

**(2011) 12 BOM CK 0104**

**In the Bombay High Court**

**Case No :** Review Petition (L) No. 91 of 2011 in 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

M.V. Tongli Yantai

APPELLANT

Vs

Great Pacific Navigation (Holdings) Corporation Ltd.

RESPONDENT

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**Date of Decision :** 22-12-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1

**Citation :** (2012) 114 BOMLR 577

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

**Bench :** Division Bench

**Advocate :** Rahul Narichania with Ms. Purnima Singh with Ms. Pooja Kapadia and Ms. Aarti Shah instructed by Mulla and Mulla and Carigie Blunt and Caroe, for the Appellant; F.E.D"Vitre with Mr. Zarir Bharucha instructed by . Bimal Rajshekhar, for the Respondent

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**Judgement**

1. The Petitioner has sought review of our judgment dated 14 October 2011 under Order 47 Rule 1 of the C.P.C. The Petitioner is entitled to have the judgment reviewed for:

- (a) bringing to light new and important matter or evidence hitherto not available.
- (b) correcting the mistake or error apparent on the face of record.
- (c) any other sufficient reason.

2. The Petitioner appears to have filed this Petition on the ground that there are errors apparent on the face of the record, contradictions in the judgment and other reasons as sufficient cause.

3. We may take up the contentions of the Petitioner separately enumerated thus:

1. Authorities cited in the judgment by the Court itself and points not argued considered by the Court:

Counsel on behalf of the Petitioner drew our attention to the case of Delta Foundations and Constructions Vs. Kerala State Construction Corporation Ltd., to show that that was a ground for review and the case of New Delhi Municipal Committee Vs. State of Punjab, etc. etc., which related to the reliance placed by the Court upon the specific statutory provision in the Municipal law for imposition of tax by the Municipalities upon considering which certain tax liabilities came to be imposed upon the State Government before obtaining their view in that behalf. Paragraph 102 of the judgment shows that when such a contention was not advanced by Counsel and liability was imposed, the Supreme Court kept in mind the rule of caution that ordinarily Courts should, particularly in constitutional matters, refrain from expressing opinions on points not raised or not fully and effectively argued by Counsel on either side.

In this case we have considered the points argued before us and seen the documentary evidence produced before us and the further law based upon the facts shown to us. We may mention that it was for Counsel to bring to our notice all the evidence on record as also the jurisprudence developed on the questions of law before us. If any fact or case law on the aspect of law before us and required to be considered by us is, however, not adverted to, it is our bounden duty to take that into consideration which we believe we have done.

The authorities cited by us though not relied upon by Counsel relate to the legal concept of beneficial ownership of a company and the legal concept of lifting of the corporate veil. The Petitioner has listed 18 such citations. This was a fundamental aspect which has been considered in our judgment based upon the facts of the case. Counsel argued extensively upon these aspects. In our judgment we have proceeded to consider these aspects from the meaning of the concept, the application of the general law relating to the doctrine of lifting of the corporate veil and the applicability of that doctrine specifically to cases of maritime claims with regard to arrest of ships of companies beneficially owned by another or managed by another company or in a group. We may mention that only upon the consideration of the entire jurisprudence in that regard could we have come to the conclusion that we did. We may also mention that we have not relied upon any judgment as a judgment covering the case in its entirety upon application of which we have based our order. If there was such a judgment not shown by both Counsel, but relied upon by the Court under which alone the order is passed, certainly we would keep the matter on board to show the Counsel, both of whom have not brought to our notice such a judgment by which the case is covered. That would be if we relied upon such judgment alone. This is not one such case. We would have expected Counsel themselves to point out to us the law on the subject as it developed. In the interest of justice we have undertaken that exercise. As the judgment would show we have distinguished certain cases, noted the principles therein and applied those principles to the facts of our case.

The Petitioners' Counsel made a grievance that Petitioner was deprived of the

opportunity of distinguishing those judgments. However in a good part of the forenoon session when the matter reached and was argued, none of these judgments have been distinguished. We, therefore, confirm our conclusions based upon those citations as they are in our judgment.

Aside from the aforesaid judgment we are not shown which points were not argued before us. Based upon the points argued before us we have appreciated the documentary evidence produced before us which would be considered in appeal.

