

(2011) 10 BOM CK 0105

In the Bombay High Court

Case No : Appeal No. 559 of 2011 in Notice of Motion No. 196 of 2011 in Admiralty Suit No. 3 of 2011 with Cross Objection (L) No. 8 of 2011

Great Pacific Navigation Holdings Corporation Ltd.

APPELLANT

Vs

M. V. Tongli Yantai

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Administration of Justice Act, 1956 — Section 3(1), 3(4), 4(4)
Arbitration and Conciliation Act, 1996 — Section 9
Merchant Shipping Act, 1894 — Section 503
Merchant Shipping Act, 1958 — Section 71
Supreme Court Act, 1981 — Section 21(4), 37

Citation : (2011) 10 BOM CK 0105

Hon'ble Judges : Mohit S. Shah, C.J.;Roshan Dalvi, J

Bench : Division Bench

Advocate : F.E. D'vitre, with Mr. Zarir Bharucha instructed by Bimal Rajshekhar, for the Appellant; Janak Dwarkadas with Mr. Pradeep Sancheti, Mr. Rahul Narichania with Ms. Purnima Singh, Ms. Pooja Kapadia and Ms. Aarti Shah instructed by Mulla, Mulla and Carigie Blunt and Caroe, for the Respondent

Final Decision : Allowed

Judgement

1. The Appellant (the Plaintiff in the Suit) has challenged the order of the learned Single Judge of this Court dated 12 July 2011 raising the arrest of the Respondent-ship, Tongli Yantai in the Notice of Motion taken out by the Respondent for such relief. The Respondent has filed cross-objections inter alia with regard to the issue of jurisdiction, the parties to the Suit, the maritime claim made for arrest of the ship by way of security of an arbitral award as an action in rem and the interpretation and applicability of the Geneva Convention of 1999 relied upon by the Appellant.

2. The Appellant's claim arose from an agreement entered into by the Appellant with one Tongli Shipping Company Ltd. Samoa (hereinafter referred to as "Tongli Samoa") under a charterparty agreement with the Appellant in respect of a ship,

Nasco Diamond. The Appellant had chartered the ship from one Da Sin Company Ltd. (hereafter referred to as "Da Sin"). The ship sank. Da Sin raised the claim upon the Appellant who in turn raised the claim upon its charterer, Tongli Samoa. The Appellant has sought recourse to arbitration under the arbitration agreement between the Appellant and Tongli Samoa. We are not concerned with the respective cases of the parties therein under the said charterparty. To secure the award which may be passed in the arbitration proceeding, the Appellant has sued the Respondent for arrest of its ship and other incidental reliefs. It is the case of the Appellant that Tongli Samoa, against whom the Appellant has raised a claim is the sister concern of one Tongli Shipping Company Ltd., China (hereinafter referred to as "Tongli China") who beneficially owned Nasco Diamond as also the Respondent ship, Tongli Yantai. Tongli China incorporated a number of shell companies including Tongli Samoa which is a sham and a facade for Tongli China. The arrested ship is of the registered ownership of one Halcyon Ocean Shipping Companies Ltd. (hereinafter referred to as "Halcyon"). It came to be initially arrested upon which the Respondent sought to have the ship released from arrest. The impugned order came to be passed releasing the ship which has been challenged by the Appellant.

3. The Appellant has shown that the Tongli China entered into a Memorandum of Agreement (MOA) on 17th March, 2010 with one Quing Shan Shipyard for purchase of Tongli Yantai at a price of US \$31.8mn. Tongli China made payment of only 10% of the purchase price. 60% of the purchase price was financed by one Far East Horizon Ltd. (FEHL). Halcyon is the subsidiary of the subsidiary of FEHL. FEHL, however, is only the financier of the ship. Hence even pursuant to its holding in Halcyon, Halcyon would not become the beneficial owner of the ship by payment of the purchase price. Halcyon entered into a charterparty agreement with one Eastshine Ltd. (hereinafter referred to as "Eastshine") who paid the remainder 30% of the cost of the ship as advance charter hire. For the Appellant to be lawfully entitled to keep arrested the Respondent vessel, the Appellant would have to show that the beneficial owner of Tongli Yantai is not Halcyon but Tongli China, the sister concern of Tongli Samoa in the Tongli Group of Companies who also beneficially owned and controlled Nasco Diamond. The Appellant has produced documents relating to the purchase of the ship contained in the MOA, the charterparty agreement between Halcyon and Eastshine as also the prospectus of FEHL showing its share holding and its consequent control and interest in Halcyon, the registered owner of Tongli Yantai.

4. It is the claim of the Respondent that the registered holder is the real and the only owner of the Respondent ship as held in various Judgments referred by the Respondent which shall be considered presently. The Appellant has relied upon several Judgments showing that the beneficial owner of the Respondent ship has to be seen and appreciated by the Court and once it is seen that the Tongli China is the beneficial owner and the Appellant shows that Tongli Samoa is its sister concern, the arrest of the ship Tongli Yantai would have to be maintained. The Appellant would, therefore, have to show the group of companies that the

Appellant claims is the Tongli Group of Companies, their share holdings, their addresses and other particulars as also the persons in management and control of both the companies within the group and their acts of management. This, the Respondent's claim, is not within the ambit of the admiralty court upon a maritime claim. Their contention is based upon the fact that the beneficial ownership has not to be seen. If it has to be seen by virtue of making inquiries into the various documents of the two companies showing the share holdings as also the control and management of the two companies, it would tantamount to lifting of the corporate veil which is not permitted.

5. The Appellant sought disclosure and inspection of various facts and documents some of which have been offered and some of which yet refused. The Appellant has relied upon and shown the Court the evidence produced by the Respondent itself and the Respondent has taken exception to produce any further evidence or documents or to show any further facts as not within the realm of the inquiry in the suit and which could be directed by the Court only upon lifting the veil of incorporation of the Respondent as also Tongli Samoa which the Respondent claimed cannot be ordered.

6. The learned Single Judge has seen and considered each of the above mentioned documents with regard to the ownership of Tongli Yantai, but has preferred not to raise the veil. That is the seminal grievance of the Appellant in this appeal. The learned Judge has refused to lift the veil of incorporation of Halcyon on the ground that Halcyon is not claimed to be the "alter-ego" of Tongli China and the relief of arrest is made only against Halcyon. The learned Judge has refused to lift the veil of incorporation of Tongli China or Eastshine on the premise that they are not sued. It may be mentioned that the aspect of raising the corporate veil in this case would have be considered as a whole upon the interwoven facts relating to each of these parties and not separately between the Appellant and one of them.

7. The Appellant urging to raise the corporate veil is to see the truth of the facts relating to all of the aforesaid parties hitherto concealed, suppressed, masked, screened or otherwise not shown by the simplicitor registration of Tongli Yantai with Halcyon in the shipping records. It may be rather myopic not to consider the true position of the parties behind legal and juristic facade. It is under such circumstances that in several cases the lifting of the corporate veil is permitted as an equitable doctrine in general law relating to corporate management as also more specially in the case of shipping companies.

8. The Respondent claims that this would not be so within the admiralty jurisdiction in view of the fact that several companies or individuals can incorporate what is popularly known as "one-ship company" to limit the financial liability of such individual company or the group of such companies. It cannot be disputed that such commercial position does prevail in the admiralty world. However, such one-ship companies are then expected to have their own corporate structure sufficient for their separate distinct presence. No Court can

countenance that such a position would be allowed to prevail if it would cause injury, damage or injustice to creditors and other third parties dealing with such companies for want for its own corporate standing. It would, therefore, be allowed to prevail if within a group or by an individual who owns a fleet of ships various separate distinct legal entities by way of incorporation are created having their separate distinct liabilities with capability to meet them. If that is done and if no connection with the group of reliance of one company upon another for the discharge of its liability is shown, the commercial position would certainly be allowed to prevail. This would be if each one-ship company thus incorporated would have its own place of business, shareholders and management distinct and separate from the group of companies so as to rely upon the assets or control of those companies for its survival. If however that is not the case, the one-ship company would not be a distinct incorporated person at all and merely a shadow of companies or the individual behind it.

9. It is this legal-cum-equitable principle that came up for consideration before the learned Single Judge in the Respondent's application.

10. The Appellant essentially relied upon Article 3 of the Geneva Convention of 1999 called Arrest Convention of 1999 in that behalf. The Appellant claims the beneficial ownership of a sister company to be accounted for in determining the liability of a ship under arrest upon its maritime claim. The relevant part of Article 3 of the Geneva Convention reads thus:

ARTICLE 3: EXERCISE of RIGHT of ARREST

1. 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.

(c).....

3(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:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

11. The Appellant claims that the Respondent ship Tongli Yantai is the other ship owned by the person liable for the maritime claim i.e. Tongli China which is the

sister company of Tongli Samoa. The ownership of Tongli China is not registered ownership but beneficial ownership.

12. The Respondent claims that the Geneva Convention is not applicable to this contract and could not be applied by the Admiralty Court. The Respondent also claims that on the facts of this case, Tongli China cannot be taken to be the beneficial owner of Tongli Yantai upon total denial of the Appellant's claim.

13. The learned Judge has gone into the respective contentions and has correctly upheld the applicability of the Geneva Convention to the case of a maritime claim of the Plaintiff under Article 1 (g) of the Geneva Convention which reads thus:

1. "Maritime Claim" means a claim arising out of one or more of the following:.....

(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charterparty or otherwise;

The learned Judge has considered the case of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, as also J.S. Ocean Liner LLC v. M. V. Golden Progress & Anr. 2 2007 (2) BCR 1 : 2007(2) Arb. LR 104 (Bom) (FB), to which the learned Judge was also a party, and disagreed with the Division Bench judgment of Gujarat High Court in the case of Croft Sales and Distribution Ltd. v. M V. Basil OJ Appeal No. 6 of 2011 in Admiralty Suit No. 10 of 2010 of Gujarat High Court dated 17 February 2011 in OJ Appeal No. 6 of 2011 in Admiralty Suit No. 10 of 2010, which were actions in rem upon which the learned Judge has rightly negated the Defendant's contention that the 1999 Convention applies in the case only where the government interest is involved and with which this Court is in full agreement.

14. The learned Judge has, however, not found anything more than a strong connection being made between the registered owner of Tongli Yantai and Tongli China on the one hand and Tongli Samoa and Tongli China on the other to be able to see the beneficial ownership of Tongli China in Tongli Yantai or to direct further disclosure upon seeing the factual position of these incorporated companies for allowing the veil to be lifted.

15. After seeing the evidence produced by the Appellant to demonstrate the beneficial ownership of Tongli Yantai by Tongli China and the relationship between Tongli China and Tongli Samoa the learned Judge has concluded that Tongli China and Tongli Samoa cannot be taken to be sister companies and that the beneficial ownership of Tongli China has not been established. Consequently the learned Judge has also negated the contention that the Tongli China was the real charterer of Nasco Diamond through its "nominee/friend/alter-ego", Tongli Samoa but has chosen not to raise the veil of incorporation as urged by the Appellant. It is appreciation of such evidence, which would demonstrate the specific fact situation in this case, which would require reconsideration.

It is this intricate web of companies which would have to be essentially seen in this Appeal.

16. The learned Judge has accepted the expression "owner" to be equitable owner and not the registered owner alone.

The distinction, if any, between equitable ownership and beneficial ownership must, therefore, be seen. The Black's Law Dictionary, Eighth Edition at page 1137 defines a beneficial owner as:

One recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else; esp., one for whom property is held in trust.-Also termed equitable owner.

The Dictionary gives illustration of beneficial ownership. These are:

a corporate share holder who has the power to buy or sell shares though not a registered member,

a person enjoying rights in a patent, trade mark or copyright even though legal title is vested in another e.g. under an assumption where the assigner has yet not signed the assignment etc.

The term "equitable owner" at page 1137 of the said Dictionary is shown to refer to beneficial owner.

