

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**INTERIM APPLICATION NO. 540 OF 2020
IN
COMM ADMIRALTY SUIT NO. 14 OF 2020**

Nippon Yusen Kabushiki Kaisha, a
Corporate entity organized under the Laws
of Japan, and carrying on business using
the trade name NYK Line and having its
office at Yusen Building, 3-2, Marunouchi 2
– Chome, Chiyoda -Ku, Tokyo, 100 – 0005,
Japan

**...Applicant/
Defendant No.2**

In the matter between

Aurobindo Pharam Limited

...Plaintiff

Versus

NYK Theseus (IMO No.9356701) and ors.

...Defendants

**WITH
INTERIM APPLICATION NO. 548 OF 2020
IN
COMM ADMIRALTY SUIT NO. 14 OF 2020**

NYK Theseus (IMO No.9356701), a
Container Ship registered in Panama, and
flying the flag of Panama together with her
hull, tackle, engines, machinery, boats,
bunkers, equipment, paraphernalia, and all
other appurtenances presently at Mumbai
Anchorage, in Indian territorial waters and
within the Admiralty and Vice Admiralty
Jurisdiction of this Hon'ble Court.

**...Applicant/Ori.
Defendant No.1**

In the matter between

Aurobindo Pharam Limited

...Plaintiff

Versus

NYK Theseus (IMO No.9356701) and ors.

...Defendants

Mr. Venkatesh Dhond, Senior Advocate, a/w Abhimanyu Singh, Akshay Kolsepatil, i/b Ms. S. Priya, for the Applicant/Ori. Defendant Nos.1 & 3.

Mr. Prathamesh Kamat, a/w Vishal Shiryan, Arsalan Thaver, i/b Vishal Shriyan, for the Respondent in IA/540/2020 – Ori. Plaintiff.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 19th JANUARY, 2023

PRONOUNCED ON: 7th JUNE, 2023

ORDER:-

Interim Application No.540 of 2020

1. The applicant – defendant No.2 has preferred this application to dismiss the suit and return the security furnished by the applicant, revoke the grant of leave under Clause XII of the Letters Patent and, in the alternative, return the plaint to the plaintiff for presentation before the appropriate forum. A direction is also sought against the plaintiff to pay an amount of Rs.35,00,000/- together with interest on cash deposit of Rs.6,50,77,230.68 at the rate of 18% p.a. from the date of deposit i.e. 18th December, 2019 till payment and/or realization.
2. The applicant – defendant No.2 is a legal entity organized under the laws of Japan.
3. Aurobindo Pharma Limited, the plaintiff, instituted a commercial admiralty suit against the applicant – defendant No.2, NYK Theseus (IMO No.9356701) defendant No.1 – the

Vessel and NYK Line (India) Pvt. Ltd., defendant No.3, asserting that the applicant – defendant No.2 is a legal entity organized under laws of Japan and carries on business as a carrier under the trade name NYK Line. Defendant No.3 is a 100% subsidiary of the applicant, in India. The registered owner of defendant No.1 Vessel NYK Theseus Corporation SA is a one ship company incorporated under the Laws of Panama. The Vessel was entirely managed and controlled by defendant No.2. The registered owner of defendant No.1 Vessel was also a company. It was owned, financed, operated, funded, managed and controlled entirely by defendant No.2 and, thus, for all practical purposes defendant No.2 was the owner and/or deemed owner of defendant No.1 Vessel.

4. Asserting the aforesaid jural relationship *inter se* defendants, the plaintiff claimed that it had entrusted defendant No.2 with carriage of pharmaceutical cargo consisting of 20 pallets of CENFURX AXET INTM from the port of Nhava-Sheva to London Gateway Port, UK. The cargo was shipped on board the vessel CCNI ARAUCO 6327 in the refrigerator container and a Bill of Lading No. MAN0631846/003 dated 8th August, 2016 was issued by defendant No.3 as an agent for and on behalf of defendant No.2. En-route the discharge port the said vessel

CCNI ARAUCO 6327 caught fire at Hamburg Port. Eventually, the plaintiffs goods were transshipped by defendant No.2 on board another vessel and the same were delivered to the consignee GlaxoSmithKline at the place of delivery, on 3rd November, 2016. However, the consignee rejected the said cargo and returned the same to the plaintiff. Hence, the plaintiff has a maritime claim under Section 4(1)(f) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (“the Admiralty Act, 2017”) for loss or damage in connection with the said cargo. The plaintiff was, therefore, entitled to file an action in rem and seek arrest of any vessel owned by the carrier/defendant No.2.

