

(2013) 07 BOM CK 0215

In the Bombay High Court

Case No : Appeal Lodging No. 228 of 2013 in Notice of Motion No. 235 of 2013
in Admiralty Suit No. 29 of 2013

Lufeng Shipping Company Ltd.

APPELLANT

Vs

M.V. Rainbow Ace and Whim Star Chartering Co. Ltd.

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Citation : (2013) 4 ABR 1412 : (2013) 7 BomCR 700

Hon'ble Judges : Mohit S. Shah, C.J.; M.S. Sanklecha, J

Bench : Division Bench

Advocate : Prashant Pratap and Mr. Ashwini Sinha, Ms. Trupti Agarwal instructed by Manoj Khatri, for the Appellant; Virag Tulzapurkar and Mr. Nikhil Sakhardande, Amitava Majumdar, Shiv Kumar Iyer, Sujan Malhotra, Nihal Shaikh instructed by y Bose and Mitra and Co., for the Respondent

Judgement

M.S. Sanklecha, J.—This appeal challenges the order dated 6 May 2013 of the learned Single Judge vacating the order dated 28 January 2013 (passed on an application by the appellant) arresting M.V. Rainbow Ace respondent No. 1 vessel. The impugned order dated 6 May 2013 vacating the arrest of respondent No. 1 vessel was on an application taken out by the owner M/s. Rainbow Ace Shipping S.A. Panama (applicant) of respondent No. 1 vessel. Facts leading to this appeal:

a) The appellant admittedly has a maritime claim of US\$ 1,628,658.07 against the Whim Star Chartering Co. Ltd. (respondent No. 2 company). This claim arises out of a voyage charter party agreement dated 6 April 2011 entered into between the appellant as owners of a vessel M.V. J Tong and respondent No. 2 company as a charterer.

b) The appellant's maritime claim on respondent No. 2 company is covered by Article 1(f) and (g) of the International Convention of Arrest of Ships 1999 ("Arrest Convention 1999"). Consequently, the appellant was entitled to secure its maritime claim by proceeding against any vessel in the registered and/or

beneficial ownership of respondent No. 2 Company in terms of the Arrest Convention, 1999.

c) The appellant's claim is that the beneficial owner of respondent No. 1 vessel is also the beneficial owner of respondent No. 2-Company. It is the case of the appellant that one Wang Wendong is the common beneficial owner of respondent No. 1 vessel as well as respondent No. 2 company. The appellant's have sought to establish the common beneficial ownership of respondent No. 1 vessel and respondent No. 2 company in one Wang Wendong by submitting the following chart:

d) On 28 January 2013, respondent No. 1 vessel was arrested at the instance of the appellant for its maritime claim against respondent No. 2 company. The case of the appellant as made out in the plaint for the arrest of respondent No. 1 vessel was that it was in the beneficial ownership of respondent No. 2 company and that both respondent No. 1 vessel and respondent No. 2 company are in the common beneficial ownership of one Wang Wendong and/or one Shan Bing.

e) On 11 February, 2013, the applicant took out a notice of motion before the learned single judge seeking that the arrest of respondent No. 1 vessel by order dated 28 January 2013 be vacated. In the application the applicant admit that it is beneficially owned by Wang Wendong. However, it is denied that respondent No. 1 vessel is in the beneficial ownership of respondent No. 2 company and that its beneficial owner Wang Wendong has any interest in respondent No. 2 company and much less being its beneficial owner. Thus, the alleged maritime claim of the appellant on respondent No. 2 company could not be secured by the arrest of respondent No. 1 vessel.

f) On 6 May 2013, the learned Single Judge, by the impugned order vacated the order of arrest dated 28 January 2013 in respect of respondent No. 1 vessel. The impugned order holds that though respondent No. 1 vessel was beneficially owned by Wang Wendong the respondent No. 2 company was not. Therefore respondent No. 1 vessel and respondent No. 2 company were not in the common beneficial ownership of Wang Wendong. Thus the arrest of respondent No. 1 vessel was not warranted. The impugned Order while disposing the application for vacation of arrest of respondent No. 1-vessel framed the following issues as arising before him:

i) Whether the International Convention on the Arrest of Ships, 1999 can be applied to the present dispute?