At page 165 of the said Dictionary the expression "beneficial" has been shown as:

consisting in a right that derives from something other than legal title beneficial interest in a trust.

18. Salmond on Jurisprudence, Twelfth Edition at page 260 in the chapter of ownership explains legal and equitable ownership thus:

... One person may be the legal and another the equitable owner of the same thing or the same right at the same time. Legal ownership is that which has its origin in the rules of common law, while equitable ownership is that which proceeds from rules of equity divergent from the common law. The courts of common law refused to recognise equitable ownership, and denied that the equitable owner was an owner at all. The Court of Chancery adopted a very different attitude. Here the legal owner was recognised no less than the equitable, but the former was treated as a trustee for the latter. Chancery vindicated the prior claims of equity, not by denying the existence of the legal owner, but by taking from him by means of a trust the beneficial enjoyment of his property. The fusion of law and equity effected by the Judicature Act, 1873, has not abolished this distinction; it has simply extended doctrines of the chancery to the courts of common law, and as equitable ownership did not extinguish or exclude legal ownership in Chancery, it does not do so now.

... Law and equity are discordant, not merely as to the existence of rights, but also as to the ownership of the rights which they both recognise.

... Whenever the legal estate is in one man and the equitable estate in another, there is a trust. A legal owner is always a trustee for the equitable owner, if there is one. But an equitable owner may himself be merely a trustee for another person.

An equitable or beneficial owner is, therefore, a person who would be entitled to sell and alienate the shares of a ship. As aforesaid, if an equitable owner is an "owner", the beneficial owner also is one, of course upon showing evidence supporting such a contention. It is this evidence that requires scrutiny and appreciation.

19. The Appellant chartered a vessel NASCO DIAMOND from one Da-Sin. The Appellant sub-chartered it to one Tongli Shipping Company Ltd. Samoa. The vessel sank on 10.11.2010. A claim was raised upon the Appellant in an arbitration proceeding. The Appellant raised the claim upon Tongli Samoa. To secure the claim the Appellant got arrested Tongli Yantai the vessel of the Respondent Halcyon. It is claimed that Tongli China is in fact the beneficial owner of the said vessel.

The Appellant claims that Tongli China and Tongli Samoa are under the same management and seeks to lift the corporate veil to show that though separately incorporated, Tongli China and Tongli Samoa are under the management and control of the same individual so that they are sister concerns, Tongli Samoa being termed as the nominee/friend/alter-ego of Tongli China. It is claimed by the Respondent that Tongli China is a separate legal entity unconcerned and unconnected with Tongli Samoa.

20. It is the Appellant's case that Tongli Yantai is beneficially owned and controlled by Tongli China who incorporated a number of Shell companies including Tongli Samoa, Halcyon as also Eastshine and one Rainbow Success Ltd. (which shall be referred to presently). These companies are a mere facade and Tongli China was the real charterer of the Appellant's vessel Nasco Diamond so that the title/ownership of Nasco Diamond itself vested in Tongli China making Tongli Yantai its sister ship.

21. It has to be first seen whether Tongli Yantai can be taken to belong to Tongli China as a sister concern of Tongli Samoa. Tongli China is the original buyer of the Tongli Yantai under Memorandum of Agreement (MOA) dated 17.03.2010. Tongli China has paid 10% of the total price of the vessel to the shipyard.

22. Tongli China was incorporated in 1998. The address of Tongli China in Lloyd's list intelligence as on 24.08.2010 is:

902, Building-4, Tianhong Triumphal City, 53, Nanshan Road, Zhifu, 26400 Yantai, Shandong, China. (4EEE-II)

The ownership of Tongli China shows one Wang Wei Dong (hereinafter referred to as "WWD") having 80% shares. He is shown to be director/legal representative of Tongli China.

The Respondents claim that the Lloyd's list dated 24th August, 2010 is false and outdated. The Lloyd's lists are documents analogous to documents 1 to 4 shown in part I of the schedule to the Commercial Documents Evidence Act, 1939 requiring presumption as to genuineness of those documents to be mandatorily drawn. The Respondents rely upon a later extract of Lloyd's list dated 3rd December, 2010, 6 days before the arrest of the ship. It does not show WWD as its director/legal representative with its shareholding. Hence the Respondents contend that there was an error in showing WWD as the main share holder of Tongli China and consequently its representative. It is contended by the Respondents that Lloyd's list must have noticed the error and corrected it. If the Defendants rely upon the later Lloyd's list it has remained unexplained how the earlier Lloyd's list could be disputed by the Respondents and how the factual information could have been incorporated into the extract showing the particulars of the representative and the main shareholder of the company by mistake of another authority. It may be mentioned that though the name of WWD is stated not to be shown as such shareholder/director/legal representative of Tongli China on 3 December, 2010, WWD is shown to have pursued a settlement of the claim of Nasco Diamond on behalf of Tongli China a few days thereafter on 12th December, 2010. The address of Tongli Samoa in a judgment of US District Court, NY which is an independent document is:

902, Tainhong Triumphant City, 53, Nanshan Road, Yantai, China, (5222-II).

The company overview in "Sea-web", a shipping website shows Tongli China to be a subsidiary company of the Government of China and one Tongli Ltd. to be a subsidiary of Tongli China.

MOA of 17.03.2010 is shown to be executed by Tongli Ltd. The execution clause of MOA does not show the signature of the authorized signatory of Tongli Ltd. clearly.

The addendum No. 1 to the MOA nominating the Halcyon as the owner of Tongli Yantai shows the distinct signature of the authorized signatory of Tongli Ltd. It is admitted that Tongli China unilaterally purchased Tongli Yantai and paid 10% of the purchase consideration to the shipyard.

23. Lloyd's intelligence list in respect of Tongli China specially shows the ownership structure of Tongli China having inter alia Rainbow Success and Tongli Ltd. Tongli Ltd. is shown to be the subsidiary of Tongli China which is shown to be a subsidiary of the Government of China. In the aforesaid company overview the addresses, telephone numbers and email Ids of all these companies in the group is shown to be the same. These particulars though disputed by the Respondent tallied with Lloyd's intelligence list. If Tongli Shipping Company Ltd. registered in China is Tongli China and Tongli Ltd. is its subsidiary and is shown to be registered in Samoa the documents executed by Tongli Ltd. would be of Tongli Samoa. The MOA is executed by Tongli Ltd. It is stated to be executed by Tongli China. The company overview shows that Tongli China is the holding company of

Tongli Ltd. and, therefore, when it is an admitted position that Tongli China has executed the MOA, Tongli Ltd. and Tongli Shipping Company Ltd., China are shown to have interchangeably dealt with the third party in execution of documents with regard to Respondent-ship, Tongli Yantai by the same authorized signatory. Similarly the Lloyd's intelligence list of Tongli China showing the ownership structure of Tongli China with regard to a number of vessels in each related company also shows Tongli Ltd. to be the subsidiary of Tongli China. Halcyon, as the registered owner of Tongli Yantai, is stated to have executed a Bare Boat charterparty agreement (BBC) in respect of Tongli Yantai with one Eastshine, which shall be considered presently. The authorized signatory of Tongli China and of Eastshine is the same. Hence Halcyon is shown to have been nominated by Tongli China in the MOA, pursuant to which it derived its title and has in turn chartered the vessel to Tongli China through Eastshine. It is this charterer Eastshine which has made payment of 30% of the value of the ship in a sum of US \$ 10.52mn as advance charter to Halcyon which Halcyon is shown to have paid the shipyard along with a loan of the remainder 60% in a sum of US \$18.15mn from FEHL to obtain registration of Tongli Yantai in its name. Halcyon, nominated by Tongli China as the owner of Tongli Yantai, is subsidiary company of the subsidiary company of FEHL.

24. It is, therefore, not surprising that in the email of the insurer dated 31st March, 2010, it has been stated that Tongli China has purchased their first vessel Tongli Yantai which had until then not been delivered to them, so that they were not covered under the insurance cover of P and I club.

25. FEHL global offering prospectus showing the company's structural and financial position inter alia sets out the direct financial leasing terms of its business. It underscores the fact that although FEHL as the lessor would have the legal ownership of the asset underlining the lease in the direct financial leasing transaction, the risk and rewards of ownership are transferred to the lessees so that those lessees are not recorded in the balance sheet of FEHL or its group companies. This shows that BBC is, therefore, in fact only the security for recovery of loan, the risk and rewards of ownership having been transferred to Eastshine there under, it reflecting only a financial arrangement between the parties thereto. This also explains Clause 51 of the BBC showing how the risk and rewards would be transferred to Eastshine by payment of the difference at the time of the net sale upon the termination sum being paid.

26. Hence in the history and re-organization of FEHL, the explanation about its establishment shows the use of special purpose vehicles (SPVs) primarily for bare-boat chartering when the customers sign purchase contract making a deposit of 10% to 20% and assign their rights and obligations under contract to FEHL who would be obliged to make payment under the contracts. At the same time they would sign charter agreement. These assets are insulated from other assets of the group "as soon as risk arises from the assets of the special purpose vehicle". Halcyon admittedly belongs to the group. FEHL is the financier which has

financed Tongli Yantai to the extent of 60% of its purchase and the BBC transferred the risks and rewards to Eastshine through its subsidiary Halcyon, nominated by Tongli China and guaranteed by its 80% shareholder WWD. The prospectus further shows 82 HK subsidiaries wholly owned by FEHL, Halcyon being one of them in offshore ship leasing business.

27. Hence FEHL financed Halcyon to the extent of 60% of the value of the ship payable to the shipyard. Halcyon entered into the BBC with one Eastshine on 23.04.2010. Eastshine is a Tongli group of companies belonging to Tongli China seen from the execution clause of BBC in which authorized signatory of Eastshine is the same as the authorized signatory of Tongli Ltd. in the MOA of 17.03.2010. Aside from the fact that under the BBC, Eastshine had to pay Halcyon 30% of the value of the ship as advance charter by way of upfront payment, Tongli China guaranteed the payment by Eastshine to the shipyard. The rider clauses in the BBC show the personal guarantee of WWD, the 80% share holder of Tongli China.

28. Further WWD, the director/legal representative of Tongli China (as reflected in the Lloyd's List) is shown as the President of Eastshine in a Civil Suit filed in the Tianjung Maritime Court, China against the Appellant. An email on behalf of Tongli China is sent by WWD with regard to chartering of Nasco Diamond on 12.12.2010. Tongli China sought to make a claim upon the Appellant's insurer inter alia in respect of Nasco Diamond through their insurance broker under the email dated 04.04.2011. The email shows the head office of Tongli Shipping at Yantai China. The subject of the email shows "new TCL" (Tongli China Ltd.). Even the settlement terms with the Appellant's insurers for Nasco Diamond is signed by WWD on 12.12.2010.

29. The insurance certificate of Tongli Yantai shows Halcyon as the registered owner, Eastshine as the bare-boat charterer and Tongli China as the commercial manager during the relevant period between 26 May 2010 to 20 February 2011. During the period 31 January 2011 to 20 February 2011 only Halcyon is shown in the insurance certificate. Eastshine has not been shown presumably because the BBC was terminated on 31.01.2011 and Tongli China is not shown as its commercial manager. Hence though Tongli China was shown earlier it has ceased to be shown after the arrest of the ship. There is, therefore, a change in the insurance certificate by which Tongli China is no longer shown with regard to Tongli Yantai just as WWD was sought not to be shown as the President of Tongli China in later Lloyd's list.

30. Another entity wholly controlled by Tongli China is one Rainbow Success. The Rainbow Success has paid charter line hire to the Appellant on behalf of Tongli Samoa under the Appellant's Nasco Diamond charter. The act of Rainbow Success in conjunction with Tongli China must, therefore, be seen. The Rainbow Success has given a corporate guarantee on behalf of Eastshine to Halcyon under the BBC along with personal guarantee of WWD on behalf of Tongli China who guaranteed the payment of Eastshine to Halcyon.