5. In addition, it was asserted that the plaintiffs claim was in bailment for loss and damage to the cargo when it was in the custody, care and control of the carrier as bailee, rendering it unfit for its intended use. It was further asserted that the plaintiff also had a claim in tort and/or in negligence against defendant No.2. The plaintiff was thus entitled to proceed *in personam* against defendant No.2 for recovery of its claim for loss and damage to its goods.

6. The plaintiff thus prayed for arrest of defendant No.1 – Vessel and a money decree in the sum of US\$ 825,600 together

with interest at the rate of 18% p.a. and in the sum of Rs.23,56,542/- along with interest at the rate of 18% p.a. from the date of institution of the suit till payment and/or realization.

7. Defendant No.3 had filed a caveat against the arrest of defendant No.1 – Vessel. In order to obviate the arrest of defendant No.1 – Vessel, the applicant – defendant No.2, on a without prejudice basis, furnished security in the form of cash deposit.

8. This application is preferred with the assertions that this Court lacks jurisdiction to hear and determine the suit as under Bill of Lading exclusive jurisdiction is conferred on Tokyo District Court. The applicant contends the plaintiff was otherwise not entitled to maintain an action in rem against defendant No.1 – Vessel. The registered owner of NYK Theseus, the vessel, does not owe any personal liability and therefore in the absence of *in personam* liability of the registered owner an action in rem against defendant No.1 – Vessel is not tenable. The claim of the plaintiff that applicant No.2 is the owner and/or deemed owner/true owner or real owner of defendant No.1 – Vessel is stated to be a subterfuge to maintain an action in rem. It is contended that none of the conditions stipulated by Section

5 of the Admiralty Act, 2017 to justify the arrest of defendant No.1 in rem is fulfilled.

9. The applicant asserts defendant No.1 – Vessel is not the sister ship of M.V. CCNI ARAUCO 6327, in which the plaintiff's cargo was loaded. No case for lifting the corporate veil is made out. The applicant claimed to be only the Time Charter of defendant No.1 – Vessel under the Time Charter party dated 18th November, 2008. Since the plaintiff has no maritime claim against defendant No.1 - Vessel and/or her registered owner NYK Theseus, defendant No.1 – Vessel could not have been proceeded against or arrested or called upon to furnish security. Hence, the security is required to be returned.

10. The tenability of the suit is also assailed on the ground that the suit is barred by law of limitation as in accordance with the provisions of the Hague Visby Rules and the Indian Carriage of Goods by Sea Act, 1925 (“the Act, 1925”), the applicant – carrier stood discharged from any liability after expiry of one year from the date of the delivery of the cargo. Institution of suit on 5th September, 2019 in the face of the confirmation of rejection of the goods latest by 7th March, 2017 is stated to be hopelessly barred by limitation. Thus, the suit deserves to be dismissed on this count as well and the security refunded.

11. The plaintiff resisted the application by filing an affidavit-in-reply. It was contended that this Court has jurisdiction to entertain and determine the suit. Since defendant No.1 – Vessel was within the territorial waters and within admiralty jurisdiction of this Court when the plaintiff moved for arrest of defendant No.1, this Court had the jurisdiction to entertain the admiralty action. According to the plaintiff, the cause of action arose within the admiralty jurisdiction of this Court. In any event, the clause conferring jurisdiction on the District Court, Tokyo does not preclude an admiralty action in rem against defendant No.1 – Vessel. It was denied that defendant No.1 – Vessel was not liable to be arrested for the maritime claim. The claim of defendant No.2 that it was only a Time Charter of defendant No.1 was put in contest. Applicability of the Hague Visby Rules as well the Indian Carriage of Goods by Sea Act, 1925 was also put in contest. The application to dismiss the suit, release the security and pay damages as claimed by defendant No.2 was stated to be wholly misconceived.

Interim Application No.548 of 2020

12. IA/548/2020 is filed on behalf of defendant No.1 – Vessel seeking dismissal of the suit qua defendant No.1 – Vessel on the ground that the plaintiff is not entitled to entertain an action in

rem against defendant No.1 – Vessel, for the reasons assigned in the aforesaid application taken out by defendant No.2.

