

(1999) 09 CAL CK 0022
In the Calcutta High Court

Case No : Civil Appellate Jurisdiction, A.P.O.T. No. 609 of 1999, GA. No. 3324 of 1999

Owners and Parties Interested in the Vessel M.V. "Dong Do" APPELLANT
and Another

Vs

Ramesh Kumar and Co. Ltd. RESPONDENT

Date of Decision : 30-09-1999

Acts Referred:

Colonial Courts of Admiralty (India) Act, 1891 — Section 2, 3
Companies Act, 1956 — Section 617
Constitution of India, 1950 — Article 1, 10, 3, 3(4)
Evidence Act, 1872 — Section 114
Merchant Shipping Act, 1958 — Section 443, 444

Citation : (2000) 1 CALLT 367

Hon'ble Judges : Satyabrata Sinha, J;Mahammad Habeeb Shams Ansari, J

Bench : Division Bench

Advocate : Mr. Gautam Chakraborty, for the Appellant; Mr. Sudipta Sarkar and Mr. Biswarup Gupta, for the Respondent

Judgement

S.B. Sinha, A.C.J.

1. This appeal is directed against an order dated 29th July. 1999 passed in Admiralty Suit No. 16/99. In the aforementioned Suit filed by the plaintiff-respondent, the ship known as M.V. Kim Dong was directed to be in arrested.

2. The fact of the matter is as follows :--

Two ships known as M.V. Kim Dong and M.V. Dong. Do allegedly belonged to the Socialist Republic of Vietnamies Government. The vessel M.V. Klm Dong was carrying rice from the port of Paradeep in India to the Port of Chita gong. For reasons which are not relevant for the purpose of the present case, the Ministry of Food of the Government of Bangladesh did not take delivery of the said consignment of the rice. The said vessel allegedly illegally left the Port of Chitagong for Hanoi on 10th July. 1999 without discharging the cargo although

all the documents in relation thereto had been seized by the appropriate authorities of the Government of Bangladesh. The Plaintiff in this suit had certain claim against the owners of the ship M.V. King Dong.

3. The vessel M.V. Dong Do had been arrested, by this court, on the following allegations ;--

"The Vessel" M.V. Dong Do" and the Vessel "M.V. Kim Dong" at all material times were and still are both owned in all respect by the Government of Socialist Republic of Vietnam. The plaintiff further states that at time when the cause of action in the Instant suit arose both the vessels were in use or Intended for use for commercial purpose.

The Vessel Dong Do is a sister vessel of the Vessel M.V. Kim Dong. The said two vessel have common owners and both the vassel are owned and controlled in all respects by the Socialist Republic of Vietnam."

4. An application for vacating the stay was filed which was dismissed by reason of the impugned order, inter alia, on the ground that both the ships sisters ships owned by the Socialist Republic of Vietnam-. The learned trial Judge in support of his aforementioned conclusion relied upon Martime Directory, from a perusal whereof it appears that there exists a heading "Vietnam, Government of Socialist Republic" wherein the names of large number of Shipping Companies appeared including some allegedly belonging to the companies incorporated under the Indian Companies Act. The Vessel Kim Dong stated to have belonging to Kamchatka Shipping Co. In Lloyds Martime Diectory, 1997 whereas admittedly the vessel Dong Do has been shown as belonging that of Eastern Dragon Shipping Co. Ltd.

5. Mr. Gautam Chakraborty, the learned senior counsel appearing on behalf of the appellant, Inter alia, submitted that in the instant case the Brussels Conventions which would be applicable, contained the following Articles :--

"Art. 3(1) Subject to the provisions of paragraph 4 of this Article and of Article 10, the claimant may arrest either the particular ship in respect of which the Maritime claim arose and/or any other ship which is owned by the person who was at the time when the Maritime Claim arose, the owner of the particular ship, even though the ship arrested be ready to sail : but no ship, other than the particular ship in respect of which the claim arose may be arrested in respect of any of the Maritime claims enumerated in Article 1(t), (o), (n), (p) or (q). This was probably the first time an International Convention provided that arrest of a sister ship and agreed between the parties to the convention. Article 3(4) is also Import which reads as follows :--

"3(4) when in the case of a Charter by demise of a ship the Charter and not the Registered owner is liable in respect of a Maritime Claim relating to that ship, the claimant may arrest such ship or any other ship in the Ownership in the Charterer by demise subject to the provisions of this convention, but no other

ship in the ownership of the registered owner shall be liable to arrest in respect of such Maritime claims."