ii) If yes, whether by virtue of Article 3(2) thereof, arrest of a ship beneficially owned by the person against whom there is a maritime claim in respect of another ship, is permissible?

iii) Whether the 1st Defendant vessel is of the beneficial ownership of defendant No. 2?

g) So far as issues (i) and (ii) are concerned, they were answered in the

affirmative and accepted by all the parties to the present proceedings. The only issue which has been raised in the present appeal is with regard to question (iii) above being answered in the negative i.e. in favour of the respondent No. 1 vessel and against the appellant. The learned single judge also records the fact that the case canvassed before him by the appellant was not as raised in the plaint as formulated in question (iii) above but the submission before him was that the respondent No. 1 vessel and the respondent No. 2 company are in the common beneficial ownership of one Wang Wendong. This submission which is a facet of the issue raised in (iii) above was also answered in the negative i.e. respondent No. 2 company is not in the beneficial ownership of Wang Wendong.

Submissions:-

2. Mr. Prashant Pratap, the learned Senior Counsel appearing for the appellant challenges the impugned order vacating the arrest of respondent No. 1 vessel and respondent No. 2 company by holding that they are not in the common beneficial ownership of Wang Wendong. In support of the above challenge following submissions are made:-

(a) Admitted position is that respondent No. 1 vessel is beneficially owned by Wang Wendong. Similarly, though not admitted by the respondents Wang Wendong is also the beneficial owner of respondent No. 2 company. The respondent No. 2 company is owned 100% by one Cartier Investment Co. Ltd., Samoa (Cartier) which in turn is 100% owned by Wang Wendong. This beneficial ownership can be established by lifting the corporate veil of Respondent No. 2 company and thereafter by lifting the corporate veil of Cartier as respondent No. 2 company was established by Cartier;

(b) In view of the laws in the State of Samoa, the names of shareholders and directors of a company incorporated in Samoa are not available for disclosure. However the ownership of Wang Wendong of Cartier and in turn of respondent No. 2 company along with the ownership of respondent No. 1 vessel is established by the following factors:

(i) Common address i.e. Sunshine Tower Qingdao, China of Cartier, respondent No. 2 company, Wang Wendong (as evident from his business card), of the applicant and its agent ZJHX Shipping Co. Ltd. as well as common fax numbers.

(ii) Company called Whim Star Co. Ltd. in which Wang Wendong held 55% shareholding which was deregistered on 12 February 2009 and the respondent No. 2 company had the same address viz. Sunshine Towers, Qingdao, China;

(iii) A Common director by the name of Li Hang was in the subsidiary of the applicant company and also in the respondent No. 2 company;

(iv) Common Signature on various fixture Notes which are contracts of carriage entered into by the appellant with respondent No. 2 company as well as Win Star Co. Ltd. The same person has also signed mortgage documents on behalf of one Rainbow Shipping Ltd. which is a part of Rainbow Group Companies of which

Wang Wendong is the owner.

(v) The appellant has a long association with Wang Wendong since 1998. The appellants have stated that they had met Wang Wendong at his office at China and whenever they negotiated with Whim Star Group, it was with Wang Wendong, its owner.

(vi) The defunct Whim Star Co. Ltd., respondent No. 2 company and the applicants along with its other group companies were all having one ZJHX Shipping Co. Ltd. as their common agent. The agency agreement entered into by the first respondent vessel with M/s. ZJHX Shipping Co. Ltd. is dated 1 March 2012 when in fact respondent no. 1 vessel was delivered on 4 September 2012 is also evidence of the fact that they are all one and the same;

(c) Reliance was placed upon the decision of the Division Bench of this Court in the matter of Great Pacific Navigation (Holdings) Corporation Ltd. vs. M.V. Tongli Yantai rendered on 14 October 2011 to contend that in almost similar facts the Division Bench of this Court had reversed the order of the learned Single Judge vacating the arrest of a vessel in that case. Thus the above cases should be applied to the present case also; and

(d) That for purposes of the arrest of respondent No. 1 vessel, the appellant has merely to establish an a reasonably arguable case i.e. prima facie case to be tried at the final hearing. In the meantime, respondent No. 1 should be kept under arrest till the respondents secure the maritime claim to be tried at the final hearing.