13. The plaintiff has contested the application reiterating that NYK Theseus the registered owner of defendant No.1 and defendant No.2 are one and the same entities and/or alter ego of each other and in the circumstance defendant No.1 – Vessel is liable to be proceeded against for enforcement of the liability of defendant No.2.

14. I have heard Mr. Dhond, the learned Senior Advocate for the applicant, and Mr. Kamat, the learned Counsel for the plaintiff, at some length. I have also perused the averments in the plaint, applications and affidavits-in-reply thereto. The learned Counsels have taken me through the relevant documents and the governing provisions.

15. Mr. Dhond canvassed a three-pronged submission. First, action in rem against defendant No.1 vessel was wholly unsustainable. The plaintiff moved to arrest defendant No.1 – Vessel on the basis of omnibus claims. Neither a case for piercing the corporate veil nor for invocation of alter ego principle was made out. Defendant No.2 being only a time charterer of defendant No.1 – Vessel, Defendant No.1 Vessel could not have been arrested for the alleged *in personam*

liability of defendant No.2 in the absence *in personam* liability of the registered owner of defendant No.1 – Vessel, which is a distinct entity.

16. Mr. Dhond urged with a degree of vehemence that the plaint singularly lacks the allegations of fraud or dishonest financial transactions. On the contrary, the allegations in the plaint are that defendant No.2 had resorted to the device of incorporating “one ship company” at diverse locations for tax benefits. Therefore, according to Mr. Dhond, no case for lifting the corporate veil was even remotely made out. The entire edifice of beneficial ownership of defendant No.1 – Vessel by defendant No.2, thus crumbles and, therefore, the security furnished to obviate the arrest of defendant No.1 – Vessel is required to be refunded along with damages and costs.

17. To bolster up the aforesaid submissions Mr. Dhond placed reliance on a Division Bench judgment of this Court in the matter of *Polygreen International DMCC vs. MT Pamboor 2 (IMO 9914852)*¹, a judgment of learned Single Judge of this Court in the case of *Kimiya Shipping INC vs. M.V. Western Light*², a

1 2022 SCC Online Bom 1704.

2 2014 SCC Online Bom 257.

judgment of this Court in the case of *M/s. Universal Marine vs. M/T Hartati*.³

18. Second, Mr. Dhond would urge that the suit instituted on 5th September, 2019 was clearly barred by law of limitation. Banking upon the provisions contained in the Indian Carriage of Goods by Sea Act, 1925 (“the Act, 1925”), Mr. Dhond would urge that under Article 3 Rule 6 of the Act, 1925, the carrier of the ship stands discharged from all liabilities in respect of loss or damage unless the suit was brought within one year after delivery of goods or the date when the goods should have been delivered. Even if the case of the plaintiff as pleaded in paragraph 49 of the plaint was taken at par and it was assumed that the cause of action lastly arose on 16th October, 2017, as claimed by the plaintiff, institution of the suit on 5th September, 2019 was clearly barred by law of limitation.

19. Third, Mr. Dhond submitted that even otherwise this Court has no jurisdiction to entertain, try and adjudicate the suit as under the Hague Rules legislations, which govern the contract between the parties, the District Court at Japan was to have exclusive jurisdiction to entertain any dispute arising out of carriage of the goods. In any event, according to Mr. Dhond,

3 2014(2) Bom CR 854.

the goods were shipped at Nhava Sheva Port, which is beyond the ordinary original civil jurisdiction of this Court. And, therefore, this Court has no territorial jurisdiction to entertain, try and decide the suit.

20. Mr. Kamat, the learned Counsel for the plaintiff, joined the issues sought to be raised on behalf of the applicant. Mr. Kamat would urge that the plaint contains adequate averments to indicate that the applicant – defendant No.2 is the owner of defendant No.1 – Vessel for all intent and purpose. In the plaint, the plaintiff has elaborately spelled out the *modus operandi* adopted by defendant No.2 to own and operate a fleet of hundreds of vessels. In this view of the matter, according to Mr. Kamat, at this stage, the Court would not be justified in delving deep into the contentions of the applicant – defendant No.2 as the questions as to whether the case for lifting corporate veil is made out or defendant No.2 is the alter ego of NYK Theseus Corporation, the registered owner of defendant No.1 – Vesel, are the matters for trial. At this stage, only the averments in the plaint are required to be considered. So construed, according to Mr. Kamat, no case for the release of the security or rejection and/or return of the plaint has been made out.