6. Mr. Chakraborty submits that Certificate of Registration granted in respect of the ships in question would be the only relevant documents and as two different owners have been shown in respect of the ships in question, they cannot be said to be sister ships. In any event contends the learned counsel, limited company being a juristic person its veil cannot be lifted. Mr. Chakraborty further contends that no document except Liyods Directory of 1997-1999 and Liyods Shipping Index of July 1997 had been relied upon by the learned trial Judge in passing the Impugned order. Drawing our attention to a large number of documents it has been contended that M. V. Kim Dong belongs to the Eastern Dragon shipping Co. Ltd. and, thus, it cannot be said to be the sister ship of M.V. Kim Dong. It has further been submitted that various documents have been produced before the learned trial Judge but the same had not been considered at all. The concept of sister ships, contends Mr. Chakraborty, would mean that both the ships must be belonging to the same owner. In this connection reliance has been placed on *Evepo Agnlc* reported in 1988 (2) Lio LR 411, *The Maritime Trader* reported in 1981 (2) Lio LR 153 and *M.V. Eitsaberth & Ors. v. Harwan Investment and Trading Pvt. Ltd.* reported in AIR 1993 SC 114.

7. Mr. Biswarup Gupta, the learned senior counsel and Mr. Sudipta Sarkar, appearing on behalf of respondent, on the other hand, submitted that even beneficiary of a ship can be subject to an order for arrest of the ship. It has been submitted that as the Government of Vietnam holds the ultimate shares in respect of both the concerns purported to be owning the ships, arrest of the ship in question was permissible. Strong reliance in this connection has been placed on *Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic Vs. New Central Jute Mills Co. Ltd.* and another, *M.V. Elisabeth and others v. Harwan Investment & Trading Pvt. Ltd.* *Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa* reported in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others*, and *Alexandros Dryon S.A. Vs. Owners and Parties interested in the vessel M.V. "PRAPTI"*, .

8. The question raised in this appeal although is a complicated one, the same must be considered having regard to the law of the land as declared by the Supreme Court. Thus, a sister ship would include the ships belonging to two different concerns only if there is a common beneficiary. But the said proposition can not be said to be absolute one. Each case has to be considered keeping in view the factual back-drop involved.

9. In India, Government Company is defined in section 617 of the Companies Act, 1956. Various Government Companies have come into being in India. But in our opinion despite the fact that the Government of India have shares in the Government Companies, a ship belonging to the Shipping Corporation of India

cannot be said to be a sister ship of a ship belonging to Oil and Natural Gas Commission. It is true that in certain cases the corporate veil of a company can be lifted- But, under the Indian Law, the shareholders of a Juristic person are not the owners of the assets thereof. This concept as regard the two companies, the entire or major shareholders whereof may be one person Including the State, has to be considered from this angle. When a company is incorporated it becomes a separate Juristic entity. Its right and obligations vis-a-vis the contracting party, unless there exists a provision to the contrary, must be confined to the terms of the contract. True it is that the Maritime Law in some cases makes an exception. But can this court extend such exception to a case where the companies are different although one of the majority shareholders is beneficiaries in respect of both. It is no doubt true that the order arresting of a ship in some cases becomes essential keeping in view the fact that once a ship is allowed to leave the port it would be difficult for the petitioning creditor to recover the amount. On the other hand. If a ship is wrongly arrested and detained at port, it will incur serious financial loss. What should be the striking balance is the question involved in this appeal.

10. Before us, the learned counsel appearing on behalf of the parties produced various documents to show that both in the Lloyds Directory of 1997-1999 and Lloyds Shipping Index of July, 1997, the ships have been shown to be belonging to different concerns although they have been clubbed together under one heading, viz, "Socialistic Republic of Vietnam".

11. As the order directing arrest of a ship will lead to a grave consequence, such as order must not be passed casually. It is true that keeping in view the stake involved in an Admiralty suit, the case of the plaintiff who is the petitioning creditor in a Maritime action must also be considered from the angle that if there is a prima facie case that both are sister ships, it should not be allowed to leave the port without furnishing security.

12. However, the said question would largely depend upon the question as to whether in such a situation, the Corporate veil can be lifted.

13. In *Dr. S.L. Agarwal Vs. The General Manager, Hindustan Steel Ltd., and Heavy Engineering Mazdoor Union Vs. State of Bihar and Others*, the apex court refused to lift the corporate veil for the purpose of finding out a relationship between employer and employee and held that the employees of the Statutory Corporation are not the employees of the Central Government.