31. The clock has turned full circle.

32. The learned Judge has not deemed such circumstances sufficient to prima facie see the interdependence of several ostensibly independent legal entities upon Tongli China and has declined to lift the corporate veil to see the sister concerns Tongli China and Tongli Samoa as they actually are and this is on the premise that the application is not made against Tongli China, FEHL is not in the Tongli group and the case that Halcyon is the "alter-ego" of Tongli China was given up. However, we find the above material circumstances impossible to pass us by.

33. Halcyon claims to be the subsidiary of the subsidiary of FEHL. Halcyon has entered into BBC with Eastshine. Two major documents being the BBC and the prospectus issued by FEHL come up for consideration in seeing the inter relationship of the main company Tongli Ltd. having its fronts Tongli China, Tongli Samoa, Eastshine as well as Rainbow Success.

34. The BBC has been entered into on 23.04.2010. As aforesaid the authorized signatory of Eastshine is the same as the authorized signatory of Tongli Ltd. in the initial MOA. Interestingly Eastshine is incorporated in Samoa. Eastshine is shown to have its registered office at level 2 Lotmao Center, Waka Street, Apia, Samoa. Tongli Samoa is also incorporated in Samoa. It is shown to have address of its registered office at Asia Citi trust, Lotmao Center in Samoa as informed in letter of the Samoa International Financial Authority in Apia, Samoa. The BBC is specifically stated not to be a hire purchase agreement under Clause 42. It would have to be seen whether in essence that was so.

35. The rider clauses of the BBC assume importance to consider whether it was a usual charterparty agreement in which the owner of the vessel gives it to a charterer upon a payment of charter hire, in which case the ownership right would remain with the owner and the charterer would, under the licence of the owner as set out in the charterparty, run the vessel on its voyages.

36. Two guarantees of corporate guarantors are given to Halcyon under the BBC. One is of the original buyer shown to be Tongli Ltd. which is admittedly Tongli China having its registered office at Sea Meadow House, Blackburne, Highway Road, Town Tortola, British Virgin Islands. The BBC also shows a personal guarantee given by WWD in favour of Halcyon. Clause 36.2.1(a) shows the Halcyon had received the charterer's particulars of incorporation, change of name, Memorandum of Articles of Association as also list of share holders of respective share holdings, documents which are not produced by the Halcyon before the Court. Under Clause 37.1 the charter was to continue for 60 months and terminate in April 2015. Eastshine, as the charterer, would however be entitled to have early termination of the charterparty upon giving Halcyon one month's notice and paying a "termination sum" calculated up to such date under Clause 37.3.

37. Despite the fact that under the charterparty payments were to be made each

month of specified amounts mentioned in the payment table schedule I to the BBC, under Clause 38.1 Eastshine was to pay US \$ 10.8mn. as upfront payment which amount came to be paid on 23.04.2010 itself. This included the amount paid as deposit by Tongli China under the MOA to the shipyard being 10% of the value of the share in a sum of US \$3.18mn. It is argued that 10% of the total value of the ship was paid by Tongli China and 30% by Eastshine. However US \$ 10.8m repaying 30% of the value is shown to include the initial payment of 10% for which credit is stated to have given by Halcyon to Eastshine.

38. Under Clause 38.9 of BBC, paramountcy of the payment of the termination sum as an absolute and unconditional obligation of Eastshine is shown denoting a situation analogous to recovery of loan. Further under Clause 47.6 of the BBC upon payment of the termination sum which would represent the balance charter hire price by Eastshine to Halcyon, Halcyon is obliged to transfer the owner's rights, title and interest in the vessel on "as is where is" basis to Eastshine. This is in consonance with a hire purchase agreement where, upon the payment of balance hire, the property would be transferred to the hirer conferring legal as well as equitable title to such transferee upon the payment.

39. Similarly under Clause 41.1 any change in the registered ownership of the vessel, which was in the name of Halcyon, would require approval of Eastshine, though only the charterer.

40. Similarly also under Clause 44.3 of the BBC insurance proceeds received by Halcyon in respect of any loss caused to the ship are required to be paid to Eastshine upon deduction of the outstanding termination sum or any other amount due and payable to Halcyon by Eastshine under the charter. Consequently on any default, loss, sale or upon payment of the termination sum by itself, Eastshine though a charterer would become the true owner. The only entitlement of Halcyon is, therefore, for receipt of the termination sum. The termination sum is the amount agreed to be payable by Eastshine as shown in the charterparty. There is no further obligation of Eastshine and no further entitlement of Halcyon under charterparty though Halcyon calls itself the legal as well as beneficial owner thereof.

41. Further under clauses 51.3 and 51.4 relating to the sale of the vessel the amount of the termination sum is agreed to be deducted from the net sale proceeds and if the net sale proceeds are insufficient for the payment to the owners, Eastshine is to pay the balance outstanding to the owners and if any amount remains from the net sale proceeds after payment to Halcyon as owners the difference is to be paid to Eastshine as the charterer. Similarly if the value of the vessel received upon sale is higher than the termination sum, the difference is to be paid by Halcyon to Eastshine.

42. Similarly under Clause 12 Halcyon undertook not to mortgage their ship without the prior consent of Eastshine.

43. It is important that indemnity is given by one party to the other under Clause

17 (a) and (b) of the BBC. Hence under Clause 17(a) Eastshine has indemnified Halcyon against loss, damages or expenses incurred upon the ship and if the ship is arrested for the reason of any claims earlier made upon Eastshine, Eastshine would be bound to have the ship released. Similarly under Clause 17(b), Halcyon has indemnified Eastshine for loss, damages or expenses incurred by Eastshine and any claim against Halcyon resulting in arrest of the vessel, Halcyon would be bound to have the ship released from arrest. The claim made by the Appellant is upon Halcyon which has caused Halcyon to apply for release from arrest under the impugned order.

44. As any hire purchase agreement under clauses 28 and 46 relating to the termination of the BBC, Halcyon would be entitled to withdraw the vessel from Eastshine upon failure to make payment of the hire dues for whatever reason. There is no case of default of Eastshine being shown and there is no case for termination by Halcyon having been made out. Halcyon, however, has terminated the BBC on 31.01.2011 and the reason stated by Counsel on behalf of Halcyon is most intriguing; since the ship remains arrested Halcyon is stated to have been constrained to terminate the BBC. This is not only diametrically against the terms of the BBC but betrays the very status of Halcyon. Halcyon though claiming to be the real and beneficial owner of the ship, who could not mortgage or transfer its title to the ship without the permission of its charterer Eastshine and who had indemnified the charterer against any loss caused by a claim made upon it and had undertaken to release the ship from arrest has sought to terminate the BBC because it could not get the ship released from arrest itself! The charterer Eastshine seems to be wholly unconcerned; it has neither applied to be a party nor applied to release the ship from arrest nor sought to make any claim upon Halcyon for the indemnity given.

45. A reading of the charterparty unmistakably shows that the only relationship between the two contracting parties is of Halcyon having been nominated by Tongli China under its corporate guarantee along with guarantee of Rainbow Success, its sister concern and the personal guarantee of WWD, the 80% share holder of Tongli China to recover specified amount and then call it a day. Once that is through, Eastshine, the other sister concern of Tongli China as reflected in the aforesaid evidence, would be entitled to the rights of ownership as also the difference of amount keeping intact its position free from encumbrances such as transfer by mortgage or otherwise by Halcyon to any other party.

46. Such unique clauses are a pointer to the fact that the agreement is essentially in the nature of hire purchase rather than pure charterparty, its other usual clauses notwithstanding. These are the clauses that commend to us rather than the other clauses, though incorporated in the BCC, but of no material commercial importance to either party to the BBC and which were not even sought to be invoked in view of the upfront payment made on the date of the execution of the agreement and the termination, however misapplied by Halcyon, being accepted by Eastshine, the charterer. The consideration of those other

clauses, hitherto not even invoked by the parties, and construed by the learned Single Judge, therefore, seems rather inconsequential to determine the real relationship of the parties of the BBC. The construction put by learned Judge upon the aforesaid clauses to hold that the document is a usual charterparty also does not find favour with our reasoning.

47. It would be pertinent to see how Halcyon became the owner in the first place. FEHL, initially Far East Hongxin Company Ltd. which changed its name to Far Eastern Horizon Ltd. on 16.12.2010 financed Halcyon to the extent of 60% of the value of the ship. Halcyon is the subsidiary of the subsidiary of FEHL being not only a one-ship, but a one-dollar company, an undercapitalized shell company the nominal value of its share capital being HK \$ 10,000 with an issued and paid-up capital of HK \$1. The loan transaction of FEHL coincides precisely with the BBC the term of the loan is from 23rd July, 2010 to 23rd April, 2015. The amount of the loan under the loan agreement is US \$18.15mn. Halcyon which was formerly Link Smart Logistic Ltd. (LSL) changed its name to Halcyon on 05.10.2010. It has as its office the residential address of the Secretary of FEHL, its email ID is that of FEHL with an extra link, a fact which by itself is not eyebrow-raising except that the another email ID of Halcyon is precisely the same email ID of Tongli China-Tonglishipping@163169. net which is also the email ID of Eastshine as shown in the communication detail presumably required to be exhibited on the ship itself. Further the individual Secretary/Director of LSL, the erstwhile company of Halcyon, is one Nlu Wei-Dong (NWD) with the same last name of WWD, the president of Eastshine and the 80% shareholder and director of Tongli China. Interestingly the signature of NWD on the documents of the company registry being the notification of the change of the company name from LSL to Halcyon and showing the appointment of NWD as its director is identical to the signature of the authorized signatory of Halcyon on the BBC. The other signature which is the signature of authorized signatory of Eastshine is identical to the authorized signatory of Tongli China. NWD and WWD are prima facie seen to be the two arms of the BBC. Tongli Yantai the ship of Halcyon, is shown in Tongli China's website, Tongli China being its commercial manager as reflected in the Insurance Certificate of Tongli Yantai also Tongli Samoa's website shows the same telephone numbers as that of Tongli China.

48. The web of such documentary evidence makes it impossible for us not to take each of these companies as but actually one, their separate names being a mere facade. None of these, more specially Tongli Samoa, which is the relevant company on the one side of the controversy, and Halcyon on the other can be taken to be separate independent legal entities capable of standing on their own. Such facts by themselves are gross enough to call for the Courts' attention and action to appreciate the truth of the transaction even if the Appellant did not urge the lifting of the veil of incorporation of Halcyon, it having given up its initial case that Halcyon was the "alter-ego" of Tongli China and the Appellant having signed the fixture note only with Tongli Samoa.

49. The separate legal entity of a company as a juristic person would require the Court to view each of these companies, albeit in a group, separately and distinctly. The exceptions carved out in viewing their structure require the Court to consider the aspects that emerge regarding these companies from the documentary evidence disclosed to the Court reflecting them as a group. These exceptions going beyond the renowned case of *Salomon v. Salomon and Company* (1897) A.C. 22 HL are cases not only of perpetrations of fraud or evasion of obligations but upon the presumption of agency or trusteeship. These exceptions extend to cases of avoidance of taxation and cases where protection of public interest is required. Mr. Dwarkadas' contention that only in cases of fraud the corporate veil may be lifted to see which company other than Tongli Samoa would incur liability upon the charterparty signed by Tongli Samoa would be rather inaccurate given the precedents that govern this issue and this is even from the British Courts which is considered less amenable to such lifting than the Courts in the U.S. which have been more ready to go further in lifting the corporate veil when the situation would result in anomaly or injustice.