## 2. Lifting of the corporate veil:

In the facts of the case considering the aforesaid law we have concluded that in the interest of justice the corporate veil be lifted so that the truth would be brought to light. This decision would require complete oral evidence of the companies that have been dealt with in the judgment to be brought before the Court. All that our judgment has concluded in that regard is the necessity for lifting the veil. The judgment shows a group of companies inter related to one another and controlled by a single individual. The Petitioner has sought to show that the Respondent as the Plaintiff in the suit sought to raise the corporate veil only in respect of some and not all of those companies. The case of the Respondent about its control by one individual was given up. However since the Court saw that the Defendant was "a one dollar company" the Court observed what it did despite the Plaintiff's concession and as a part of a larger scenario since whilst appreciating the documentary evidence brought before us we did come to a conclusion that the Defendant Company (Halcyon) also was a part of the group. Our judgment would be tested in the appeal there from. However, we do not find any cause to carve out of our judgment the exception to the aforesaid doctrine as applicable to the Defendant.

## 3. Reference to one Niu Wei Dong :

Upon seeing the documents before us the name of the aforesaid person surfaced as a Secretary/Director of LSL of the erstwhile company of Halcyon. The Petition shows that the said person is not related by blood or marriage to the person in control of the companies concerned in this case and that it is a common name amongst the chinese. That aspect would require evidence to be led. Given the facts of the case and in conjunction with the other circumstances we indeed came to the conclusion that that person would be the obvious nominee of the person in charge and control of the companies in the group. We were called upon to see a prima facie case based upon the evidence before us to consider whether to confirm or lift the arrest of the Defendant's vessel. It is in that regard that we have made the observations shown in paragraphs 47 and 87 of the judgment. It is contended that whatever be the share holding of the Defendant Company the case for lifting the corporate veil of the Defendant Company was given up by the Plaintiff itself. However since we have considered the larger issue of the inter relationships between the companies that we have noted and we have made our

observations. We have also referred to the judgment inter alia in the case of the Saudi Prince which has been sought to be distinguished by the Petitioner's Counsel in this Petition. However we have found a similar analogy in the said case which resulted in the veil being lifted and orders being passed consequent thereto. We have, therefore, made an analogy between the aforesaid Niu Wei Dong and the nominees in that case who were the children of the shareholders who controlled that company. We confirm our observations which are indeed subject to appeal.

It is argued by Counsel on behalf of the Petitioner that the judgment was cited before the single Judge, but not our Bench. We do not see how it is not our duty to go through the entire of such judgment in question.

#### 4. Hire Purchase/ Bare Boat Charter (BBC):

We were called upon to interpret the BBC and to ascertain the true intent of the parties to the said charter party. In such exercise we have concluded that it is essentially in the nature of a hire purchase agreement. The Petitioner's Counsel argued that various clauses of the BBC were shown to the Court which have not been adverted to. Indeed the clauses reflect what is on the document, whereas we have sought to go behind the document to ascertain the intent of the parties. Our conclusions would be subject to the order in appeal and we do not propose to go through the arguments with regard to the various clauses in this Review Petition.

Counsel on behalf of the Petitioner drew our attention to the judgment of K.L. Johar & Co. Vs. Deputy Commercial Tax Officer, Coimbatore III & Ors. 1965 16 STC 213 showing the instances of Hire-purchase agreements which are not conditional sales having the elements of bailment and sale therein. The judgment relates to the taxable event which would take place upon their execution. The applicability or otherwise of the hire purchase may be considered in appeal from our observation that the BBC was analogous to an hire purchase in reality.

#### 5. Transfer of Defendant Vessel by the Defendant:

Defendant claimed to be the real owner of the vessel. That aspect was required to be tested. This was done upon interpretation of several clauses of the BBC in paragraph 44 of the judgment. Counsel on behalf of the Defendant has found fault with our reasoning. He has drawn our attention to clause 41 of the BBC which relates to the transfer of vessel. We had observed with surprise the contention that the Defendant, though claiming to be the real owner of the vessel, could have transferred or mortgaged the vessel only with the permission of the Charterer under the BBC which is one of the incidents that impelled us to consider the BBC a sham. Counsel on behalf of the Petitioner has laid stress upon the last portion of clause 41 whilst arguing this review petition. It shows that any change in the ownership of the vessel would not cause negative consequence for the Charterers. In fact this aspect fortifies our conclusion with regard to the worth of the BBC and the intent of the parties executing it.