3. On the other hand, Mr. Tulzapurkar, Senior Counsel appearing for respondent No. 1 vessel in support of the impugned order submits as under:

a) The arrest of the vessel in terms of Article-3 of the Arrest Convention 1999 is subject to the same being permitted under the laws of the state in which the arrest of the vessel is being sought. Therefore the arrest of the vessel not owned by the person liable for the maritime claim would be permissible only if the arrest is sought of the vessel which is beneficially owned by another person. However, to determine the beneficial ownership it is not open to lift the corporate veil and contend that the shareholder of the company is the owner of the property of the company as is being sought to be done by the appellant. It is his submission that as a matter of Corporate law as existing in India, the identity of a company is different and distinct from the identify of its shareholder. In the circumstances, the maritime claim available against respondent No. 2 does not become maritime claim payable by its alleged beneficial owner Wang Wendong;

b) The entire case of the appellant is that respondent No. 2 is owned by Cartier which in turn is owned by Mr. Wang Wendong, thus making Wang Wendong the beneficial owner of respondent No. 2 company. This is so as Wang Wendong has filed an affidavit dated 8 February 2013 stating on oath that he owns no interest directly or indirectly in Cartier nor in respondent No. 2 company and he is not a

director in any of the two companies i.e. Cartier and respondent No. 2. On the face of it, it is not open to the appellant to allege that Wang Wendong is the ultimate beneficial owner of respondent No. 2 company in the absence of the affidavit being found to be false.

c) The various circumstances being relied upon by the appellant such as common director, common address, common agent etc. alleged by the applicant do not establish that that Wang Wendong is the beneficial owner of respondent No. 2 company. All these factors were explained by the appellant and the learned Single Judge was satisfied with the explanation offered by the applicant to conclude prima facie that the arrest of respondent No. 1 vessel is not warranted.

d) The reliance placed by the appellant upon the decision of the Division Bench of this Court in the matter of Great Pacific Navigation (Holdings) Corporation Ltd. vs. M.V. Tongli Yantai rendered on 14 October 2011 is misplaced as the same has been set aside by the Apex Court by order dated 12 December 2012.

Consideration:-

4. We have considered the submissions. We find that though the appellant had moved the Court seeking to arrest respondent No. 1 vessel primarily on the ground that it is in the beneficial ownership of respondent No. 2 company, it had also alleged in its plaint that the common beneficial owner of respondent No. 1 vessel and respondent No. 2 company is Wang Wendong and/or Shan Bing. Therefore, the issue of common beneficial ownership of Wang Wendong was raised by the appellant while coming to the Court and it was not a new case made out during arguments as contended by Mr. Tulzapurkar. The issue examined by the learned Single Judge was whether the common beneficial ownership of the respondent No. 1 vessel and respondent No. 2 Company vest in one and the same person namely Wang Wendong. This is borne out in para 58 of the impugned order wherein it is recorded:-

I now proceed to examine whether the plaintiff has made out even a prima facie case that defendant No. 1 vessel is in the same beneficial ownership of defendant No. 2.

5. There is no dispute between the parties that the appellant i.e. the owner of respondent No. 1-vessel is beneficially owned by Wang Wendong. However Wang Wendong while not disputing his beneficial ownership of respondent No. 1 vessel has filed an affidavit dated 8 February, 2013 before the learned single judge denying that he is in any manner directly or indirectly through the medium of Cartier or otherwise the beneficial owner of respondent No. 2 company. Notwithstanding the affidavit of Wang Wendong (which is not proved to be false/incorrect) the appellant seeks to establish the beneficial ownership of Wang Wendong in respondent No. 2 by seeking to lift not only the corporate veil of respondent No. 2 Company but also of Cartier.