50. Hence in the case of *Smith, Stone and Knight v. Birmingham Corpn.* (1939) 4 AER 116 CA Lord Justice Atkinson set out situations in which he would not hesitate to lift the corporate veil. These were when the profits of one company were treated as the profits of the other, the persons conducting the business were appointed by the parent company, the head and the brain of the venture in question was the company, the adventure of the venture and the capital involved was governed by the company, the company made profits by its skill and directions therein and the company was in factual and constant control of the other company. These guidelines were laid down in the case in which the company acquired a partnership concern, registered it as a company and continued to carry out the acquired business as a subsidiary company. The parent company held all the shares except five which its directors held in their respective names in trust for the company. The profits of the company were treated as the profits of the parent company which appointed persons to carry on the business keeping with itself the factual and constant control. The company also acquired the premises upon which the business of the subsidiary company was carried on. The company made a claim for compensation upon the purchase of the property of the subsidiary company by the Municipal Corporation of the City to build a technical college. The corporation claimed that upon the law of separate legal entity of a limited company as laid down in *Salomon's* case the company could not be granted the compensation. Relying upon the case of *Gramophone and Typewriter Ltd. v. Stanley* (1939) 4 AER 120 CA Lord Justice Atkinson accepted that when an individual by himself or by his nominees held practically all the shares in a company he would have complete control of the company for exercising voting powers to enforce his views as to policy without diminishing his rights and powers or making the property and assets of the company as distinct from the company. Considering that to be a question of fact in each case, he observed that the subsidiary was carrying on business as the

company's business rather than its own and laid down the aforesaid six guidelines. He, therefore, held that the company though a separate legal entity could claim compensation from the Municipal Corporation.

51. Following that case in the case of DHN Food Distributors Ltd. v. London Borough of Tower Hamlets (1976) 3 AER CA 462 Lord Justice Denning MR came to consider the interrelationship between three companies in a group again for claiming compensation upon compulsory purchase of the premises owned by its wholly owned subsidiary. He upheld the view of the trial Judge about a constructive trust being created under a licence granted to the company by its subsidiary in which the property of the firm was not in one ownership but owned by three companies; the business was owned by the parent company, the land by a subsidiary and the vehicles by another subsidiary. The parent company held all the shares in both the subsidiaries. The directors were same in all the three companies. Strangely as the result of the business having been closed down, all the three companies were in liquidation. Justice Denning answered his most pertinent question; what is the effect of the firm being in truth the three companies ? He considered the question of equitable interest of the company consequent upon the revocable licence granted and the lifting of the corporate veil. He quoted Professor Gower from Principles of Modern Company Law (3rd Edition 1969 p 216) at page 467 thus:

"there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group."

He observed:

This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.

In fact he came to the aforesaid conclusion from his initial observation on page 464 of the case thus:

This case might be called the "three in one": three companies in one. Alternatively, the "one in three": one group of three companies.

Lord Justice Goff agreed with the observations on page 468 thus:

... I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever;...

He, therefore, concluded that the company would be the equitable owner of the property which came to be acquired.

52. The acceptance of the position that the Court must go far and beyond what

could be suggested merely on paper would bring cases requiring justice to be done to be heeded. The Court, therefore, had come of age in putting substance before form and went ahead of the earlier case of *William Cory and Son Ltd. v. Dorman Long and Company Ltd.* (1936) 2 AER 386 CA. In that case the Plaintiff company was foisted the liability of damage which resulted to a barge supplied by it through the negligence of the bargee. It claimed to limit its liability under the statutory provisions contained in Section 503 of the Merchant Shipping Act, 1894. The company had founded its subsidiary company to which all the lighters and employees were transferred. However there was change in management thereafter. During the period of such transfer the parent company continued to exist and made agreements with third parties but the profits were credited to the subsidiary company and all the expenses and wages were debited to it without any document in writing between the two companies. The question was whether the parent company was the owner or the charterer under the aforesaid Act. The real anomalous situation was whether the company would be liable for the damage but not entitled to take advantage of limiting its liability there under. Lord Justice Slesser at page 387 considered the question of which of these two companies was responsible for the negligence of the bargee who was the employee of the parent company. The statutory benefits which accrued to the owners of the ship were considered in the light of the earlier judgment rendering the company liable for full damages upon the negligence of its employee. The incorporation of the new company made it a separate legal entity since the re-transfer to the parent company was not documented though third party contracts were made by which the profits were accounted for in the name of the subsidiary company. It was observed that the company could not show itself as the owner to claim the benefit of the limited liability. Though, therefore, the company took over the management, was in control over the lighters, the subsidiary company having received amounts under the contracts was held to be the owner.

53. Similarly Courts have been unhesitant to apply the doctrine of the lifting of the corporate veil under varied circumstances not only relating to the taxing statutes or contracts which expressly enjoin such acts, but also the situation in which welfare legislations are sought to be outwitted against labour by capital, acts involving "controlling interest" issues, mergers and acquisitions amongst group companies, relationship of agency and trust requiring investigation (See. *Adams v. Cape Industries Plc* 1990 Ch. D. 433) acts perpetuating illegality, cases in which "mareva injunctions" were granted in U.K. under, implicitly for actions subverting public interest when courts would wind up companies under the "just and equitable clause" (See. *Ebrahimi v. Westbourne Galleries Ltd.* 1972 (2) AER 492 HL). It has been succinctly put that the veil is lifted to view actions meant to "defeat public convenience, justify wrong, protect fraud and defend crime". (Observed in *U.S. v. Milwaukee Refrigerator Transport Company* Gower's Modern Company Law, 4th Edition, Page 112) It, therefore, applies as much to cases of fraud as to sale and transfer of the company's movable and immovable assets including its shares to relatives or member of a group of companies (See.

Nahidco Housing P. Ltd. Vs. The State, or to prevent legitimate dues to labour.

54. This is more so when companies were inextricably connected as to be in reality a part of one concern such that the subsidiary company is created by the holding companies holding 100% of its shares (See. State of UP v. Renusagar Power Company 1991 (70) CC 127 SC)

55. Of course, it would never be used to allow anyone to take advantage of his own wrong; it could never be relied upon by a company itself to show its own contract which would go against the provisions of any law or rule as it has been neatly observed. "It is not to say "look it is me; the company is only a facade"." (See. Premlata Bhatia v. UOI 2004 (58) CLA 217 Delhi) Nor it can be allowed to be used to settle personal scores in case of family feuds when separate companies are incorporated by members of a group. (See. J.C. Khosia Vs. Khosla Medical Institute and Research Society etc.,) It would certainly be applied to companies which are no longer autonomous having the identity and community of interest between companies in a group to look at the economic scenario to meet which the companies are incorporated. The test is to see whether they exist as autonomous units or as organs of each other. As the financial and economic situations become more and more complex in the commercial and business world, the ambit of the employment and application of the doctrine would grow commensurately. It would be required to be more frequently invoked upon present day considerations when such situations arise oftener enjoining courts to use their discretion to do complete justice upon equitable consideration - not to look at the juristic person alone but its directors, officers, nominees and even employees.

56. The doctrine has been similarly applied in India in various cases the more illustrious of which could be cited.

57. In the case of Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd. 1986 (59) CC 134 a company purchased shares in another company and the dividends which accrued there from were used for payment of bonus to its workmen. The company transferred all those shares to its wholly owned subsidiaries which had no other business so that its own balance sheet and profit and loss account could not reflect the surplus for payment of bonus which plummeted from 16% to 4%. The Court observed that in such exceptional cases it was entitled to lift the veil of corporate entity "to pay regard to the economic realities behind the legal facade". Drawing from English decisions under taxation laws as also situations of group companies which carried on business in two countries under the principle of agency, the Court applied the principle to the said company upon the avoidance of welfare legislation. At page 138 the Supreme court observed:

A new company is created wholly owned by the principal company, with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred

to it by the principal company and serving no purpose whatsoever except to reduce the gross profits of the principal company. These facts speak for themselves. There cannot be direct evidence that the second company was formed as a device to reduce the gross profits of the principal company for whatever purpose. An obvious purpose that is served and which stares one in the face is to reduce the amount to be paid by way of bonus to workmen. It is such an obvious device that no further evidence, direct or circumstantial, is necessary.

58. In the case of *L.I.C. of India v. Escorts Ltd.* 1986 (59) CC 548 the Court considered the law relating to foreign investment in India and the interest of a group of companies represented in essence by a single share holder who constituted a trust of himself and his family as a group of companies for making investment in India as a non resident Indian. By a Government circular NRIs as well as overseas companies which had beneficial interest vested in NRIs were entitled to invest in shares of Indian companies if they had a 60% ownership or beneficial interest in their hands. The rule was introduced to prevent large scale acquisitions or shares of Indian companies by non residents causing destabilization. A person representing a group of companies sought to show their interest in the holding companies and claimed the entire beneficial interest in the family trust. He sought permission of the RBI on behalf of the group of companies. He could set up a number of companies directly owned by him and invest through each company up to 1% of the capital of company in India. The eligibility to invest to the extent of 60% in the hands of the NRIs was under consideration. When the group of companies sought transfer of shares upon the investment sought to be made which was refused by the company, the Court at page 626 observed:

It was submitted that the thirteen Caparo companies were thirteen companies in name only; they were but one and that one was an individual, Mr. Swraj Paul. One had only to pierce the corporate veil to discover Mr. Swraj Paul lurking behind.

The Court saw inroads made by the law and the principle of separate legal personality of companies and the various fact situations such as taxation legislation, protection of public interest etc. In that case the Court sought to lift the veil upon the requirement under the Foreign Exchange Regulation Act, 1973 and the portfolio investment scheme of the Government of India. The Court noted the object of the act and the scheme that was made there under. At page 628 the Court observed:

Which of such non-resident companies or legal personalities may then be permitted to invest in shares of Indian companies? The answer is furnished by the scheme itself which provides for "lifting the corporate veil" to find out if at least 60 per cent of the shares are held by non-residents of Indian nationality or origin. Lifting the veil is necessary to discover the nationality or origin of the shareholders and not to find out the individual identity of each of the shareholders. The corporate veil may be lifted to that extent only and no more.

59. The consideration of lifting the corporate veil in cases of shipping contracts have been similarly considered in a host of Judgments to which our attention has been drawn since the earliest case of *The Aventicum* (1978) 1 LR 184 QB (Admiralty Division) .

60. In the case of *Aventicum* it was held that the Court could look behind the registered owner to determine the beneficial ownership of a ship and that the consideration of ownership in a ship was not limited to a registered or legal owner alone. That was the case in which the ship was arrested u/s 3(4) of the Administration of Justice Act, 1956 which runs thus:

3 (4): In the case of any such claim as is mentioned in paragraphs (d) to (r) of Sub-section (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court and (where there is such jurisdiction) the Admiralty jurisdiction of the Liverpool Court of Passage or any county court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.

The reasoning in this case has been applied in the case of *Saudi Prince* (1982) 2 LR 255 QB (Admiralty Division) which has in turn been referred to and applied in the case of *The Able Lieutenant* (2003) 3 Case 4 (HCM) which shall be considered presently.

61. In the case of *Andrea Ursula* (1971) 1 LR 145 : (1973) 1 QB 265 Lord Brandon, J. is shown to have considered the ownership of a ship to include beneficial ownership as

"the vessel has been spirited into different ownership...." which Judgment has been dissented from in the later judgment in the case of *I Congreso del Partido* (1978) 1 AER 1169 QB (Admiralty Division) and in the case of *The Permina 3001* (1979) 1 LR 329 (Singapore Court of Appeal) Per Chief Justice Jin. The case of *I Congreso*, however, related two ships registered in the republic of Cuba, showing the Cuban Government as the registered owner. The judgment of Justice Robert Goff considering Section 3 (4) of the Administration of Justice Act was in turn not followed by the Singapore Court in the later case of *the Ohm Mariana* (1993) 2 SLR 698 of the Singapore Court of Appeal.