#### 6. Appropriate Party to the Arbitration:

The party who was seen to be the beneficial owner of the Respondent ship, one Tongli China (TC) claimed not to be a party to the Arbitration between the Plaintiff and its sister concern, one Tongli Samoa (TS). It was contended by the Defendant that the beneficial owner was not a party to the Arbitration and could not be. Yet it was contended that it was a necessary party and had to be joined in the suit. Counsel on behalf of the Petitioner has taken exception to the adjective "appropriate" as the party was described by us. However the essence of the argument was that TC could not have been a party to the Arbitration and hence the adjective.

#### 7. Geneva Convention 1999:

It was the case of the Petitioner that the beneficial ownership of the Defendant vessel was not contemplated under the Geneva Convention. The Petitioner, therefore, argued why the beneficial ownership should not be looked into by the Court. It is in that light that we have mentioned the contention of the Petitioner herein that the Court had not to see the beneficial ownership at all.

#### 8. Applicability of the Geneva Convention 1999:

The learned single Judge considered various judgments on this aspect with which we were in complete agreement. The judgments related to the claim of public law character. We have described it as Government interest. As per the contention of the Petitioner's Counsel we may instead describe that as public interest.

#### 9. Reliance upon Lloyd's List International:

The Petitioner's Counsel took exception to the expression "rely upon". There are two Lloyd's lists brought before us. One was dated 24 August 2010 and the other was dated 3 December 2010. The factual information relating to the beneficial owner of the Respondent ship (TC) was different in the two lists with regard to the particulars of its representative and the main shareholder. In the argument by the Petitioner's Counsel reliance was placed upon a later list alone to show the position that prevailed. However we noticed both the lists and the differences therein. Hence we observed in paragraph 22 of the judgment how the Defendants relied upon the later Lloyd's list and left the earlier Lloyd's list unexplained. Counsel on behalf of the Petitioner herein has contended that the expression is incorrect because the Plaintiff in the suit had got produced both the Lloyd's lists. We may mention that there is a distinction in "production of documents" and "reliance upon the documents". The document produced by one party may be relied upon by the other for its interpretation.

#### 10. Evidentiary value of Lloyd's List International:

We have observed in paragraph 22 of the judgment that Lloyd's list is a document analogous to documents 1 to 4 shown in part one of the schedule to

the Commercial Documents Evidence Act, 1931. Lloyd's lists of two separate periods were produced by the Plaintiff before us containing material differences. We were shown how a material information relating to the person in control of the Defendant Company was altered in the period when the cause of action in the suit accrued. We have considered the presumption that would be raised in documents under the aforesaid Act and that Lloyd's list would be analogous such documents being maintained as public documents containing the data of shipping companies. Of course, our observation would be subject to the decision in the appeal. Counsel on behalf of the Petitioner has produced the Terms and Conditions issued by Lloyd's List International for consideration of the data produced by the said agency and the terms and conditions under which it could be used. It shows a disclaimer of the facts contained therein. This document would certainly be considered at the stage of trial, when presumption would be drawn upon the facts contained therein. However we do not feel it necessary to reconsider our judgment based upon the terms and conditions not relied upon though available to the Petitioner at the time of the hearing of the application before the learned single Judge or in appeal before us. We may mention that such a document would not fall within the ambit of Order 47 Rule 1 as a document which was newly discovered upon an important matter or evidence at this stage.

11. The Petitioners have produced the Dictionary of International Trade showing the meaning of Lloyd's list and Lloyd's register. Lloyd's list is shown to be the leading source of worldwide maritime news and information including coverage of world shipping insurance. Lloyd's register is shown to be a register of vessels containing valuable information relating to their description and insurance. Lloyd's list, therefore, appears to be wider than the Lloyd's register and would contain matters relating to vessels and their description and insurance. From the Dictionary meanings of the two documents themselves the closeness to the relationship between the two is shown. The admissibility and acceptance of the documents alone would differ. Even if the statutory presumption was not to be drawn, the Lloyd's list would be accepted in evidence as being the leading source of maritime information. The information in this case would be considered in the evidence in that light. We have made our prima facie observations upon the documentary evidence pending any further oral evidence in proof of the document.

