that all the invoices raised by the Plaintiff are admittedly only on M/s. Marg Limited, Chennai and not on M/s. Marg Limited, Singapore. In this regard, learned Counsel appearing for the Defendant has also invited the attention of this Court to various invoices and letters exchanged between the Plaintiff and M/s. Marg Limited and submitted that all the e-mails and letters addressed by the Plaintiff demanding payment have been addressed only to M/s. Marg Limited, the demised Owner and not to M/s. Marg International Dredging Pte. Ltd., Singapore. The only document which purports to be an admission of liability is an e-mail dated 23.11.2013. From the attachment to the said e-mail, it could be seen that it was signed only by M/s. Marg Limited, Madras and bears the seal of M/s. Marg Limited, Madras. Thus, admittedly, the so called admission of liability is not by M/s. Marg International Dredging Pte. Ltd., Singapore. The registered Owner M/s. Marg International Dredging Pte. Ltd., Singapore entered into a Demise Charter with M/s. Marg Limited, Chennai on 1.4.2010, in terms of which the Defendant-Dredging Vessel was given on a Bareboat charter to M/s. Marg Limited, Chennai for a period of 60 months. Clause 17 of the charter party dated 1.4.2010 between M/s. Marg International Dredging Pte. Ltd., Singapore and M/s. Marg Limited, Chennai provided for termination in case of non-fulfilment or breach of any of the terms and conditions of the Agreement. In the instant case, on 1.4.2014, the Agreement between M/s. Marg Limited and M/s. Marg International Dredging Pte. Ltd., Singapore was terminated by mutual consent only. Only when anyone of the parties intends to terminate the contract, the question of issuing 30 days" prior Notice would arise. Since the Agreement was terminated by mutual consent,

absolutely there is no need to issue 30 days" prior Notice. Therefore, it is incorrect to state that the document was created fraudulently for the purpose of this case. Even according to the case of the Plaintiff, only M/s. Marg International Dredging Pte. Ltd. is the Owner of the Defendant-Vessel. Hence, by Mutual Agreement dated 1.4.2014, M/s. Marg Limited ceased to be the Demise/Bareboat Charterer of the Defendant-Dredging Vessel with effect from 1.4.2014. Subsequently, on 24.11.2014, M/s. Marg International Dredging Pte. Ltd., Singapore entered into an Agreement with M/s. Pelagia Marine Services Pte. Ltd., Mumbai in terms of which the Defendant-Dredging Vessel has been handed over to M/s. Pelagia Marine Services Pte. Ltd., for the sole purpose of and with a right to utilize the Dredger in the operations of the proposed project after carrying out necessary repairs. Hence, on the date of Order of Arrest of the Dredging Vessel viz., on 5.12.2014, M/s. Marg Limited ceased to be the Demise Charterer of the Defendant-Dredging Vessel. In this regard, learned Counsel appearing for the Defendant has also invited the attention of this Court to the Application dated 25.11.2014 submitted by M/s. Pelagia Marine Services Pte. Ltd., to the Director General of Shipping, which is a Statutory Authority appointed under Section 7 of the Merchant Shipping Act, 1958 for the purpose of exercising or discharging the powers, Authority or duties conferred or imposed upon the Director General under the said Act and submitted that the said Application would go to show that much earlier to the filing of the present Suit, the Agreement was terminated and the Dredging Vessel was handed over to M/s. Pelagia Marine Services Pte. Ltd., pursuant to the Agreement dated 24.11.2014. Therefore, on the date of Order of Arrest, M/s. Marg Limited, Chennai is not the Owner of the Vessel against whom the Plaintiff is having a claim. By suppressing all these facts, the Plaintiff has filed the present Suit and obtained an Interim Order of arrest.

(II) With regard to the submission made by the learned Counsel appearing for the Plaintiff that "if really the alleged Termination Agreement dated 1.4.2014 has been genuine, the pleading in the Counter would have been that the Demise Charter had been terminated by consent. But, in the Counter Affidavit, the Defendant has stated that the Demise Charter between M/s. Marg International Dredging Pte. Ltd. and M/s. Marg Limited had expired", the learned Counsel appearing for the Defendant replied that the Bareboat/Demise Charter party dated 1.4.2010 between M/s. Marg Limited and M/s. Marg International Dredging Pte. Ltd., stood terminated on 1.4.2014 by mutual consent. In view of the urgency involved and the necessity to move this Court to vacate the Order of Arrest passed on 5.12.2014, the Counter Affidavit dated 8.12.2014 was prepared in a hurried manner and therefore, it was mistakenly stated therein that the Demise Charterer between M/s. Marg Limited and M/s. Marg International Dredging Pte. Ltd. had expired, when in effect, the said Demise Charter stood terminated on 1.4.2014. In any event, the reference as to whether the said Demise Charter dated 1.4.2010 had expired or stood terminated would not be of any relevance as the legal consequences of termination or expiry of an Agreement would be the same.