14. In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , the law has been stated in the following terms :--

"A Company registered under the Companies Act is a legal person, separate, and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an Interest in the Company arising under Its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the distributed profit. Again a director of a

Company is merely its agent for the purpose of management. The holder of a deposit account in a Company is its creditor: he is not the owner of any specific fund lying with the Company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for Infringement of the rights of the Company, unless by the action Impugned by him, his rights are also Infringed."

15. Yet again in *Western Coalfields Limited Vs. Special Area Development Authority, Korba and Another*, , the apex court held :--

"A company registered under the Companies Act is a legal person, separate, and distinct from its Individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an Interest in the Company arising under Its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the distributed profit."

16. The court referring to the decision of *Andhra Pradesh State Road Transport Corporation Vs. Income Tax Officer, B-I B-ward, Hyderabad, and Another*, observed :--

"In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown Property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a Government department nor do its powers fall Within the province of Government."

17. In *Electronics Corporation of India Ltd. and Others Vs. Secretary, Revenue Department, Govt. of Andhra Pradesh and Others*, , it has been held :--

"It is the case of the appellant company in its writ petition that it is the lessee of the Department of Atomic Energy of the Union of India in respect of the said land. The said land, therefore, is of the ownership of the Central Government and, being leased out to the appellant Company for an Industrial and commercial purpose, is land to which the Act applies. By virtue of the amended definition of "owner" u/s 2(j) of the Act, the appellant Company is the owner of the said land and by virtue of section 3, is liable to pay non-agricultural assessment thereon."

It may be that in some cases this court had been following the common law practise of England in such matters, but as Indicated hereinbefore, each case has to be considered at its own facts and the law providing in this Country.

In the Instant case the allegation made in the plaint by the plaintiff are absolutely vague. Excepting stating, inter alia;

"The Vessel Dong Do is a sister vessel of the Vessel M.V. Kim Dong. The said two vessels have common owners and both the vessels are owned and controlled in all respects by the Socialist Republic of Vietnam."

No statement had also been made as regard how and in what manner both the

ships can be said to be the sisters ships.

In the plaint it is not stated that the ships although belonging to the different Companies the Companies were constituted with a view to commit fraud on its creditors. It has not been denied that the two ships belong to two different concerns but the plaintiff proceeded on the basis that as both the companies belong to the Socialistic Republic of Vietnam, the latter is the owner of both the ships. Such a concept can neither be countenanced under the Companies Act, 1956 nor under common law, much less in a Maritime action which is an action in rem.

18. In The "Mawan" now named "Mara" (supra), it has been held :--

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

19. Admittedly the arrested ship did not belong to the owner of the vessels M.V. Kim Dong.

20. Before us a dictionary has been produced to show that whatever has been written in the Vietnamese language has been translated in English correctly. It may be true under the Commercial Documents Act, Lloyds Directory is admissible in evidence.

21. Mr. Biswarup Gupta, had submitted that the appellant had failed to produce relevant documents which were in their possession.

22. The plaintiffs herein had entered into a contract with the owners of M.V. Kim Dong. Therefore, it is also presumed that they knew the status of the contracting party and other details relating to the ship wherein the Cargo was loaded at Paradip Port. In the instant case the parties have produced the documents of certificates of registration granted by the Government of Vietnam in respect of the vessels Kim Dong as also Dong Do as would appear from pages 66 and 154 of the Paper Book. The appellant herein has also produced the following documents to show that that M.V. Dong Do is owned by the Eastern Dragon Shipping Co. Ltd. :--

"(A) Bills of Lading Issued by the Master on behalf of M.V. Kim Dong. All the Bills of Lading are of Eastern Dragon Shipping Co. Ltd.

(B) Letter dated 13th July, 1999 from Eastern Dragon Shipping Co. Ltd., to

Maritime Services Ltd., Chittagong (Page 56) of the stay Petition.

(C) Letter dated 14th July, 1999 from Eastern Dragon Shipping Co. Ltd. to R. Piya Lal International Ltd., Calcutta (Page 37).

(D) Letter dated 14th July, 1999 from Eastern Dragon Shipping Co. Ltd., to R. Piya Lal (Page 58).