62. The case of *Permina 3001* (1979) 1 LR 329 (Singapore Court of Appeal) again differed from the case of *Andrea Ursula* (1971) 1 LR 145 : (1973) 1 QB 265 but considered in detail the concept of beneficial ownership of the shares in a ship. In the case of *Permina* a charterparty agreement was entered into

between the owners and the charterers. Though the ship was owned by the owners it was under the full control and possession of the charterers. The liability for insurance was in dispute. The trial Judge, Justice Rajah held that the charterers did not have beneficial ownership of all the shares in the ship. The Singapore Court of Appeal in Appeal held that the persons who have right to sell, dispose of or alienate all the shares in the vessel had the beneficial and equitable ownership whether he was the legal owner or not u/s 4(4) of the High court (Admiralty Jurisdiction) Act which is a statute in Singapore Pari Materia with Section 3(4) of the Administration of Justice Act, 1956 in UK and which runs thus:

4 (4): In the case of any such claim as is mentioned in paragraphs (d) to (q) of Sub-section (1) of Section 3 of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of the action arose, the owner or charterer of, or in possession or in control of, the ship, the admiralty jurisdiction of the Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.

After considering the views of Justice Goff in *I Congreso* (1978) 1 AER 1169 QB (Admiralty Division) and the view of Justice Brandon in *Andrea Ursula* (1971) 1 LR 145 : (1973) 1 QB 265 and the concept of constructive trust in principles of equity the Court held on the facts of that case that the name of the registered owner who has the right to take possession of the ship and not the equitable owner of the ship would be regarded as its true owner.

63. The change of ownership of a ship prior to the contract between the parties has never been frowned upon by the Courts. In a number of Judgments to which our attention has been drawn such an act is accepted in the normal course of Maritime business. In the case of *The Maritime Trader* 1989 (2) LR 153 QB (Admiralty Division) the question of whether the vessel was beneficially owned by the charterers was to be considered. Justice Sheen took into account of the shares of the transferee company having been owned by the company to which the vessel was let. In that case the registered owner of the ship *The Maritime Trader* which was arrested under an action in rem applied to set aside the arrest. The claim was against the another ship, *Antaios*. Upon considering the claim for beneficial ownership under the Brussels convention dated 10th May, 1952 and the decisions in *Permina* 3001 (1979) 1 LR 329 (Singapore Court of Appeal) and *I Congreso* (1978) 1 AER 1169 QB (Admiralty Division) it was held that the ship beneficially owned by a charterer was not a sister ship. In that case also the other ship was purchased well before the contract date. The Court refused to consider the decision in *Aventicum* (1978) 1 LR 184 QB (Admiralty Division) for

investigating the title of lifting the corporate veil. However that was upon clear facts in that case which showed that the two ships were not sister ships of sister concerns. The judgment in *Aventicum* was seen to be in a case where the change of ownership was not genuine but a sham justifying the lifting of the corporate veil as "there was much to be investigated" in that behalf.

The arrested ship was twice transferred to other parties. However it was held that the first owner continued to be the beneficial owner despite two changes in the register. The Court, therefore, concluded that:

the Plaintiffs bear the burden of proving beneficial ownership only when they want to proceed against a ship not in the registered ownership of the Defendant who would be liable to them on the claim. This is the only situation where the court would ignore the owner's name listed on the ship's register and look behind the register to catch the real ship-owner hiding behind the nominee. In all other cases, the registered ownership of the ship as in the ship's register is paramount.

In *The Maritime Trader* 1989 (2) LR 153 QB (Admiralty Division) the Court observed that circumstances may justify the lifting of the corporate veil, or more than one veil, if it is necessary to reveal the truth. Upon the evidence in that case the Court concluded that the matter did not raise even a *prima facie* case that the ship which was arrested for its availability as security for a judgment against another company which owned another ship purchased by that company. The rhetorical questions which the Court answered have been brought out thus:

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.

64. The Court observed upon the evidence or rather the lack of it thus:

I am left in no doubt that *Maritime Trader* was not beneficially owned by MTO and she cannot be arrested to secure the Plaintiff's claim against that company.

65. It would have to be seen whether the facts of our case show sufficient documentary evidence thus far produced to see whether the owners of *Nasco Diamond*, the ship that sunk whilst under the charterparty between the Appellant and Tongli Samoa were essentially the same as the beneficial owner of *Tongli Yantai* the ship of *Halcyon* and whether the documentary evidence is sufficient to show the beneficial ownership itself.

66. The later case of *Saudi Prince* (1982) 2 LR 255 QB (Admiralty Division) showed more evidence of such beneficial ownership. The ship was owned by Mr. Orri when the cause of action arose. The ship was transferred to another company before the arrest came to be made. That was the company in which Mr. Orri and his children owned all the shares. It was seen in evidence that they were nominees of Mr. Orri who retained full beneficial interest in the ship and was to have beneficial ownership thereof. In that case a dispute arose between

the Plaintiff and the Defendant concerning the damage to the Plaintiff's cargo carried on a vessel which was owned by the Defendant. The Defendant sought release of the ship arrested on the ground that it was owned by another company. However the Defendant owned 80% of the shares in that company. The relationship of the parties in that case are rather similar to the relationship in this case. Though there was only one ship which came to be arrested the ownership was different. The Defendant in that case was the charterer of the Plaintiff. The Defendant itself owned the ship. The Defendant itself was sued as the owner of the ship. But the Defendant contended that another person was the owner. The Defendant however owned 80% share in that company much like WWD held 80% in Tongli China whilst the ship of Tongli Samoa, Nasco Diamond came to be arrested. The Court saw the evidence that aside from the Defendant holding 80% of the shares in the other company, the Defendant's son and daughter owned the remainder 20% of the share as the Defendant's nominees and hence concluded that the Defendant was the beneficial owner at all material times as was the conclusion in *Aventicum* (1978) 1 LR 184 QB (Admiralty Division). The shares held by NWD as reflected in the records would bring home identical fact situation in this case and upon the principal laid down in *The Maritime Trader* 1989 (2) LR 153 QB (Admiralty Division) (in which enough evidence was not brought before the Court), the above evidence in this case would not only justify but necessitate the lifting of the corporate veil. The observation quoted by Justice Sheen in *The Maritime Trader* as sought above would merit repetition:

Circumstances may justify the lifting of the corporate veil or more than one veil, if that is necessary, to reveal the truth.

67. In the case of *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) Lord Donaldson M.R. in Appeal from the judgment of Justice Sheen of the Admiralty Division of the Royal Courts of Justice considered the judgment of Justice Goff in *I Congresso* (1978) 1 AER 1169 QB (Admiralty Division) and ultimately concluded, setting aside the judgment of Justice Sheen as also the direction for disclosure which he passed for seeing the ownership of the ship, that the owner of the ship is only a registered owner. The Plaintiff's case was that one "P" was the real owner of the two ships concerned in that case stated to be the sister ships. Upon the case that one man owned these two ships amongst the fleet Justice Donaldson observed that registration was not sham. He observed:

My conclusion is that, in relation to a registered ship, "owner" in Section 21(4)(b) means "registered owner." I am as realistic as most judges who have served in the Commercial Court, but I really do not see the commercial advantage of the creation of sham registered ownerships. Mr. Pothitos no doubt has a legitimate interest in running these ships, including the two with which we are concerned, as a fleet, but he can do this by running a series of genuine one-ship shipowning companies as a group. He does not need a structure involving a holding company and subsidiaries, and still less sham companies. As governing shareholder in

each shipowning company, he can cause them to use their individual assets to the mutual advantage of the members of the group and of Mr. Pothitos.

68. The Court considered Section 21(4) of the Supreme Court Act, 1981 (of UK) which followed from the Administration of Justice Act, 1956

(also of UK) and which runs thus:

"21.

(1)...

(2)...

(3)...

(4) In the case of any such claim as is mentioned in Section 20(2)(e) to (r), where

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) ...

(iii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

However in that case also the Court considered that the evidence was insufficient to see beneficial ownership to release the ship from arrest on that ground. The Court observed:

... there can be no doubt that discovery can be ordered if there is any real indication that this may uncover a situation which will confirm, or for that matter negative, the court's jurisdiction. But there has to be some real indication that further facts may exist which will affect the issue. Ironically the Plaintiffs put the point much higher - and possibly too high - in their skeleton argument when they said that a judge should order discovery where the Plaintiffs raise a strong prima facie case of the same beneficial ownership and when, in the absence of co-operation by the Defendants - either voluntarily or as a result of a court order - there are no further steps that the Plaintiffs can reasonably take to ascertain the true position. Something less than a strong prima facie case might well suffice in such a situation, but here there is no indication of any case at all.

The Court however concluded that the ship of a sister company would not fall within the mischief of Section 21 thus:

The truth of the matter, as I see it, is that Section 21 does not go, and is not intended to go, nearly far enough to give the Plaintiffs a right of arresting a ship which is not "the particular ship" or a sister ship, but the ship of a sister company of the owners of "the particular ship." The purpose of Section 21(4) is to give rights of arrest in respect of "the particular ship," ships in the ownership of the owners of "the particular ship" and those who have been spirited into different legal, i.e., registered, ownership, the owners of "the particular ship" retaining beneficial ownership of the shares in that ship. This was the situation in *The Saudi Prince* (1982) 2 LR 255 and was alleged to be the situation in *The Aventicum* (1978) 1 Lr 184.

69. Hence the facts situation in *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) would not lend itself to consider the beneficial ownership upon ordering further investigation and looking into further evidence which would be the act of lifting the corporate veil of the company whose ship was arrested and the company who actually equitably was its owner. Consequently the aspect of the raising of the corporate veil was allowed in the earlier cases of *Aventicum* (1978) 1 LR 184 QB (Admiralty Division) and *Saudi Prince* (1982) 2 LR 255 QB (Admiralty Division).

70. Nevertheless the Court of Appeal of the High Court of Singapore in the case of *The Ohm Mariana* (1993) 2 SLR 698 considered *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) but refused to follow it. In terms it held that the owner of the ship was not only the registered owner after evaluating the Judgments in the aforesaid cases since *Aventicum*, *Permina* and *Evpo Agnic*.

In that case in a company having two directors sued another company which was a joint venture of those two directors. The two joint venturists agreed to purchase the ship upon payment of 10% price as deposit. Since these two joint venturists could not make payment of remainder 90% of the price, the company paid that amount and completed the purchase and registered the vessel in its name in Singapore. The joint venture entered into a MOA under which the company was appointed the sole managing agent of the vessel. The Appellants were repaid the 90% of the purchase price paid by them. The vessel was initially only provisionally registered which registration was later confirmed in the name of the Respondent in Malaya. The dispute having been arisen in the meantime and before the final registration, the company sought to arrest the ship. The joint venturists were held to be the beneficial owners of the ship upon repayment of purchase price to the company, even before the final registration of the ship in their name.

71. The Singapore Court of Appeal considered each of the facts of *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) showing how the two ships of two sister companies amongst a fleet managed by one President and Vice President

were involved in the suit in which a claim was made in respect of one ship which sank. The claim was not allowed by way of arrest of another ship. In *Evpo Agnic* it was observed that that was not the sister ship of the owner of the ship which sank but the ship of a sister company of that company which was not the owner of the ship which sank. However the Singapore Court observed:

Both companies were one-ship shipowning companies and both had the same officers and shareholders.

After dealing with this fact situation the Singapore Court of Appeal rejected the ratio decided in *Evpo Agnic* which was set out in its last para thus:

The above passage (coming at the end of his judgment), in our respectful view, was the ratio decided of that decision, and, with respect, it was unnecessary for his Lordship to say that the word "owner" in Section 21(4)(b) of the Supreme Court Act 1981 in relation to a registered ship means the "registered owner". In our opinion, "*The Evpo Agnic*" is not an authority for the proposition that the word "owner" in Section 21(4)(b) (which is the equivalent of Section 4(4) of our Act) means the "registered owner".