(III) Further, the learned Counsel appearing for the Defendant by inviting the attention of this Court to Article 3.1 of the International Convention on Arrest of Ships, 1999 and submitted that arrest is permissible of any ship in respect of which a maritime claim is asserted if-

"(a) The person, who owned the ship at the time when the maritime claim arose is liable for the claim and is Owner of the ship when the arrest is effected; or

(b) The Demise Charterer of the ship at the time when the Maritime claim arose is liable for the claim and is Demise Charterer or Owner of the ship when the arrest is effected."

Admittedly, in the instant case, on the date of arrest, M/s. Marg Limited against whom the Plaintiff is having claim, is not the Owner of the Dredging Vessel. Therefore, the Plaintiff is not entitled for arrest of the Vessel. Further, learned Counsel appearing for the Defendant submitted that the Order of Arrest cannot be passed in a case where a person owns different ships in the names of different Companies unless it is established by the Plaintiff that the Company structure is a sham and a mask to play fraud on the public. Hence, the submission made by the learned Counsel appearing for the Plaintiff that since M/s. Marg Limited, Chennai is the Holding Company and the registered Owner viz., M/s. Marg International Dredging Pte. Ltd., is its wholly owned subsidiary i.e., M/s. Marg Limited is holding 100% share capital of M/s. Marg International Dredging Pte. Ltd. and as such the Vessel of the subsidiary Company could be arrested for the claim of the Holding Company, is not legally sustainable. Thus, the learned Counsel appearing for the Defendant submitted that in the instant case, the Plaintiff is not entitled for arrest of the Defendant-Dredging Vessel, which is owned by M/s. Marg International Dredging Pte. Ltd. In this regard, learned Counsel for the Defendant has relied upon the Judgment of the Bombay High Court in the case of Universal Marine and another v. M.T. Hartati and another, Notice of Motion No. 1080 of 2013 in Admiralty Suit No. 77 of 2012 dated 11.2.2014.

(IV) Further with regard to the submission made by the learned Counsel appearing for the Plaintiff that since M/s. Marg International Dredging Pte. Ltd. is a 100% subsidiary of M/s. Marg Limited and since the Directors are common and the signatory of M/s. Marg International Dredging Pte. Ltd. is also the Company Secretary of M/s. Marg Limited, the Corporate Veil must be pierced and that upon doing so, it would reveal that M/s. Marg Limited is the beneficial Owner of the Defendant-Dredger and therefore, the Suit is maintainable against the Defendant-Dredger, the learned Counsel appearing for the Defendant replied that since one Company was a 100% subsidiary of another or that directors and signatories were common, that would not warrant lifting of the Corporate Veil, unless the allegations of fraud are specifically raised in the Plaint. In this regard, learned Counsel appearing for the Defendant once again relied upon the Judgment of the Bombay High Court in the case of Universal Marine and another v. M.T. Hartati and another, Notice of Motion No. 1080 of 2013 in Admiralty Suit

No. 77 of 2012 dated 11.2.2014, Thus, the learned Counsel appearing for the Defendant sought to vacate the Interim Order of Arrest of Vessel.

10. By way of reply, the learned Counsel appearing for the Plaintiff submitted that the Judgment of the Bombay High Court relied upon by the learned Counsel appearing for the Defendant in the case of Universal Marine and another v. M.T. Hartati and another, Notice of Motion No. 1080 of 2013 in Admiralty Suit No. 77 of 2012 dated 11.2.2014, was stayed by the Division Bench of the Bombay High Court and therefore, the said Judgment cannot be taken into consideration to decide the issue involved in this case. Per contra, learned Counsel appearing for the Defendant, by relying upon the Judgment of the Hon"ble Supreme Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, , submitted that though the Division Bench of the Bombay High Court stayed the Order of the learned Single Judge, it does not mean that the Judgment passed by the learned Single Judge has been wiped out from existence and the said Judgment would prevail until it is set aside or reversed.