(E) Letter from Eastern Dragon Shipping Co. Ltd., to R. Piya Lal International Ltd. (page 59)

(F) Letter dated 16.7.1999 from Eastern Dragon Shipping Co. Ltd. to R. Piya Lal (page 60)

(G) Letter dated 16.7.1999 from Eastern Dragon Co. Ltd. to R. Piya Lal claiming U.S. Dollars 405.815 (page 61)

(H) Letter dated 17th July 1999 from Eastern Dragon Shipping Co. Ltd. to R. Piya Lal. Calcutta (page 62)

(I) Fax dated 14th July 1999 from R. Piya Lal to Eastern Dragon Shipping Co. Ltd. (page 63)

(J) Fax dated 17th July 1999 from R. Piya Lal International Ltd. to Eastern Dragon Shipping Co. Ltd. was owned by the Government of Vietnam.

23. Similarly the owners of Dong Do have produced the following documents :--

(i) Certificate of registration granted by the Government of Vietnam dated 28th December, 1994.

(ii) Classification Certificate Issued by the Vietnam Registrar of Shipping which shows DONG DO is owned by Hanoi Maritime Transportation Co. (page 150).

(iii) A copy of the certificate Issued by Vietnam Insurance Corporation (page 151).

(iv) A copy of certificate Issued by Vietnam Insurance Corporation (page 152).

(v) A copy of relevant page of Lloyds Registrar of Ships 1991-1992 (page 153), in which the owner of the Vessel is shown as Hanoi Maritime Transportation Co. (page 153).

(vi) Certificate of Entry by the West of England Ship owners Mutual Insurance Association page 158 in favour Hanoi Maritime Transportation Co. (HAMATOO).

(vii) Letter from LLP Ltd. being the publishers of Lloyd Maritime Directory and Shipping Index which shows that in previous edition both the companies were listed under the General Heading of the Government of Vietnam. The 200 Edition of Lloyds will have the vessel under their respective Companies name (page 159 and 160). The publishers of Lloyds Maritime Directory confirmed that the registered owner of DONG DO is Hanoi Maritime Transportation Co. and that Registered owner of KIM DONG is Eastern Dragon Shipping Co. Ltd."

24. Such documents clearly go to show that both the ships not only belonged to two different concerns but also they were registered as being owned by different Companies and had been transacting business separately.

25. This aspect of the matter has not been considered by the learned trial Judge at all.

26. In *The EVPO AGNIC* reported in 1988 (2) Llo LR 411, it was held :--

"Thus, although prima facie the *"SKIPPER 1"* and *"EVPC AGNIC"* are owned by separate one ship-owning Companies, it becomes clear on lifting the veil of incorporation that the shareholders in each of these Companies are the same and their President/Director and Vice President/Director are also the same.

In the circumstances it is my belief that the owners of the Vessel *"SKIPPER I"* were on the date of the issue of the writ herein beneficial Owners as respects all shares in the Ship or Vessel. *"EVPO AGNIC"*, and that it is clearly the case that the two separate Companies which are the registered owners according to Lloyd's (Register), are part of an arrangement which has the effect of covering up the true ownership of these Vessels. Such being the case I respectfully submit that the court should lift the corporate veil in order to determine that the "relevant person", who would be liable on an action in personam, is also the present beneficial owner of all shares in the *"EVPO AGNIC"*."

27. The learned Judge in answering the question, stated the law in the following terms :--

"In answering this question I bear in mind three Important considerations. First, it is a basic rule of construction that where a statute employs different terminology in different provisions, prima facie a different meaning is intended and this is particularly the case if the differing terminology occurs within a single sub-section. "Owner" in par. (b) thus falls to be contrasted with "beneficial owner" in pars, (i) and (ii). Second, all maritime nations maintaining registers of shipping which record the names of the owners. These registers are of fundamental Importance as establishing the flag of the vessel, thereby making it for some purposes part of the flagging territory of that country and subjecting it to the laws of that country. I would therefore, regard the concept of a registered owner as being a nominal owner as a contradiction. Third, the Convention clearly looks to ownership and registered ownership as one and the same, although as Mr. Justice Robert Goff pointed out in *The 1 Congresso del Partido* (1977) 1 Llo LR 536: (1978) 1 Q.B 500, the "trust" concept involving a dichotomy between legal and equitable ownership may be unknown to some, and perhaps most, other Jurisdictions. My conclusion is that, in relation to a registered ship, "owner" in section 21(4)(b) means "registered owner".