6. Before examining the issue on facts one would need to examine as a pure

question of law, whether it is permissible under the Indian law to uphold the submission of the appellant that the shareholder of an incorporated company has proprietary rights in the assets of an incorporated company permitting the ignoring of the separate identity of a Corporate entity.

7. Article 3 of the Arrest Convention 1999 and in particular, in sub Article 1 and 2 of Article 3 permits the arrest of vehicle and also provides in sub Article 3 thereof as under:

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

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

9. The Supreme Court in *Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another*, has held that each company incorporated under the Companies Act has a separate and distinct legal entity from its shareholders and other companies. Therefore, the mere fact that the two companies have common shareholders or common Board of Directors will not convert the two companies into a single entity. Similarly as far back as in 1955 Supreme Court in *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, held that there is no warrant to assume that shareholder who buys shares of the companies buys any interest in the property of the company. This was on the basis that an incorporated company has an identity different and distinct from that of its shareholders. The submission of the appellant that the concept of beneficial owner by itself implies the concept of lifting the corporate veil and in support of which reliance is placed upon the decision of the Apex Court in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, as well as the decision in *Liverpool and London S.P. & I Association Ltd. v. Sea Success (supra)* and the Calcutta High Court decision in *Owners & Parties Interested in the Owners and Parties Interested in the Vessel M.V. "Dong Do" and Another Vs. Ramesh Kumar and Co. Ltd., .*

10. We find that the submission of the appellant on the above basis is not sustainable as in none of the cases did the court permit the lifting of the

corporate veil to make the shareholder of an corporate entity the owner of a property belonging to the incorporated company. In the case of *M.V. Elisabeth* (supra) the issue which arose for consideration was the question of jurisdiction viz. whether Andhara Pradesh High Court had jurisdiction in its admiralty jurisdiction to proceed against a foreign ship owned by a foreign company not having a place of business in India. The arrested vessel viz. *M.V. Elisabeth* was the vessel against which a maritime claim had arisen and no issue of lifting the corporate veil arose. In the course of Judgment the Apex Court had observed in Para 46 thereof that the jurisdiction can be invoked against a sister ship i.e. a ship in the same beneficial ownership. In the present case the arrest is being sought not of a sister ship i.e. a ship in the ownership of the same person but a ship/vessel owned by a sister company of the company against which maritime claim arose. In *Liverpool and London S.P. & I Association Ltd. v. Sea Success* (supra) the issue for consideration was whether the non payment of insurance premium gave rise to a maritime claim. The premium was not paid in respect of vessels *Sea Ranger* and *Sea Glory*. The vessels *Sea Ranger*, *Sea Glory* and *Sea Success* were owned by the same owner. The vessel arrested was *Sea Success*. No issue of lifting the corporate veil for the purpose of arresting *Sea Success* arose. In the case of *M.V. Dong Do* (supra) Calcutta High Court held that under the Indian Law, shareholders of a company are not the owners of the assets of the corporate entity. The Court set aside the arrest of the vessel even though it was alleged that both the vessels were ultimately owned by the Socialist Republic of Vietnam through the medium of two limited companies. The Calcutta High Court negated the aspect of beneficial ownership as extending to shareholders of an incorporated entity and as an illustration pointed out that in India various Government Companies are in existence who are independent of each other having a distinct identity. Therefore a ship belonging to Shipping Corporation of India cannot be said to be a sister ship of a ship belonging to Oil & Natural Gas Commission to enable the arrest of ship owned by one company for the maritime claim arising in respect of another company.