11. In view of the submissions made by the learned Counsel on either side, the questions that fall for consideration are-

"(i) Whether the Plaintiff has made out a case for making the Interim Order of Arrest of the Vessel as absolute?

(ii) Whether piercing/lifting of Corporate Veil is necessary to find out as to, who is the beneficial Owner of the Defendant-Dredging Vessel in this case?

(iii) Whether the Vessel belongs to the Subsidiary Company can be arrested for the claim of the Holding Company?"

12. Question No. (i) : With regard to the first question, this Court finds that the Suit was filed by the Plaintiff based on an admitted liability of a maritime claim by the M/s. Marg Limited, Chennai. Admittedly, the Defendant-Dredging Vessel belongs to M/s. Marg International Dredging Pte. Ltd., Singapore. A Bareboat Charter Hire Agreement dated 1.4.2010 was entered into between M/s. Marg International Dredging Pte.Ltd., Singapore, the registered Owner and M/s. Marg Limited, the Charterer. Subsequent to the Bareboat Charter Agreement dated 1.4.2010, the Owners of the Defendant-Dredger viz., M/s. Marg Limited, entered into an Agreement with the Plaintiff by which it required the services of the Plaintiff for Operation, Manning, Repair and Maintenance of CSD MARG CAUVERY for the period from 1.4.2010 to 31.3.2011. Such Agreement was subsequently renewed three times. According to the Plaintiff, in respect of the work done by them, a sum of Rs. 6,47,67,717/- is due and payable to the Plaintiff by M/s. Marg Limited. In fact, M/s. Marg Limited has also admitted the liability by e-mail dated 23.11.2013. In spite of the admission, M/s. Marg Limited has not come forward to pay the amount. Hence, the present Suit has been filed. Pending Suit, based on the admission made by M/s. Marg Limited, this Court has also ordered for Interim Order of Arrest of the Vessel by Order dated 5.12.2014. Thereafter on

appearance, the registered Owner viz., M/s. Marg International Dredging Pte. Ltd., Singapore has filed Counter stating that the Charter Agreement was terminated on 1.4.2014 by mutual consent between M/s. Marg Limited and M/s. Marg International Dredging Pte. Ltd., Singapore. Subsequently, on 24.11.2014, the registered Owner viz., M/s. Marg International Dredging Pte. Ltd., Singapore entered into another Demise Charter Agreement with one M/s. Pelagia Marine Service Pte. Ltd., Mumbai. Therefore, on the date of arrest of the Vessel i.e., on 5.12.2014, M/s. Pelagia Marine Services Pte. Ltd., Mumbai is the Demise Charterer of the Vessel and not M/s. Marg Limited, against whom the Plaintiff is having a claim. Suppressing all these facts, the Plaintiff has filed the present Suit. But, according to the learned Counsel appearing for the Plaintiff, the Termination Agreement dated 1.4.2014 and the subsequent Bareboat/Demise Charter Agreement dated 24.11.2014 between M/s. Marg International Dredging Pte. Ltd., Singapore and M/s. Pelagia Marine Services Pte. Ltd., Mumbai are created only for the purpose of this case to get over the Order of Arrest. In support of this contention, learned Counsel appearing for the Plaintiff has also invited the attention of this Court to Clause 17 of the Bare Boat Charter Hire Agreement dated 1.4.2010 entered into between M/s. Marg Limited and M/s. Marg International Dredging Pte. Ltd., Singapore, and submitted that as per Clause 17, thirty days prior notice is necessary for termination of the contract. But, in the Termination Agreement dated 1.4.2014, there is no whisper about the thirty days prior notice. Further, in the Counter Affidavit, it has been stated by the registered Owner that the Charter between the registered Owner viz., M/s. Marg International Dredging Pte. Ltd., and the charterer viz., M/s. Marg Limited had expired. Thus, the learned Counsel appearing for the Plaintiff submitted that if really the alleged Termination Agreement has been genuine, the pleading in the Counter would have been that the Demise Charter had been terminated by consent and not expired. But, I find that, as contended by the learned Counsel appearing for the registered Owner, as per Clause 17 of the Bare Boat Charter Hire Agreement, only in the event of anyone of the parties intends to terminate the contract, thirty days" prior Notice is necessary. But, in this case, the contract was terminated by mutual consent. Under such circumstances, I am of the opinion, the submission made by the learned Counsel appearing for the Plaintiff based on the statement made in the Counter filed by the registered Owner has no significance in this case. However, irrespective of the submissions made by the learned Counsel on either side, I find that on 25.11.2014, M/s. Pelagia Marine Services Pte. Ltd., has filed an Application before the Director General of Shipping, which is a Statutory Authority appointed under Section 7 of the Merchant Shipping Act, 1958 for licence required under Section 407 of the Merchant Shipping Act for the purpose of exercising or discharging the powers, Authority or duties conferred or imposed upon the Director General under the said Act. A perusal of the said Application would go to show that the Agreement dated 24.11.2014 entered into between M/s. Marg International Dredging Pte. Ltd., Singapore and M/s. Pelagia Marine Services Pte. Ltd., Mumbai is not a created one for the purpose of this case. As contended by the Plaintiff, if the