21. Mr. Kamat would urge that the reliance sought to be placed on the Hague Rules and the Carriage Of Goods By The Sea Act, 1925 is of no assistance to the applicant/defendant No.2. Those rules would apply provided there is specific stipulation in the Bill of Lading. In the absence thereof, neither the jurisdiction of the Court can be questioned nor the plea of the limitation can be urged. Mr. Kamat would further submit that the question of applicability of the provisions of Japanese laws, is a question of fact and, therefore, a matter for trial. At any rate, according to Mr. Kamat, the aspect of limitation is a mixed question of law and fact and cannot be legitimately adjudicated in an omnibus application ranging from refund of security to rejection of plaint to award of damages.

22. To being with, uncontroverted facts. The plaintiff claimed to have entrusted the cargo to defendant No.3, a 100% subsidiary of defendant No.2, a named carrier for carriage at the port of Nhava Sheva to London Gateway Port UK. The cargo was shipped on board the vessel M.V. CCNI ARAUCO 6327. The cargo was allegedly damaged on account of the fire on board M.V. CCNI ARAUCO 6327. GalxoSmithKline, the consignee, allegedly refused to accept the delivery of the cargo.

23. Evidently, no material is placed on record to show who is the registered owner of M.V. CCNI ARAUCO 6327. Neither M.V. CCNI ARAUCO 6327 is proceeded against in rem nor the registered owner of M.V. CCNI ARAUCO 6327 is proceeded against *in personam*.

24. The case of the plaintiff is that NYK Theseus Corporation SA, the registered owner of defendant No.1 is a one ship company incorporated under the laws of Panama. Defendant No.1 – Vessel is, however, operated, managed and controlled by defendant No.2 – applicant. Registered owner of defendant No.1 – Vessel NYK Theseus Corporation SA., is also a company which is owned financed, operated, funded, managed and controlled entirely by defendant No.2. For all practical purposes, according to the plaintiff, defendant No.2 is the owner and/or deemed owner of defendant No.1 – Vessel (paragraph 7 of the plaint).

25. In the Equasis Folder in respect of NYK Theseus, defendant No.1 – Vessel, NYK Theseus Corporation SA is shown as a registered owner of defendant No.1 – Vessel since 11th November, 2016. It also indicates that Osaki Marine Corporation was the erstwhile registered owner of defendant No.1 – Vessel since 25th November, 2008. One NYK Theseus

Ship Management PTE Limited is shown ISM manager of defendant No.1 – Vessel since 28th April, 2009.

26. In the backdrop of the aforesaid facts, the crucial question that wrenches to the fore is whether the plaintiff was justified in proceeding in rem against defendant No.1 – Vessel and seeking its arrest for enforcement of the maritime claim which the plaintiff claimed to have against defendant No.2?

27. Recourse to few provisions of the Admiralty Act, 2017 may be apposite. Section 2(1)(f) of the Admiralty Act, 2017 defines, “maritime claim”, to mean a claim referred to in Section 4. Section 4(1) of the Act, 2017, in turn, contains a list of the claims which are designated as maritime claims. In the context of the indisputable transaction at hand, the relevant part of Section 4(1)(f) can be extracted as under:

“4. **Maritime claim.**– (1) The High Court may exercise jurisdiction to hear and determine any question on a maritime claim, against any vessel, arising out of any –

.....

(f) loss or damage to or in connection with any goods.

.....”

28. Under Section 5 of the Act, 2017, the High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against the maritime claim upon

arriving at the satisfaction regarding the conditions precedent for arrest stipulated therein. Section 5 reads as under:

“5. Arrest of vessel in rem.— (1) The High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject of an admiralty proceeding, where the court has reason to believe that—

(a) the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is the owner of the vessel when the arrest is effected; or

(b) the demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the vessel when the arrest is effected; or

(c) the claim is based on a mortgage or a charge of the similar nature on the vessel; or

(d) the claim relates to the ownership or possession of the vessel; or

(e) the claim is against the owner, demise charterer, manager or operator of the vessel and is secured by a maritime lien as provided in section 9.

(2) The High Court may also order arrest of any other vessel for the purpose of providing security against a maritime claim, in lieu of the vessel against which a maritime claim has been made under this Act, subject to the provisions of sub-section (1):

Provided that no vessel shall be arrested under this sub-section in respect of a maritime claim under clause (a) of sub-section (1) of section 4.”