Consequently *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) of the Court of Appeal of UK has been dissented from by the Court of Appeal of Singapore several years later thus:

We are unable to accept the construction that the word "owner" in Section 4(4) means the "registered owner". First, registration of a ship does not determine and is not conclusive as to the true ownership of the ship. It is *prima facie* evidence that the registered owner is the owner of the ship. Secondly, although the word "owner" in Section 4(4) can be contrasted with the words "beneficially owned" in paras (a) and (b), there is nothing to suggest that the word "owner" should be restricted only to "registered owner". It can be validly read and construed more widely than "registered owner". Thirdly, it is significant to note that the person who would be liable in personam and against whose ship an action in rem may be brought is not confined merely to the "owner" of the ship in question but extends to other categories of person, namely, charterer or person in possession or control of the ship. Each of these categories has a substantive, and not merely a formal or nominal, role in relation to the ship in question. In the context of these words, the word "owner" cannot be construed to mean only the "registered owner". If this narrow construction is adopted, the consequence would be that no action in rem would lie against an offending ship whose owner having bought it fails or refuses to register it in his name. Take, for instance, the case of a person who has just bought a registered ship and for some reason has delayed registration of the transaction. If in the meantime the ship incurs a liability in respect of which a claim falling within one of the paras (d) to (q) of Section 3(1) arises then on this narrow construction, an action in rem could never be brought against the ship in respect of that claim on or after the registration of the transaction.

The analogy in this judgment upon the narrow construction put by Lord Donaldson in *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) is on the reasoning that if such a construction is put no action in rem would lie if the owner of the ship fails to register the ship thus putting a premium on such oblique default. Consequently considering Section 4(4) of the Singapore Act (which is in tune with Section 3(4) of the UK Act) the Court concluded that the real owner is the person who can sell, dispose of or alienate the ship though he may or may not be the registered or legal owner and hence concluded that the Court is not confined to mere registration of ships but "and often the Court has to look behind the register and determine who in fact is the owner of the ship", thus giving its primaritor upon the lifting of the corporate veil.

It may be mentioned that in the earlier Judgments the right to sell, dispose of or alienate related to "all the shares" in the ship in line with Section 21(4) of the Supreme Court Act, 1981.

Mr. Dwarkadas would strongly emphasize the word "all the shares" of the ship in all of those Judgments. However in this judgment the Singapore Court of Appeal has strikingly not referred to the word "all the shares" of the ship. On page 711 the Court considered Section 4(4) of the Act for interpreting the term "owner" and concluded the right to sell, dispose of or alienate etc. in the owner as:

a person who is vested such ownership as to have the right to sell, dispose of or alienate the ship.

Upon observing how only a registered owner cannot be taken to be the owner of the ship, the Court reiterated the facts and considered the respective liabilities of the parties. The joint venture sought to purchase the ship. Since it could not make payment of the purchase price save 10% thereof the company paid the balance. Thereupon the company only had a security for the advance and the interest thereon. The company was later paid off. The beneficial ownership remained with the joint venture though the possession and control of the ship was with the company as agents of the joint venture under the management agreement. The company was released the amount paid by it through a bank and thereafter only remained in possession of the vessel as trustees for the joint venture. Upon repaying the company the advanced amount, the joint venture had a right to sell, dispose of or alienate the vessel even when the vessel was held as security by the company. of course, if they sought to sell, dispose of or alienate the vessel they could have done so only after repaying the company the amount paid by it initially and secured. The joint venturists were, therefore, the owners though they were not the registered owners when the cause of action arose. They were, therefore, held to be the owners "as respects all the shares in the vessel". This is the concept of beneficial ownership as explained by Salmond in the passage cited above.

72. In the later case of *The Skaw Prince* (1994) 3 SLR(R) 146 (Admiralty Division) the legal principle of lifting of the corporate veil to determine the true

beneficial ownership of the ship was confirmed. It was observed that the Court had the duty to look behind the register to determine who was in fact beneficial owner of the ship. Citing the case of *Opal 3 ex Kuchino* (1992) 2 SLR(R) 231 it accepted that, "question had to be approached from different aspects and that each case depended on its own circumstances." The Court accepted the principles of equity and trust, principles of avoiding fraudulent conveyances to defeat creditors and piercing the veil of incorporation amongst others. It was contended that two companies in that case had no separate and independent existence from their parent company and were alleged to be nominees or a sham. The Court was shown that in that case two ships were mortgaged and the shares of the owning companies were pledged for the mortgage. The two companies owning the ships did not keep separate accounts and one of the companies made decisions regarding utilization and sale of the ships to alleviate financial defaults of the group. The principal documentation was signed by the common share holders.

Upon seeing the evidence and undisputed facts the Court could not conclude that the two companies were nominee companies of a single share holder or were a sham. The Court concluded that the fact situation was as in *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA). The Court was also persuaded that the change in ownership of the ship took place after the cause of action arose.

Drawing from the case of *The Andres Bonifacio* the Court accepted that under certain special circumstances such as the presence of the facade or sham set up to deceive the party claiming to arrest the ship, the corporate veil could be lifted but not just because a company made subsidiaries in order to avoid future liabilities accepting the incorporation of one ship companies as a legitimate means of limiting liability. It was held that that itself did not justify the lifting of the corporate veil. The Court considered that the accounts of the subsidiary company are often consolidated into the holding company's account. Such accounts were shown in the Receiver's Report under the heading "The Group". The two companies were not shown to have failed to file the accounts and this fact was absent in the Receiver's Report. The Court, therefore, concluded that the corporate structure of the company was formally in place before the cause of action arose and the creation of wholly owned subsidiary of the group was entirely legitimate being a genuine company having separate existence. The transfer of the ship from one company to another prior to the claim made against them was, therefore, held not to be a facade or a deliberate fraud. Consequently as per the general rule that the parent company had no property in its subsidiary was held to apply.

73. Hence in *The Skaw Prince* (1994) 3 SLR(R) 146 (Admiralty Division) the principle that veil can be lifted has come to be settled. It would depend upon the facts of the case. It would have to be seen whether in the facts in this case as stated above the veil could be lifted.

74. The case of *The Kapitan Temkin* (1998) 2 SLR(R) 537 : (1998) SGHC 427

again shows the meaning of beneficial ownership upon following *The Ohm Mariana* (1993) 2 SLR 698. It considered that the purpose and object of Section 4 of the High Court Admiralty Jurisdiction Act (in Singapore) for understanding the expression "beneficial ownership" is "to protect claims against fraudulent concealment and sham transfers designed to defeat a claim and also to protect authentic owners who are not personally liable to the claimants" and that beneficial owner is the person who has the right to sell, dispose of or alienate all the share in that ship (i.e. the arrested ship).

75. Similarly in the case of *The Able Lieutenant* of the High Court of Malaya (2003) 3 Case 4 (HCM) dated 26th August 2002 the Court again considered the aspect of beneficial ownership u/s 21(4) of the Supreme Court Act, 1981 (of UK). Reconsidering the case of *I Congreso* (1978) 1 AER 1169 QB (Admiralty Division), *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA), *Saudi Prince* (1982) 2 Lr 255 QB (Admiralty Division) and *Aventicum* (1978) 1 LR 184 QB (Admiralty Division) the Court laid down the purpose and object of the word beneficial - "to catch the owner operating a registered ship under a nominee to avoid arrest". Hence the Court considered that u/s 21(4) the right of arrest is under three circumstances (a) to arrest the particular ship, (b) to arrest the sister ship and (c) to arrest the particular ship "spirit away into a different legal ownership". It can be seen that in the first two, the registered owner is the beneficial owner. In the third the registered owner is different from the beneficial owner.

Therefore, the Appellant must prove that in the words of Lord Donaldson in *Andrea Ursula* (1971) 1 LR 145 : (1973) 1 QB 265 "the vessel has been spirited into different ownership".

In that case the Plaintiff alleged that the transfer was a sham. The Defendant contended that the Plaintiff alleged fraud and the contention was repelled that the attempt to equate sham with fraud was a baseless attempt to raise the standard of proof. The Court explained that the sham transaction meant not a genuine sale, not arms length transaction, but a commercial arrangement or a sale of convenience. The sham could be proved on a balance of probabilities as in the case of *The Loon Chong* and *The Sino Glory* referred to therein.

In that case the sham nature of transaction was shown by the valuation of the ship and the transfer. A vessel valued at US \$3mn with an outstanding mortgage of US \$10mn came to be transferred ostensibly to a third party. The Court was satisfied that a person would do so if it is a sham arrangement or a sale of convenience. The Court observed that the Defendant selling their asset for US \$3mn and retaining the mortgage debt of US \$9.5mn on the same asset smacks of a sham.

The Court also noted that no independent confirmation of the mortgagee bank was produced by the Defendant claiming the mortgage except an affidavit in another proceeding, showing that the bank was aware of the sale, which was not

accepted. In that case though the sale of the ship was stated to have taken place before the Plaintiff lodged its claim and hence it was contended that it was not a sham, the Court countered the contention noticing that the date of the bill of sale does not matter because it can be secretly executed for future claims.

The Court noted the case of *The Tjaskemolen* in which it was observed:

That case is an example of piercing the corporate veil where assets are deliberately transferred from A to B in the knowledge that to do so will defeat a creditor's claim or potential claim even if that is not proved to be the purpose of doing so.

77. In the case of *M. V. Dong Do & Anr. v. Ramesh Kumar and Company Ltd.* (2000) 1 CLT 367 (DB) the Court considered the concept of sister vessels. Two vessels *Kim Dong* and *Dong Do* were stated to have belonged to the Socialist Republic of Vietnamese Government. They were on two different voyages. Recovery of claim arose in respect of *Kim Dong*. *Dong Do* was arrested on the premise that both belonged to the same owner and thus were sister vessels of the particular vessel owner. It was observed in para 8 of the judgment that the sister ship would include the ships belonging to two different concerns only if there was a common beneficiary. But the said proposition was not absolute one and was to be considered keeping in view the factual backdrop involved. It was observed that if there was a prima facie case that both were sister ships, the arrested ship should not be allowed to leave the port without furnishing security. It was also observed that this question would depend upon the lifting of the corporate veil. Upon considering earlier Judgments in respect of doctrine, the Court could not see even prima facie that the two vessels were shown to belong to the same owner. The Court observed that the allegation in the Plaint were "absolutely vague". There were no allegations with regard to the commission of fraud. It was denied that two ships were of different concerns. It was not accepted that the ships belonged to the Government of Vietnam as contended. The Defendant produced a number of documents to show the different ownership of the two ships. One *Eastern Dragon Shipping Company Ltd.* was stated to be the registered owner of *Kim Dong*. It produced the bills of lading and various letters of the owners. *Dong Do* produced its certificate of registration granted by the Government of Vietnam, classification certificate issued by Vietnam, registration of shipping showing its separate ownership by one *Hanoi Maritime Transportation Company*, the certificates issued by *Vietnam Insurance Corporation*, the relevant *Lloyd's* registration of ships of the relevant years, a certificate of entry in the *Mutual Insurance Association* manual, a letter producing the extract of *Lloyd's* maritime directory and shipping index showing the list of companies under the General Heading of the Government of Vietnam and confirming the registration of *Dong Do* in the name of *Hanoi Maritime Transportation Company*. Hence upon unshakable evidence produced by the company which owned the arrested vessel, the Court observed that documents clearly show that both the ships not only belonged to two different concerns but they were registered as being owned by

different companies and had transacted business separately.

Considering the contention raised and the answer to the contention in *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) relating to the companies being under the same President/Director and considering the ambit of the term "beneficial owners respectively" and the conclusion that only the registered owner was the owner u/s 21(4)(b) of the Supreme Court Act, 1981 and also considering the concept of beneficial ownership in *The Maritime Trader* 1989 (2) Lr 153 QB (Admiralty Division) (supra), the Court held that it was not proved that the two ships were sister ships and the corporate veil need not be lifted.