Agreement dated 24.11.2014 is made up or fabricated for the purpose of the present case, an Application could not have been filed with the Statutory Authority by M/s. Pelagia Marine Services Pte. Ltd., much earlier to the filing of the present Suit. Therefore, I find that the Application dated 25.11.2014 filed before the Statutory Authority completely throws away all the submissions made by the learned Counsel appearing for the Plaintiff that the documents were created by the Defendant only for the purpose of this case. Hence, I am of the opinion, prima facie, the documents produced on the side of the registered Owner clearly show that on the date of Order of Arrest of the Vessel viz., on 5.12.2014, only M/s. Pelagia Marine Services Pte. Ltd., is the Demise Charterer of the Defendant-Dredging Vessel and not M/s. Marg Limited, against whom the Plaintiff is having a claim. Since prima facie the documents produced on the side of the Defendant would show that on the date of arrest, M/s. Pelagia Marine Services Pte. Ltd., is the Demise Charterer and not M/s. Marg Limited against whom the Plaintiff is having a claim, the submission made by the learned Counsel appearing for the Plaintiff that since the Plaintiff has made out arguable best case, the Interim Order of Arrest of Vessel has to be made absolute, does not need any consideration.

13. Question No. (ii) : The next fold of submission of the learned Counsel appearing for the Plaintiff in this case is, it is necessary to pierce the Corporate Veil to find out as to which Company is the Owner of the Vessel at the time of passing the Interim Order of Arrest of the Vessel dated 5.12.2014 during the course of adducing evidence and therefore, at this stage, the Interim Order of Arrest of the Vessel has to be made absolute since the Plaintiff has prima facie made out a best arguable case. In this regard, I find that it is the case of the Plaintiff that since M/s. Marg International Dredging Pte. Ltd., is a 100% subsidiary of M/s. Marg Limited and since the directors are common and the signatory of M/s. Marg International Dredging Pte. Ltd., Singapore is also Company Secretary of M/s. Marg Limited, the Corporate Veil must be pierced and that upon doing so, it would reveal that M/s. Marg Limited is the beneficial Owner of the Defendant-Dredger and therefore the Suit is maintainable against the Defendant-Dredger. In this regard, the Judgment relied by the learned Counsel appearing for the Defendant in the case of Universal Marine v. M.T. Hartati, Notice of Motion No. 1080 of 2013 in Admiralty Suit No. 77 of 2012 dated 11.2.2014, gives a fitting answer for this issue, wherein, in the said Judgment, it has been held as follows:

"15. In support of his submissions, Mr. Pratap, first relied upon the "Maritime Trader" 1981 (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 the 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 the 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:

"all 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 persona. 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 Quickened in *Rodwell Securities v. The Inland Revenue Commissioners*, 1968 (2) ALL E.R. 257, and in particular to a short passage on page 260 in which that the 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 "beneficially 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. Justin Slynne that the onus is upon the Plaintiffs to show that the person against whom it is ought 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 the 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, "What is wrong with using the Company structure to limit liability?" To that question he said that the answer must be, "Nothing, 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."

14. In this regard, one more reliance could be placed in the Judgment of the Bombay High Court in the case of Condor Maritime v. M.V. Western Light and another, Notice Motion No. 1597 of 2013 in Admiralty Suit No. 22 of 2012, dated 21.2.2014, vide its Judgment in wherein it has been held as follows:

"In my opinion, simply because the shareholders, the Directors (in this case were not common) the address of the two Companies that own the two ships are common or the constituted attorney, who was appointed to buy the Vessel is the same or that both the ships were purchased pursuant to the board meeting on the same day does not mean that the efforts of the subscribers were to conceal that fact and does not automatically mean that the intention to register the two ships in different names was to play a fraud. There is no bar in purchasing ships in different names if that is the way a person wants to do his business. There is of course an exception that the intention was to mask the true Owners and the Companies are a sham.