11. Learned Single Judge of this Court in Admiralty Suit (L) No. 3547 of 2008 rendered on 22 December 2008 in *Polestar Maritime Limited Vs. M.V. QI LIN Men* and others observed that merely because the shareholders are common or their holding in two different companies are common/identical would not make the two companies one and the same entity. Similarly, the Gujarat High Court in the matter of *Croft Sales and Distribution Ltd. v. M.V. Basil and 17 ors.* in Civil Application No. 73 of 2011 in Admiralty Suit No. 10 of 2010 rendered on 17 February 2011 the Gujarat High Court held that shareholders are distinct and different from the corporate entity and the two separate legal entities are so regarded as independent of each other, and it is only in exceptional circumstances such as fraud etc. that the Court would examine question of lifting the corporate veil.

12. In this case it is not the case of the appellant that the applicant company has been created so as to only defeat the maritime claims against the respondent No.

2 company. In the present facts it is not the case of the appellant that the applicant company is a subsidiary of the respondent No. 2 company when possibly it could be said that that the holding company is the beneficial owner of the subsidiary company. In cases where two independent companies are both 100% subsidiary of a common holding company then it may be possible to contend that the beneficial owner of both the companies is the common holding company. These are not the facts in the present case as the applicant company and the respondent No. 2 company are not subsidiaries of one common holding company or have subsidiary and holding company relationship inter se.

13. The above principle of a corporate identity being distinct from its shareholders and its shareholders not being owners of the property of the company has been consistently followed/applied in Admiralty proceedings by British Courts as well. In the matter of *The EVPO AGNIC* (1988) 2 LLR 411 the case of the plaintiff was that one Evangelos or his company Pothicos Shipping Company was the real owner of two ships one Skipper 1 (maritime claim arose) and Evpo Agnic (ship sought to be arrested). The ownership of the two ships were in two independent companies though having the same managers and shareholders with the ultimate ownership of both the limited companies being found to be in Evangelos or his company. The argument of the plaintiff was that on lifting the corporate veil it would be found that one and the same person was the beneficial owner of the two companies. This submission was rejected on the ground that the arrest could not be made of the ship of a sister company but arrest could only be made of the sister ship i.e. ship of which the owners was the same as the ship in respect of which the maritime claim arose. The court vacated the arrest of the vessel Evpo Agnic holding that the ships are owned by two different limited companies which own them. It is the limited company and not its shareholders who are the legal and equitable owners of the ship.

14. The appellant placed reliance upon the decision of the Division Bench of this Court in *Great Pacific Navigation (Holdings) Corporation Ltd. V. M.V. Tongli Yantai* rendered on 14 October 2011 on the ground that on similar facts, this Court had allowed the appeal of the appellant therein and set aside the vacation of the arrest of the vessel. The aforesaid decision rendered by this Court on 14 October 2011 has been set aside by the Apex Court in Civil Appeal No. 8988 of 2012 in *M.V. Tongli Vs. Great Pacific Navigation (Holdings) Corporation Ltd.* on 12 December 2012. In view of the fact that the decision of the Division Bench of this Court dated 14 October 2011 has been set aside, no reliance can be placed upon the judgment which has been set aside. It is as though it never existed. In fact in *Ramchandra Vishnu Tendulkar and Others Vs. State of Maharashtra and Others*, this Court has held that once a Judgment of the Division Bench was set aside by the Apex Court then neither the observations and/or conclusion of the judgment that has been set aside can be relied upon. Consequently, reliance upon the aforesaid decision in the matter of *M.V. Tongli* (supra) rendered on 14 October 2011 is completely misplaced. Therefore, no occasion to consider the same for the disposal of this appeal can arise.

15. In these circumstances, the arrest of respondent No. 1 vessel is not justified as a matter of law and the order passed by the learned Single Judge cannot be found fault with.