28. It has further been held :--

"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. Tills was the situation in *The Saudi Prince* (1982) 2 LLR 255 and was alleged to be the situation in *The Aventicum*. (1978) 1 Llo LR 184."

29. The "*The Maritime Trader*" reported in 1981 (2) Llo LR 153. the said learned Judge held that the company was not beneficially owned by MTO and could not be arrested to secure the plaintiffs claim against that company.

30. It went on to observe :--

"The court had no Jurisdiction to arrest a ship in order to provide security for a maritime claim which was to be referred to arbitration, and that purpose being the only purpose in Issuing the writ in this action."

31. As regard the quantum of evidence, the learned Judge observed :--

"The evidence upon which I have to decide that matter does not raise even a prima facie case that the ship *Maritime Trader* was purchased by MTS in 1976 in order that it would not be available as security for a Judgment against MTO. If, of course, the parent company, MTO, is unable to pay its debts and is wound up. one of the assets of the company will be its shareholding in MTS. The value of those shares must depend upon the assets and liabilities of MTS, about which I have no evidence."

32. The Commercial Documents Act carries a presumption. Such presumption may be raised in respect of the Items mentioned therein. But presumptive evidence must necessarily be considered in terms of the pleadings of the parties and other relevant evidences brought on records. No trial on evidence has taken place in this case. The dispute between the parties have to be resolved on the basis of affidavit evidence.

33. As has been stated herein before that in respect of such matters the court shall presume, but the various documents all of which are public documents show different things. Under the Indian Evidence Act not only the court has to raise a presumption but such presumptions are rebuttable. The matter in respect whereof the court shall presume also comes within the purview of the evidence and, this, the same must be considered in its entirety and not in Isolation. This must be construed in the context of the other relevant statutes which governed the field.

34. In *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, , while holding that the High Court can exercise such Jurisdiction, the apex court held :--

"In the absence of any statute in India comparable to the English statutes on admiralty Jurisdiction, there is no reason why the words "damage caused by a ship" appearing in section 443 of the Merchant Shipping Act, 1958 should be so narrowly construed as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carriage of goods. The expression is wide enough to Include all maritime questions or claims. If goods or other property are lost or damaged, whether by physical contact or otherwise, by reason of unauthorised Acts or negligent conduct on the part of the ship-owner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of the person aggrieved, is liable to be detained when found within Indian Jurisdiction by recourse to sections 443 and 444 of the Maerchant Shipping Act, 1958 read with the appropriate rules of practice and procedure of the High Court. These procedural provisions are but tools for enforcement of substantive rights which are rooted in general principles of law, apart from statutes, and for the enforcement of which a party aggrieved has a right to Invoke the inherent Jurisdiction of a superior court."

35. But the question is whether it is a fit case where the court should exercise such Jurisdiction.

36. In *Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic Vs. New Central Jute Mills Co. Ltd. and another*, . the apex court held :

"In the present case, the appellant having been held to be a foreign State within the meaning of section 86 and the plaintiff-respondent not having obtained the consent of the Central Government, as required by section 86 the suit filed on its behalf was not rightly entertained by the trial court. The question whether a suit should be entertained, cannot be deferred, till the stage of the final disposal of the suit, because that will serve neither the Interest of the plaintiff nor of the defendant, The object of section 86 is to save foreign States from being harassed by defending suits in which there are hardly any merit. If the foreign State is required to file written statement and to contest the said suit and only at the stage of final disposal, a verdict is given whether in the facts and circumstances of the particular case, such foreign State is entitled to the protection of section 86 of the Code, the very object and purpose of section 86 shall be frustrated. The bar of section 86 can be taken at the earliest opportunity and the court concerned is expected to examine the same."

37. The said decision has no application in the present case.

38. In *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others*, , the apex court was not concerned with the question Involved herein.

39. We are, therefore, of the view no prima facie case has been established to arrest the ship in question.

In the result, the appeal is allowed and the Judgment and order under appeal is set aside.

In the facts and circumstances of this case, there will be no order as to costs.

M.H.S. Ansari, J.—I agree.

2. The Court : After the Judgment was pronounced Mr. Sudipta Sarkar, learned Sr. counsel appearing on behalf of the appellant submits that the claim of the plaintiff/respondent had been secured by P.I. Club. The learned counsel seeks to withdraw the suit Such a prayer for withdrawal of the suit may be made before the learned trial Judge.

All parties Including the Marsall and Port authority are to act on a xeroxed signed copy of the operative part of this Judgment on the usual undertaking.

3. Appeal allowed