78. In the case of *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, the Supreme Court of India, Per Justice S. B. Sinha considered the insurance claim under the protection and indemnity cover of the P and I Club in respect of sister vessels. In that case the first Defendant vessel was owned and/or controlled by Defendant No. 2 company through its wholly owned subsidiary. The second Defendant was the owner of the vessel and accordingly held to be the party liable in personam in respect of Plaintiff's claim. The Plaintiff claimed Defendant No. 2 to be the beneficial owner and hence entitled to proceed against it by way of arrest for recovery of its outstanding insurance premium. In paragraph 144 of the judgment it was held that the beneficial ownership of a ship is a mixed question of fact and law. It accepted the dictum laid down in the earliest case of *Aventicum* (1978) 1 LR 184 QB (Admiralty Division) giving the Court the right to investigate the beneficial ownership and for which to be able to pierce the corporate veil. Referring to the judgment of Justice Brandon in *Andrea Ursula* (1971) 1 LR 145 : (1973) 1 QB 265, in *Aventicum* and Justice Goff in *I Congreso* (1978) 1 AER 1169 QB (Admiralty Division) the Court held that:

the Court has the power and should in some cases look even further.

The Supreme Court again accepted the dictum in *Andrea Ursula* regarding the legal and equitable title of the person owning the ship being the legal or equitable owner or the person in full possession and control and having all benefit and use of the ship which a legal and equitable owner would ordinarily have. Since the Court was deciding only the aspect of rejection of Plaint under Order 7 Rule 11 of the CPC in that case, the Court left the matter of ascertaining the ownership of the ships as sister ships or otherwise to the trial Court at appropriate stage.

79. In the case of *Polestar Maritime Ltd. v. M. V. QI Lin Men and Ors.*, Admiralty Suit (Lodging) No. 3547 of 2008 the single Judge of this Court clinically considered the concept of sister ship under Article 3(2) of the Arrest Convention of 1999. The ship "Rewa" was the one against which the maritime claim arose. The Court considered that ship of Defendant No. 1 was not in respect of which any maritime claim arose. The Court saw that the two ships were not owned by the same owner and hence concluded that no action could lie against Defendant

ship.

80. In the case of *Croft Sales and Distribution Ltd. v. M V. Basil* OJ Appeal No. 6 of 2011 in Admiralty Suit No. 10 of 2010 of Gujarat High Court the Division Bench of the Gujarat High Court in a similar case considered at length the aspect of the lifting of the corporate veil of the other owner of the other ship claimed to be the sister ship to ascertain the beneficial ownership of that ship. It considered the application of the Arrest Convention of 1999 in the case of *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, as also earlier cases relating to the general law of the lifting of the corporate veil. After examining Article 3(2) it held that it provided for the arrest of any other ship. That ship must be owned by the persons who are liable for the maritime claim. The arrest of any available ship was not provided even as per 1999 Convention. However the word owned, it held, should be read and interpreted to mean and include the subsidiary company and also other companies by lifting the corporate veil. In that case the company which was sought to be held liable was not shown to be the subsidiary of the company owning the ship. Though it was pointed out to the Court that veil could be lifted only when the fraud was pleaded, it observed in para 25 of the judgment that the principle behind the doctrine was a changing concept and expanded its horizons. Hence it was held that if any corporate entity was abused for an unjust or inequitable purpose, the Court would not hesitate to lift its veil to look into the realities so as to identify the person who was guilty and liable there for. In the facts of that case however the Court saw that the company in whose name the ship was registered was already registered prior to the contract having been entered into by the Plaintiff with the company whose ship was concerned in the maritime claim. The Court, therefore, concluded that it could not be said that with a view to defraud the Plaintiff company, the other company was formed or that it purchased that ship. Though the Court accepted the ratio in the case of *Kapila Hingorani Vs. State of Bihar*, that when the corporate entity is found to be opposed to justice, convenience and interest of the revenue or workmen or against the public interest the veil could be lifted, it observed that in that case since the company was already formed and the ship arrested was already owned by that company prior to the date of the contract it would not defraud the Plaintiff "in its capacity as a creditor". In that case it was alleged that the company owning the vessel was a single dollar company registered in Marshall Islands and, therefore, should be treated as a dummy company. That contention was not accepted as no evidence in that regard was produced. Similarly there was nothing to show that the company owning the ship was the subsidiary of the company against whom the claim was made. Since the conditions requiring lifting of the veil of incorporation were not satisfied, no relief was granted.

81. In the case *Antonio Gramsci Shipping Corporation & Ors. v. Oleg Stepanovs* (2011) EWHC 333 (Comm) QB (Commercial Court) Lord Justice Burton considered the case of a company in maritime law "merely used as vehicles". In that case 30 "one ship" companies were incorporated in a number of off-shore

jurisdictions being in the ultimate beneficial ownership of one Latvian Shipping Company (LSC). A judgment was rendered against five of the companies upon an application for disclosure as well as an application for summary judgment. It was claimed that they were incorporated to dishonestly siphon out substantial profits from the chartering business of LSC instead of having charterparty agreement with arms length commercial charterers. There was one nominee shareholder for all of these companies and a constituted attorney of the sole director of all the companies. The Plaintiff sought to pierce the corporate veil. The Plaintiff claimed that for that purpose it was sufficient to show that the Defendant was responsible for what his puppet company did. The Plaintiff also claimed that the Defendant not only knew but most likely organized conclusion of various agreements handing over the vessels to the subsidiary companies. Drawing from two earlier cases of *Gilford Motor Company v. Home* (1933) Ch 935 and *Jones v. Lipman* (1962) 1 WLR 832 Justice Burton observed in paragraph 26 thus:

There is in my judgment no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppet who, all the time, was pulling the strings. The Claimants seek to enforce the contract against both puppeteer and the puppet company (as in *Gilford* and *Jones*).

Of course, it is for the Plaintiff to show who was the puppet and the puppeteer.

82. A reading of the jurisprudence with regard to the doctrine of the lifting of the veil of incorporation more specially in maritime contracts from the earliest case of *Aventicum* (1978) 1 Ir 184 QB (Admiralty Division) considered in the later Judgments, the legal situation that arises is that if it is *prima facie* shown by the Appellant that there is a concerted effect in incorporating a company either as a sister company or as a subsidiary company which are under the management and control of a single company or a single person so that the assets of these companies are not distinguishable and cannot even be applied differently for the satisfaction of the claims of the creditors of those companies and if an arrangement engineered to keep several companies within the group and hold of a single company or an individual is established which would result in an illegality or inequity, the veil of incorporation would be lifted to see the reality. Since one-ship companies can be legitimately incorporated by a single individual to limit the liabilities, it would have to be shown that the incorporation of one-ship companies is not only to limit liabilities but goes much further either to create a sham entity to avoid a contractual liability or to have a one dollar company which would be incapable of discharging its own liability thus limited by its incorporation. One-ship companies would, therefore, be permitted to operate as separate companies having separate individual distinct legal entity if they would be able to discharge and capable of discharging their own separate liabilities. In such an event, the company having a larger capital base in the group of companies would not be held liable for their claims. However it is impossible to accept that the law would permit a dollar company to be incorporated to limit the

liability of a million dollar company by its incorporation since the dollar company would be incapable of discharging its own liability for its single ship. Hence though such companies are allowed to function, they are expected to have resources and reserves enough for them to so function. In other words they should be capable of standing on their own feet as juristic persons and not have to lean upon the shoulder of any other companies in their group. Consequently they would require to be separately incorporated, to have their individual separate management, (though that management may be the same as other companies of the same group), they would maintain their separate accounts and would be amenable to making the disclosure of their statutory documents accounts and management structure. Consequently when that is not the case and the dollar companies are incorporated more specially in the incorporation havens where statutory disclosure is neither made nor permitted and where it is shown that they are not indeed separate legal entities, they having been governed and controlled by a single individual or a company and are even sought to be brought within protective umbrella of such individual company for the very transaction that is the subject matter of the dispute, the permissive statute enabling them separate incorporation would be to play mischief and take advantage of their incorporation.

83. It is seen that in *Aventicum* (1978) 1 LR 184 QB (Admiralty Division) that person liable for a maritime claim was a beneficial owner as distinguished from the registered owner. *I Congreso* (1978) 1 AER 1169 QB (Admiralty Division) was the case of two ships of single owner being the Cuban Government. In the case of *Permina 3001* (1979) 1 LR 329 (Singapore Court of Appeal) it is considered that the beneficial owner was a person who could sell all the shares in the ship though it broadened the circumstances for lifting the veil of incorporation. *The Skaw Prince* (1994) 3 SLR(R) 146 (Admiralty Division) held that the relevant ship was indeed not beneficially owned by the party against whom the claim was brought upon considering the documents of the alleged one ship companies. *The Maritime Trader* 1989 (2) LR 153 QB (Admiralty Division) was the case of a ship beneficially owned which was not the sister ship. *The Saudi Prince* (1982) 2 LR 255 QB (Admiralty Division) was the case where shares were held by a single individual and his nominee who are seen to be the beneficial owners at all material times. Mr. Orri and his children who were his nominees were considered in that case upon the evidence produced, to be the man who called the shots. *Evpo Agnic* (1988) 2 LR 411 : (1988) 1 W.L.R. 1090 (CA) strictly considered Section 21(4) of the Supreme Court Act, 1981 to hold only the registered owner as the true owner which came to be dissented in *Ohm Mariana* (1993) 2 SLR 698 by a Court of co-ordinate jurisdiction in Singapore. That was the case of a common Directors and shareholder of the company who was one of the two joint venturists held to be a beneficial owner of the ship. Hence though *Evpo Agnic* dealt with not a sister ship but a ship of a sister company as the one outside the purview of the order of arrest in a maritime claim, the narrow construction put by it was repelled u/s 4(4) of the Singapore Act equivalent to Section 3(4) of the

UK Act. In *Ohm Mariana* repelled the dictum that only the registered owner of the ship was the owner upon the analogy that if the owner did not register the ship there would be no owner of the ship. The conclusion was to look behind the register and to determine who is the factual owner of the ship. The person who could have the right to sell, dispose of or alienate the ship was the one who was given the title of beneficial owner. Consequently it is the power of disposition that must determine the issue. *The Capitan Temkin* (1998) 2 SLR(R) 537 : (1998) SGHC 427 followed *Ohm Mariana* (1993) 2 SLR 698 and accepted that the evidence supported the proposition that the person in charge and control was the beneficial owner at the material time. Hence the person who could sell all the shares of the ship was held to be having beneficial ownership. *The Able Lieutenant* (2003) 3 Case upon considering Section 21(4) the UK Act which applied in Malaya set the test of "catching" the owner operating a registered ship under a nominee to avoid arrest and consequently included as the ship liable for arrest also the ship "spirited away into a different legal ownership". That was when the registered owner was different from the beneficial owner. *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, dealt with the insurance claims under P and I cover of the various vessels in a group of companies which had wholly owned subsidiary for ascertaining the true beneficial ownership as a question of fact and law by giving the Court the right to investigate such ownership and "in some cases look even further" which could only be done by piercing the veil of incorporation. *Polestar Maritime Admiralty Suit (Lodging) No. 3547 of 2008* went no further than *I Congreso* (1978) 1 AER 1169 QB (Admiralty Division) and *The Maritime Trader* 1989 (2) Ir 153 QB (Admiralty Division). In *Dong Do* (2000) 1 CLT 367 (DB) the claim of the Plaintiff of two ships and one owner being a Government of a country was itself rejected upon a plethora of documents produced by the other ship. *Croft Sales OJ Appeal No. 6 of 2011 in Admiralty Suit No. 10 of 2010 of Gujarat High Court*. accepted the explanation of the doctrine of the corporate veil to encompass all unjust and inequitable purposes of incorporation of companies in a group but for want of evidence and material produced by the Plaintiff in that case to show the relevant company owning the arrested ship as a single dollar company prevented it from granting relief in the facts of that case. The ultimate case of *Antonio Gramsci Shipping* (2011) EWHC 333 (Comm) QB (Commercial Court) recognized and accepted the principle that both the puppet and puppeteer could be sued.