16. In view of our above finding that arrest of respondent No. 1 vessel in the present facts is not warranted on an issue of law the consideration of the other submission such as a common director between the respondent No. 2 company and a subsidiary of the applicant company, common agent and common signature would all warrant lifting the corporate veil of the respondent No. 2 company to determine its beneficial owner would not arise. The entire basis for looking at surrounding circumstances arises according to the appellant in view of the fact that 100% shareholding of respondent No. 2 company is held by Cartier which is a company incorporated in Samoa. However under the laws of Samoa the names of the directors, shareholders are not required to be disclosed. It is submitted by the appellant that in view of the aforesaid peculiar situation that appellant is unable to establish beyond doubt the ownership of the Wang Wendong in Cartier and through it in respondent No. 2 company. However the necessity to examine the surrounding circumstances and proceed on suspicion that Wang Wendong is the beneficial owner of respondent No. 2 company is obviated for the reason that Wang Wendong who is alleged by the appellant to be the beneficial owner of respondent No. 2 company has filed an affidavit dated 8 February 2013 before the learned Single Judge wherein, he inter alia states as under:-

4. I state that I was never and I am not the Director nor hold any shares of M/s. Whim Star Chartering Co. Ltd., the Defendant No. 2 in the captioned proceedings, at any given point of time. I further state that I was never and I am not the Director nor hold any shares of M/s. ZJHX Shipping Co. Ltd. at any given point of time.

5. I also state that I was never and I am not the Director nor hold any shares of M/s. Cartier Investment Co. Ltd. at any given point of time.

In view of the above categorical statements on oath of Mr. Wang Wendong the reason to act on suspicious surrounding circumstances cannot be sustained. In the face of the above affidavit it is impossible to accept the submissions of the appellant that the arrest of the vessel which admittedly is beneficially owned by Wang Wendong has to be continued to secure the appellant's maritime claim against respondent No. 2 company. The learned single judge has examined the various surrounding circumstances and reached a finding that the same does not establish that Wang Wendong is the beneficial owner of respondent No. 2.

17. In fact in the decision of Queen's Bench Division in Mawan (1988) 2 LLOYD LR 459, the argument on behalf of the plaintiff was that if one looks at all the connecting links between the shareholders, the directors, and the management of the two limited companies it would be clear that the beneficial ownership of the two ships is vested in the same person and they are truly sister ships even if

attempt is made to conceal the fact. The Court negated the aforesaid submission by holding that the approach suggested involves not merely lifting a corporate veil but also sweeping aside all the corporate structure. Therefore, in the present facts, no fault can be found in the impugned order dated 6 May 2013.

18. The appellant had also submitted that while considering the application for vacation of said arrest of the vessel, the Court is required to consider not only the prima facie case but balance of convenience and irreparable injury involved in the matter. The above proposition is indisputable. However, a prima facie case cannot be built merely on suspicion. The arrest of the vessel on the basis of the suspicion raised certainly causes more injury to a third party than the plaintiff. Thus, the balance of convenience would be against the arrest of the vessel. In the case of *Aventicum 1978 1 LLOYD's LR 184* Queen's Bench Division (Admiralty Court) has held that onus is upon the plaintiff to show that the person against whom it is sought to invoke Admiralty jurisdiction is the person who beneficially owns both the vessel in respect of which maritime claim has arisen as well as the vessel which is sought to be arrested. The Court found that there were a number of factors to indicate that there is very close connection between two companies such as common address etc. yet the Court on the basis of the evidence before it held that there was no positive evidence produced by the plaintiff which could establish the beneficial ownership of the vessel sought to be arrested is in the same person as in respect of the vessel in which maritime claim arose. The appellant has not been able to establish that even prima facie that respondent No. 2 vessel is in the beneficial ownership of Wang Wendong. In the circumstances the impugned order has to be upheld.

Conclusion:-

In view of the above, we see no reason to interfere with the well reasoned order of the learned Single Judge dated 6 May 2013 setting aside the arrest done on 28 January 2013 of respondent No. 1 vessel. Accordingly, the appeal is, dismissed with no order as to costs.

After pronouncement of the judgment, learned Counsel for the appellant prays for continuing the ad-interim stay granted earlier in order to enable the appellant to have further recourse in accordance with law.

In the facts and circumstances of the case, the ad-interim stay granted earlier will continue for a period of 2 weeks from today.