

PIERCING THE CORPORATE VEIL

The arrest of the Chinese registered vessel, M.V. Tongli Yantai, at Chennai, India by the Bombay High Court in appeal filed by Great Pacific Navigation (Holdings) Corporation Ltd [(Great Pacific)] against M.V. Tongli Yantai, decided on 14th October 2011, highlighted the importance of

- a. Admiralty jurisdiction can be acquired if the writ or if the warrant of arrest is executed on the ship when it arrives within the territorial jurisdiction of the court
- b. Lifting the corporate veil to establish beneficial ownership for the purpose of arresting a sister vessel-ship

Great Pacific, a Hong Kong based company, filed a suit in the Bombay High Court against the vessel M.V. Tongli Yantai for security in respect of their claim pending arbitration. At the time of filing of the suit and application for arrest as well as at the time of passing of the order, the vessel was not within the territorial waters of India. The vessel was arrested later when she arrived Indian territorial waters at Chennai.

Great Pacific had chartered a vessel called M.V. Nasco Diamond from Da Sin Shipping Pte. Ltd. Da Sin had in turn time chartered the vessel from the head owners YDM Shipping Company Limited. Great Pacific thereafter sub-chartered the vessel M.V. Nasco Diamond to Tongli China acting through its agents/nominees/alter ego Tongli Samoa pursuant to a fixture recap for a time trip charter. The fixture recap was signed by Tongli Samoa. The ship sank. Da Sin raised the claim upon Great Pacific who in turn raised the claim upon its charterer, Tongli Samoa. Great Pacific sought recourse to arbitration. Tongli Samoa, against whom Great Pacific has raised a claim is the sister concern of one Tongli Shipping Co. Ltd., China who beneficially owned M.V.

Nasco Diamond as also the respondent, original defendant vessel, M.V. 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 Halcyon Ocean Shipping Companies Ltd.

The Single Judge refused to lift the veil of Halcyon; and refused to consider Halcyon as being the alter ego of Tongli China nor had recorded any finding that there was a fraud involved, the defendant vessel M.V. Tongli Yantai was released from arrest, this decision was overturned on appeal.

In this case, the Appeal Court of Bombay High Court allowed that an order from Bombay High Court can be executed in any Indian territorial waters and is in agreement with the decision of the learned single judge answering the preliminary issue with regard to the jurisdiction of the court in *Geetanjali Woollen Pvt. Ltd. Vs. M.V. X-Press Annapurna And Ors.* dated 9th August, 2005 (2005 (6) BCR 31). It was also held by the single judge that the Court can acquire jurisdiction if the writ or if the warrant of arrest is executed on the ship when it arrives within the territorial jurisdiction of this Court. Although the question on jurisdiction was left unanswered by the appeal court in *M.V. X-Press Annapurna And Ors. Vs. Geetanjali Woollen Pvt. Ltd.*, dated 11th March 2011, as it was in their opinion not necessary to decide that question in appeal. In an unreported appeal court judgment, dated 20th July 2001 in *M.V. Umang*, the Bombay High Court ruled that its admiralty jurisdiction extends throughout the territorial waters of India.

Great Pacific also urged in their appeal to raise the corporate veil 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. The Counsel for the vessel owner argued in the Appeal Court that where there was no fraud made out, lifting the veil would not be possible.

The appeal court observed that 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.

Based on the above cited decision when the moment comes for decision as to which court of India one should approach for obtaining an order of arrest, Bombay High Court is preferred as order for arrest of a vessel obtained from the Bombay High Court can be executed anywhere in Indian territorial waters, wherever the vessel is found.

However, this pan-India admiralty arrest jurisdiction is only with the Bombay High Court while other High Courts with admiralty jurisdiction i.e. Calcutta, Madras and Gujarat High and other admiralty courts jurisdiction is within their State territorial waters.

Absent fraud, economic and commercial unity is no ground to lift the veil. However, the observation of the appeal court is extremely broad. This will ease untangling the complex cobweb behind one-ship company that mask the real owner, the concept that detaches ships from her sister-ship, making it

difficult to arrest the sister ship, as the real owner is not known. One-ship company concept is used to limit the financial liability of such individual company or the group of such companies. 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. 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 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.

All the orders passed by the single judge and the appeal court in the matter was set aside by the Supreme Court of India (the Apex Court) since they were passed at the interlocutory stage. The Supreme Court further directed that the High Court will dispose of the pending matters in accordance with law taking note of the fact that the Supreme Court have set aside the orders passed by the learned Single Judge and the Division Bench of the High Court.

The Bombay High Court division bench hearing appeal, in the matter of Lufeng Shipping Company Ltd -vs- m.v. Rainbow Ace & Anr has handed down a decision that lifting of corporate veil will arise if there is fraud and evidence thereof. A ship can be arrested under beneficial ownership for a

maritime claim under the 1999 arrest convention supported with evidence of the beneficial ownership of the ship sought to be arrested is the same as the one who is responsible and liable for the claim, and not merely on suspicion.

Corporate veil can be lifted if there is fraud and supported with evidence also a ship can be arrested under beneficial ownership if supported with evidence.