Under Order 4, Rule 4 of Code of Civil Procedure, it is provided that if party pleading relies on any fraud then particulars with dates and time and the nature of fraud has to be stated in the pleading, i.e., the Plaint. There are no particulars as required under Order 4, Rule 4 of C.P.C. of fraud stated in the Plaint. Moreover, all these factors were known to the Plaintiff or the Plaintiff is deemed to have known prior to entering into the Management Agreement with the Plaintiff. It is not the Plaintiff's case that they would not have entered into the Management Agreement otherwise."

A reading of the above Judgment would show that if the intention of the Owner of the Vessel to mask the true Owners and the Companies are a sham, the question of considering the piercing of Corporate Veil at the time of trial would arise. In the instant case, absolutely no fraud was alleged in the Plaint. Nowhere

in the Plaintiff it has been alleged that the intention of the Owner of the Vessel to mask the true Owners and the Companies are a sham. Only after the Counter was filed by the Defendant along with documents, the Plaintiff has filed a rejoinder Affidavit stating that the three documents viz., Termination Agreement dated 1.4.2014, the Agreement dated 24.11.2014 entered into between M/s. Marg International Dredging Pte. Ltd., and M/s. Pelagia Marine Service Pte. Ltd., and work Order dated 5.11.2014 issued in favour of M/s. Pelagia Marine Service Pte. Ltd., were fabricated and created by the Defendant for the purpose of getting over the Interim Order of Arrest. As observed earlier, the Application dated 25.11.2014 submitted by M/s. Pelagia Marine Services Pte. Ltd., to the Director General of Shipping, which is a Statutory Authority appointed under Section 7 of the Merchant Shipping Act, 1958 for license as required under Section 407 of Merchant Shipping Act completely throws away the submission made by the learned Counsel appearing for the Plaintiff that the documents produced by the Defendant were created for the purpose of this case. Only if the Plaintiff establishes a strong prima facie case that the Defendant has played fraud by creating documents with an intention to get over the Order of Arrest, the question of piercing/lifting the Corporate Veil would arise at the time of trial. In the instant case, in my considered opinion, the Plaintiff has only made an attempt to create a suspicion in the mind of the Court by pointing out certain discrepancies found in the documents filed on the side of the Defendant. In my opinion, creating a suspicion in the mind of the Court by pointing out minor discrepancies found in the documents filed on the side of the Defendant is not sufficient enough to come to the conclusion that the Defendant has played fraud by creating documents to get over the Order of Arrest of vessel. Hence, I am of the opinion, the question of piercing/lifting the Corporate Veil at the time of adducing evidence is not necessary in this case since the Plaintiff has prima facie failed to establish a strong case on the ground of fraud. In this regard, a reference could be placed in the Judgment of the Bombay High Court in Lufeng Shipping Co. Ltd. v. M.V. Rainbow Ace and another, Notice of Motion No. 235 of 2013 dated 2.7.2013, wherein the Bombay High Court held that a prima facie case cannot be built on suspicion. The relevant portion is usefully extracted hereunder:

"19. The Appellant had also submitted that while considering the Application for vacation of said arrest of the Vessel, the Court is required to consider not only the prima facie case but balance of convenience and irreparable inquiry involved in the matter. The above proposition is indisputable. However, a prima facie case cannot be built merely on suspicion. The arrest of the Vessel on the basis of the suspicion raised certainly causes more inquiry to a third party than the Plaintiff. Thus, the balance of convenience would be against the arrest of the Vessel. In the case of *Aventicum*, 1978 (1) LLOYD'S Law Reports 184 Queen's Bench Division (Admiralty Court) has held that onus is upon the Plaintiff to show that the person against whom it is sought to invoke Admiralty jurisdiction is the person, who beneficially owns both the Vessel in respect of which maritime claim

has arisen as well as the Vessel which is sought to be arrested. The Court found that there were a number of factors to indicate that there is very close connection between two Companies such as common address, etc. yet the Court on the basis of the evidence before it held that there was no positive evidence produced by the Plaintiff which could establish the beneficial Ownership of the Vessel sought to be arrested is in the same person as in respect of the Vessel in which Maritime claim arose. The Appellant has not been able to establish that even prima facie that Respondent No. 2 Vessel is in the beneficial Ownership of Wang Wendong. In the circumstances the impugned Order has to be upheld." A reading of the above Judgment would show that if the arrest of the Vessel is on the basis of the suspicion raised, certainly it would cause more injury to a third party than the Plaintiff. Therefore, absolutely the question of piercing /lifting the Corporate Veil would not arise in this case even at the time of trial since the Plaintiff has failed to establish a prima facie case on the ground of fraud. Only in the event of establishing strong prima facie case on the ground of fraud, the piercing/lifting of the Corporate Veil at the time of trial would arise and only in such circumstances, making of the interim arrest of the Vessel absolute could be considered.