29. The case at hand, would primarily be covered by Clause (a) of Sub-section (1) of Section 5. If the said stipulation is satisfied, then the applicability of the provisions contained in Sub-section (2) of Section 5 justifying the arrest of, “any other vessel” for the purpose of providing security against a maritime claim would crop up for consideration. It is imperative to note that the provisions of Sub-section (2) empowering the High

Court to order the arrest of any other vessel in lieu of the vessel against which a maritime claim has been made, are subject to the provisions of Sub-section (1). Thus, the arrest of a “sister ship” must also relate to one of the clauses of Sub-section (1) and satisfy the conditions thereof.

30. As noted above, in the case at hand, defendant No.1 – Vessel is not the vessel on board the cargo was laden. Thus, primarily, the plaintiffs have a maritime claim for loss or damage to or in connection with the cargo against the vessel M.V. CCNI ARAUCO 6327. The plaintiffs, however, profess to arrest defendant No.1 – vessel on the premise that defendant No.2 carrier is the “owner” of defendant No.1 – Vessel and thus defendant No.1 satisfies the requirement of, “any other vessel” under Sub-section (2) of Section 5 of the Act, 2017.

31. It would be necessary to note that the existence of a maritime claim against a vessel, of which the vessel proceeded against is claimed to be a sister ship, “is imperative”. It does not appear that under the Act, 2017, the arrest of any vessel against which there is no maritime claim, is permissible. In the case of *MT Pamboor 2* (supra), a submission was sought to be canvassed premised on the difference in the phraseology used in Section 5(1) of the Admiralty Act, 2017 and Article 3 of Arrest

Convention that, under the Admiralty Act, 2017 arrest of even the vessel against which there is no maritime claim, is permissible. This submission was repelled by the Division Bench by enunciating that Section 5(1) requires that there be a maritime claim against the vessel sought to be arrested. Section 5(2) is a fall back position, if the vessel against which there is the maritime claim cannot be arrested, then any other vessel can be arrested, but this has to be in lieu of the vessel against which there is a maritime claim. The maritime claim itself must exist in both cases.

32. The aforesaid enunciation thus makes it abundantly clear that for the arrest of a, “sister ship” under Section 5(2) of the Act, 2017 for enforcement of a maritime claim against a vessel, the commonality of the ownership of both the vessels is required to be established. In other words, is it incumbent upon a person moving for the arrest of a vessel, being the other vessel, to establish the nexus between the vessel against which maritime claim exists and the other vessel as the “sister ship”.

33. How this element is professed to be satisfied by the plaintiff in this case? Recourse to the pleadings contained in paragraphs 37 to 39 of the plaint, in which the alleged *modus operandi* of defendant No.2 is sought to be spelled out, becomes

necessary, as that constitutes the core of the plaintiffs case to arrest defendant No.1- Vessel as the sister ship of M.V. CCNI ARAUCO 6327. They read as under:

“37. The Plaintiff submits that NYK Line is the trade name of Defendant No.2 Nippon Yusen Kabushiki Kaisha, a legal entity registered under the laws of Japan. NYK Line is a well-known carrier internationally and operates at ports worldwide including several ports in India. Defendant No.2 is the 6th largest container carrier in the world and as per the website of their India agents, they own and operate a fleet of 799 major ocean vessels (as at the end of 2017) including 97 container ships. The modus operandi or the manner in which Defendant No.2 acquires ships and owns, operates, manages, funds and controls the ships as a carrier for sea transportation of goods, is as follows :-

a. Defendant No.2 acquires a ship either as a new building or from the secondhand market.

b. Defendant No.2 then incorporates a company in a flag of convenience country such as Panama, Liberia etc. This is because ship manning, regulatory and operational requirements for ships under such flags of convenience are not as stringent as they would be in other countries such as India or in other parts of Europe, etc. These countries also offer substantial tax rebates and concessions in respect of earnings out of operation of ships. In recent years, Singapore has also offered various incentives for registering ships under the Singapore flag by non-Singapore companies with the only requirement being that the vessel be registered in the name of a Singapore Company. Thus this would also require incorporation of a ship owning company in that country. It is only for the purpose of convenience that companies are set up in such jurisdictions so that the ship is registered in the ownership of such companies as only then it can fly the flag of such country and avail of all the benefits. Such companies have no other assets except the ship in question.