84. In the facts of our case, upon the material brought on record by the partial disclosure made by the Respondent upon the persistent queries of the Appellant after the filing of the Suit and making their initial claim, WWD is shown to be the person calling the shots. Halcyon is the one-ship one-dollar company in whose name the arrested vessel is got registered. Tongli Samoa is incapable of managing its affairs independently of Tongli China. In fact, Tongli Samoa has been under the protective umbrella of the WWD, the 80% shareholder of Tongli China in the Tongli Group of Companies. The documents reveal Tongli China having proposed an insurance cover for various ships including Nasco Diamond

and WWD having written a letter for settlement of the claims of Tongli Samoa for the liability of Nasco Diamond. The documents show a further labyrinth involving therein Halcyon, the company which obtained the guarantee from Tongli China and the personal guarantee of WWD including the corporate guarantee of Rainbow Success for the charter hire of Eastshine though claiming to be a sub-subsidiary of FEHL. The registered records indeed show the issue and paid up share capital to be HK \$1. Consequently WWD would fit the place of Mr. Orri enumerated in *The Able Lieutenant* (2003) Part 3 Case 4 (HCM) referring to *The Saudi Prince* (1982) 2 LR 255 QB (Admiralty Division) and NWD being seen to be his nominee as the children of Mr. Orri. The documents produced in this case either through the efforts of the Appellant or upon the disclosure by the Respondent are diametrically opposite of the documents produced in *Kim Dong* (2001) 1 CLT 367 (DB) and show the pyramidal structure raised with WWD of Tongli China who protected Tongli Samoa and who sought to give a personal guarantee to Halcyon for the charter of Tongli Yantai upon a charterparty which has been terminated not on account of the breach of the charterer or the arrest on account of such breach by the charterer, but strangely upon the arrest on account of the corporate position of Halcyon in the web of Tongli China, Tongli Samoa, Eastshine and Rainbow Success all controlled ultimately by WWD. In *The Kapitan Temkin* (1998) 2 SLR(R) 537 : (1998) SGHC 427 though on the facts of the case, the beneficial owner was not seen to be another individual who owned the other ship arrested and corporate veil was not required to be lifted, it was held that if the situation permitted it would be. It would be a wholly different situation in this case upon Tongli Samoa being seen to be the puppet of the puppeteer WWD as in *Antonio Gramsci Shipping* (2011) EWHC 333 (Comm) QB (Commercial Court). Consequently under the presently expanding scope of the doctrine of the lifting veil of the incorporation, as in *Renusagar* 1991 (70) CC 127 SC it is seen that this is a fit case unlike all the above, deserving of that equitable judicial exercise. It would, therefore, be myopic to turn a Nelson's eye to the gross facts on record showing the outlandish reach of WWD and the egregious sweep of his control by way of his own actions to constitute only one dollar company which cannot be taken to be one-ship company capable of discharging its financial liabilities. Such being the Respondent's vessel Tongli Yantai, the Court would be failing in its duty if it let go Tongli Yantai from arrest legitimately made as fortified by the evidence at least later brought on record upon partial disclosure made by the Respondent.

85. The learned Single Judge in the impugned order has considered each of the aforesaid parameters of beneficial ownership of a vessel deserving of the order of arrest but has failed to see that upon the facts of this case it was well deserved.

86. The argument of Mr. Dwarkadas that all the shares of the ship were to be in a single person who would be entitled to sell, alienate or dispose of the ship, which is not shown in this case, is shown by Mr. D'Vitre not to apply to this case. The expression "all the shares" in Section 21(4) finds no parallel in any law in India. Section 4(4) of the High Court (Admiralty Jurisdiction) Act has its parallel in

Singapore. Mr. D'vitre rationally contended that in the absence of any statute analogous to the Supreme Court Act, 1981 in India only the Geneva Convention, 1999, upon which the Appellant's case is founded, is applicable. Common law applies in India as one of the commonwealth nations. That is the law of justice, equity and good conscience. It is only to the extent to which there is a specific legislation in a given area that that statute would apply in India. In England the Supreme Court Act, 1981 would apply for considering the definition of ownership of a ship u/s 21(4) thereof. The common law would continue to apply in India for want of any other statute.

Mr. D'vitre rightly drew our attention to Section 71 of the Merchant Shipping Act, 1958 though not applicable to this case directly, if only to draw a logical analogy to the concept of "beneficial interest". Section 71 runs thus:

71. Liability of owners.-Where any person is beneficially interested otherwise than by way of mortgage in any ship or share in a ship registered in the name of some other person as owner, the person so interested shall, as well as the registered owner, be subject to all the pecuniary penalties imposed by this or any other Act on the owners of ships or shares therein, so nevertheless that proceedings for the enforcement of any such penalties may be taken against both or either of the said parties with or without joining the other of them.

He, therefore, contended that the concept of beneficial interest and consequently beneficial title is present to the mind of legislators in India. That beneficial interest refers to the interest of a person in a ship which is registered in the name of another as owner subjecting him as well as the registered owner to the statutory penalties as applicable. Consequently also it can be seen that with regard to "any other ship" being Tongli Yantai, the ship other than Nasco Diamond, the liability of the owner would be as much the liability of an equitable or a beneficial owner as of the registered owner.

87. Hence the shares do not have to be arithmetically computed. The percentage of the shares in an incorporated being would alone suffice to consider. Such percentage of the shares as would enable the sale, disposition or alienation of the ship would suffice. That would be an almost absolute majority shareholding capable of calling the shots. It is, therefore, that in Ohm Mariana (1993) 2 SLR 698 the conclusion of the Court in determining the beneficial ownership is specifically shown to be "a person who is vested with such ownership as to have the right to sell, dispose of or alienate the ship" (specific reference to page 711). Upon the facts of that case though the vessel was purchased upon 90% price being paid by the company, the joint venturists who repaid the advance were held to be the beneficial owners though not the registered owners at the time the cause of action arose. Hence though the registration was effected later, they could sell or dispose off the ship and hence were held to be the owners "as respects all the shares in the vessel". The emphasis of Mr. Dwarkadas upon the contention "all" in British Statutes and various judgments would not apply with the same force in India. The capability of sale of the ship is the yardstick. In this

case that capacity is shown to be upon WWD who is the 80% shareholder of Tongli China acting through Tongli China, his admittedly registered company which sought to insure Nasco Diamond and he personally seeking to settle the claim of Tongli Samoa in the Tongli Group of companies and NWD his obvious nominee shown as the Secretary/Director of Halcyon acting in consort. The name of the Defendant vessel itself betrays its antecedents in the Tongli Group of companies which are in maritime business.

88. It is contended on behalf of the Defendant in the cross Appeal filed by them that the acceptance by the learned Single Judge of beneficial ownership under Article 3(2) of the Arrest Convention of 1999 is erroneous. In view of the Judgments showing the scope of its applicability to maritime transactions between private parties cited above and above discussion by explaining the scope of the doctrine of piercing the corporate veil upon the exigencies of modern commercial and maritime trade, we do not find the learned Judge in error upon the acceptance of the beneficial ownership.

89. Similarly it is argued that since the Appellant can pursue arbitration only against Tongli Samoa in respect of their claim against Nasco Diamond, the involvement of Tongli China even as the beneficial owner of the Defendant's ship would be out of the scope of arbitration and hence must not lead to the arrest of the ship. This argument is wholly misconceived.

90. This suit is not concerned with the Appellant claiming to join Tongli China as a party in arbitration. If Tongli China is joined in Arbitration it would be seen therein whether the Appellant can in law do so upon the law laid down in the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, as also Hemant D. Shah and Ors. v. Chitaranjan D. Shah & Ors. in Appeal No. 658 of 2006 from Arbitration Petition No. 295 of 2006 (DB) and Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, The claim of the Appellant in this Suit, however, is only to secure the award in arbitration obtained by them in respect of Nasco Diamond against Tongli Samoa by the arrest of the other ship of a sister company Tongli China which beneficially owned Nasco Diamond as also the Respondent ship through its 80% shareholder WWD.

91. The Appellant's claim can be judged in yet another way. If the Appellant was to obtain an arbitral award, it would seek to enforce that award not only against Tongli Samoa as the judgment debtor but against all the properties of the sister concern of Tongli Samoa, the puppet company which could not individually settle its own business. Then the Appellant, upon the aforesaid facts of the case, would legitimately arrest the Respondent ship as the other ship beneficially owned by Tongli China, the sister company which in fact beneficially owned Nasco Diamond for the satisfaction of the claim of the Tongli Samoa. The Appellant has only sought to secure its award by a timely arrest before the ship is "spirited away" by its sale, disposition or alienation by the WWD in the name of Tongli China pending the arbitration.

92. The reading of the last para of *The Maritime Trader* 1989 (2) LR 153 QB (Admiralty Division) that the Court would have no jurisdiction to arrest ships for the purpose of providing security for the maritime claim to be referred to arbitration is no longer good law in view of para 78(ii) of the Full Bench judgment of this Court in the case of *J.S. Ocean Liner LLC v. M. v. Golden Progress & Anr.* 2007 (2) BCR 1 : 2007(2) ALR 104 (Bom) (FB) Hence the Appellant's Suit as an action in rem for arrest of the ship for seeking recovery of its maritime claim in Arbitration is maintainable, through an application u/s 9 of the Arbitration and Conciliation Act, 1996 would not be. Hence the learned Judge's view in that regard is correct and requires no interference except for the observation that the Appellant's Suit is akin to an application u/s 9 of the Arbitration and Conciliation Act. The sum total of these two aspects is that the Arbitration would be only in respect of the loss alleged by the Appellant to have been caused to the cargo and the crew which the Appellant may prove against Tongli Samoa, who was the subchapter, but award, if any, obtained by the Appellant against Tongli Samoa may be satisfied by the sale of the arrested ship Tongli Yantai, which is beneficially owned by Tongli China the sister concern of Tongli Samoa.

93. The Respondent has also contended that the Court has no jurisdiction as the vessel was not in the Indian territorial waters within the jurisdiction of the Court when the Suit was filed and the order of arrest came to be made. That issue has been decided in the case of *Geetanjali Woollen Pvt. Ltd. v. m. v. X-press Annapurna and Ors.* 2005 (6) BCR 31 That judgment has come to be final upon the dismissal of the Appeal on merits there from as shown by the learned Judge in the impugned order. We are in agreement with the decision of the learned Judge answering the preliminary issue with regard to the jurisdiction of the Court and the impugned order in that respect which calls for no modification.

94. The contention of the Suit being bad for non joinder of parties being Tongli China taken out by the Respondent is rather contrary to the Respondent's argument that Tongli China would not be an appropriate party to the arbitration proceeding and hence the ship of the Respondent could not be arrested for want of Tongli China as party Respondent. The contention as regards Eastshine is much the same since Eastshine lives in the shadow of Tongli China under the umbrella of WWD. Though it may be prudent for the Appellant to bring some or all of these entities either as a puppeteer or a puppet to cause it to disclose further facts at the time of trial, we do not find the failure to do so would be fatal to the Appellant's case in not allowing the Court to determine all the necessary issues between the Appellant and the Respondent. In fact the further facts, if any, to be brought on record would be documentary evidence filed with public authorities which could be produced by the Appellant without having to make the parties shown in such document as party-Respondents. We agree with the conclusion of the learned Judge that in a Suit in rem, the owner of the ship need not be sued and all parties, if materially affected by an order of the Admiralty Court, may seek to intervene.

95. Considering all of these aspects we hold that the learned trial Judge fell in error only with regard to the application of the doctrine of lifting the veil of incorporation to see various entities aside from the Respondent and appreciate the ultimate beneficial ownership of the Respondent-vessel. That having been done, we find no error in the order of the learned Single Judge accepting the convention of 1999 as applicable to the parties under the jurisdiction of this Court as also the acceptance of the claim for securing arbitral award by the arrest of the ship in the beneficial ownership of the sister company of the judgment debtor in the arbitration award.

96. Consequently Appeal No. 559 of 2011 is allowed and the cross-objections thereof are disallowed. In the result the arrest of the Respondent-ship shall continue pending the Suit and the impugned order directing its release is set aside. However, if the Respondent deposits in Court US \$56.6mn along with interest @ 12% per annum thereon till date, the Respondent-ship shall be released.