15. Question No. (iii): It is the submission of the learned Counsel appearing for the Plaintiff that M/s. Marg Limited is a Holding Company and M/s. Marg International Dredging Pte. Ltd., is its wholly owned subsidiary i.e., M/s. Marg Limited is holding 100% of the share capital of M/s. Marg International Dredging Pte. Ltd. and the Chairman and Managing Director of M/s. Marg Limited is also the Director of M/s. Marg International Dredging Pte. Ltd. and the deponent to the Counter Affidavit viz., one Rabindra Kumar Samal is the Company Secretary of M/s. Marg Limited and he is said to be the Authorized Signatory of M/s. Marg International Dredging Pte. Ltd. and hence, for the claim against the Holding Company, the Vessel of the Subsidiary Company can be arrested.

16. For the said submission, it is the reply of the learned Counsel appearing for the Defendant that the Plaintiff is entitled to arrest of the Vessel only if they establish that the Company structure is a sham and a mask to play a fraud on the public. In this regard also, learned Counsel appearing for the Defendant has relied upon the Judgment of the Bombay High Court in the case *Universal Marine v. M.T. Hartati*, Notice of Motion No. 1080 of 2013 in Admiralty Suit No. 77 of 2012 dated 11.2.2014, wherein, in Paragraphs 22, 23, 24 and 28, it has been held as follows:

"22. He later relied upon the unreported Judgment of the Division Bench of this Court in the matter of *Lufeng Shipping Company Ltd. 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:

"In 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 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 Others Vs. Md. Illiyas, , the Supreme Court held as under:

"Reliance 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 analyze 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 Devi). A case is a precedent and binding for what it explicitly decides and no more." 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:

"9. While interpreting the above provision, the Supreme Court in *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, , 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 *Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another*, , 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 Vs. Commissioner of Income Tax, Bombay*, , 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 Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, , 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. "Dong Do" and anr. v. Ramesh Kumar and Co. Ltd.*, 2000 (1) Cal. LT 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. Elisabeth* 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 negated 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)

From a reading of the above Judgment, it is clear that the mere fact that the two Companies have common shareholders or common Board of Directors will not convert the two Companies as a single entity and hence, the Order of Arrest cannot be passed in a case where a person owns different ships in the names of different Companies unless it is a sham and the onus is on the part of the Plaintiff to establish that the Company structure is a sham and a mask to play fraud on the public. But, in the instant case, the Plaintiff has not established that the Company structure is a sham and mask to play fraud on the public. In this regard, learned Counsel appearing for the Plaintiff submitted that the said Judgment of the Bombay High Court has been stayed by the Division Bench of the Bombay High Court. In my considered opinion, as contended by the learned Counsel appearing for the Defendant, the purpose of granting stay is only to stop the operation of the said Order and it will not completely wipe off the order from existence. In this regard, learned Counsel appearing for the Defendant relied upon the decision of the Hon'ble Supreme Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, , wherein in Para 10, it has been held as follows:

"While considering the effect of an Interim Order staying the operation of the order under challenge, a distinction has to be made between quashing of an Order and stay of operation of an Order. Quashing of an Order results in the restoration of the position as it stood on the date of passing of the Order, which has been quashed. The stay of operation of an Order does not, however lead to such a result. It only means that the Order, which has been stayed would not be operative from the date of the passing of the Stay Order and it does not mean that the said Order has been wiped out from existence." Thus, even assuming that the Order has been stayed, it would prevail until it is set aside or reversed.

17. For all the reasons stated above, I am of the opinion, the Plaintiff has not made out any case to make the Interim Order of Arrest of the Vessel as absolute.

In fine, the Interim Order of Arrest of the Vessel dated 5.12.2014 passed by this Court is liable to be vacated and accordingly, vacated and the Application in A. No. 7903 of 2014 is dismissed. No costs.

The Registry is directed to issue Release Warrant of the Vessel to the learned Counsel for Defendant-M/s. T. Poornam.