12. Finance of Far East Horizon Ltd. (FEHL):

It was an admitted position that one Far East Horizon Ltd., (FEHL) was a financier who financed the Defendant ship to the extent of 60% of its purchase price. Counsel on behalf of the Petitioner would have it emphasised that FEHL financed the ship through Halcyon. We do not see the difference that it would make.

13. The judgment in the case of Permina 3001 (1979 (1) LLR 327):

Counsel on behalf of the Petitioner contended that the paragraphs emphasised by

the Petitioner during the arguments of the appeal were not considered or reproduced in our judgment. The judgment related to the beneficial ownership. We have considered that aspect. We need not articulate it as the Petitioner would desire.

14. All the shares in the ship:

The beneficial ownership was shown to be contained in the individual company which owned all the shares in the ship. That aspect has been set out in the plaint as also in the English statute and the English judgments. It is contended that thereafter the Plaintiff put forward a contrary case of the shares, but not all the shares, in the ship which were required for beneficial ownership. This aspect has been considered in our judgment upon minutely dissecting the case of Ohm Mariana referred to whilst taking an overall view of all the cases cited before us in paragraph 83. Whether or not all the shares of the ship or the person who had the right to sell, dispose of, or alienate the ship could be termed as the beneficial owner would be the question of law to be decided in an appeal from our judgment, we having decided in favour of the latter.

15. Judgment in the case of Polestar Maritime Vs. Qi Li Men & Ors.:

The judgment sets out the usual position which prevails with regard to limited companies. It lays down the correct state of law under the usual circumstances. The corporate veil is required to be lifted to see the position that actually prevails under unusual circumstances. Consequently, what the Petitioner considers our failure would be tested in appeal.

16. The Merchant Shipping Act, 1958:

We have considered the provision of the Act as was shown to us by Counsel on behalf of the Plaintiff. Counsel on behalf of the Defendant had argued about his own interpretation of that law. Reiteration of that fact would be permissible only in appeal.

17. Judgment in the case of Geetanjali Wollen Pvt. Ltd. Vs. M.V. X-press Annapurna & Ors. (2005 (6) BCR 31):

We are informed that our observation that the appeal from order in that case was dismissed is erroneously recorded in paragraph 93 of our judgment though it was stayed in that case. We shall make the necessary correction in that behalf.

18. Observation of the learned single Judge with regard to the reason for not lifting the corporate veil:

We have observed that the learned single Judge has observed that two of the companies whose veil was sought to be lifted were not sued. Paragraph 136 of the judgment of the learned single Judge shows that the question of law relating to lifting the corporate veil would arise in "proceedings between" the Plaintiff and those companies. That could only be if the companies were sued. We read the judgment accordingly.

19. Points pressed which were not taken in the judgment:

Counsel on behalf of the Petitioner has drawn our attention to the judgment in the case of Mohd. Akram Ansari Vs. Chief Election Officer and Others, in which it was held that in such a case a review would lie. Upon this judgment Counsel of the Petitioner has raised before us the aforesaid points which have been considered. We may mention that other than the aforesaid, no other point has been pressed before us in arguments and we refrain from considering any other.

4. We find all but two of the aforesaid aspects falling wholly outside the purview of the review petition. Those two aspects would be corrected as shown below.

Hence the following order.

1. In the last line in paragraph 13 at page 10 of our judgment the words "Plaintiff's interest" shall be replaced by the words "public interest".
2. In line 6 of paragraph 93 on page 87 of our judgment the words "final upon the dismissal of the Appeal on merits there from" shall be substituted by the words "stayed".
3. The respondents have sought to correct our order at certain places mentioned in their praecipe to show the expression "real charterer of Nasco Diamond" instead of the expression "beneficial owner of the Respondent ship, Tongli Yantai". The relevant correction shall be made at the places stated in the praecipe of the Advocate of the Respondent herein/the Appellant.
4. Office shall carry out the aforesaid corrections in our judgment dated 14 October 2011.
5. The Review Petition is disposed of accordingly.
6. The Petitioner to register the review Petition as well as the cross objection for statistical purpose.