c. These companies have a nominal share capital and are not in a position to raise funds to acquire ships. The funding is entirely done by the parent company who has set up the company in such jurisdictions. The company may have nominee local Directors and/or nominee shareholders as may be required by local law. However they act as per the dictates of the parent company. The ship is then transferred to such company which is managed, operated and controlled by the parent company from outside the country of the flag of the ship either directly or by appointing a ship manager. The profits earned from the operation of the ship are made available to the parent company by using various methods.

d. Defendant No.2 has been doing precisely this. One-ship companies are registered in such countries but are funded, managed, operated and controlled by Defendant No.2. These one-ship companies are nominees of Defendant No.2. The address of these one ship companies is also shown as C/o. NYK Line, Japan.

e. These ships are then operated by Defendant No.2 as carrier. The management of these ships is also done by Defendant No.2 and/or a related entity.

f. These ships are a part of NYK Fleet of ships and Defendant No.2 issues Bills of Lading as carrier in respect of goods transported on these ships. It is however possible that NYK Line may also allow other slot charterers to whom space on the ships is leased out for shipment of containers by slot charterers as carriers.

g. All profits of such companies from ship owning ultimately enure to the benefit of Defendant No.2. Whenever the ship owning entity require funds, these are provided by Defendant No.2. The company has no independent existence and is set up solely for the purpose of acting as registered owner of the ship. These one-ship companies are nominees of Defendant No.2.

h. All of these ships have the prefix "NYK". In this manner Defendant No.2 represents to the whole world that this is their ship and they are the owners and carriers. This gives confidence to shippers and exporters to give their cargo for sea transportation to Defendant No.2. Shippers therefore rely upon this representation to make shipments on such "NYK" vessels of Defendant No.2. Annexed hereto and marked as Exhibit "O" is a list of 23 ships owned operated managed and controlled by Defendant No.2 in the manner aforementioned. This list is only indicative and not exhaustive.

38. The Plaintiff submits that if this is the manner in which Defendant No.2 operates and that these one-ship companies are only set up to fly flags of convenience and for obtaining tax benefits in those countries from earnings/operations of these ships, then it is clear that the real owner of these ships is NYK Line and Nippon Yusen Kabushiki Kaisha. The Plaintiff submits that Defendant No.2 holds itself out as the owner of these ships and such ships can be proceeded against in rem for a maritime claim against NYK Line who is liable for the claim and is deemed to be the owner of such ships.

39. The Plaintiff submits that each of the one-ship companies are nominees of Defendant No.2 who is real or true owner of the ship including the Defendant vessel NYK Theseus."

34. The substance of the plaintiffs claim is that defendant No.2 who claims to be the sixth largest container carrier and own about 800 major vessels, including around 100 container ships acquires a ship, then incorporates a company in a flag of convenience country to avail of the benefits of flexible regulation and tax incentives and operates the Vessel exercising persuasive

control. Those one ship companies are financed, operated, managed and controlled by defendant No.2 and they are mere nominees of defendant No.2. All those ships are part of NYK Theseus fleet of ships and defendant No.2 issues Bill of Lading as carrier in respect of goods transported on board those ships. In effect, the one ship companies are the nominees of defendant No.2, who is the real or true owner of the vessels, including defendant No.1 – vessel.

35. Mr. Dhond would urge that none of the aforesaid elements attributed to defendant No.2, even if taken at face value, would justify an inference that defendant No.2 is the owner of defendant No.1 – Vessel. It was submitted that it is fairly well recognized that the corporation has distinct juristic entity from that of its directors and shareholders. A Court would be justified in piercing the corporate veil only where the case of fraud or dishonest siphoning of funds is made out. In the case at hand, no effort is made to even aver, much less establish, the element of fraud. Mere identity of the shareholders or directors or the fact that the companies operate from one and the same address, by itself, is not sufficient to lift the corporate veil. Nor a one ship company is a taboo. Thus, according to Mr. Dhond, the aforesaid averments in the plaint do not justify the professed

arrest of defendant No.1 – Vessel as the sister vessel of the M.V. CCNI ARAUCO 6327.

36. In the case of *Kimiya Shipping INC* (supra) the return of the security was sought on the ground that the arrested vessel was not the sister vessel of M. V. Eastern Line against whom the plaintiff had a maritime claim and no case for piercing the corporate veil was made out. After an analysis of the provisions of the Arrest Convention, the pleadings and the decisions which enunciated the law as regards lifting of corporate veil, the learned Single Judge has enunciated the law as under:

“22. It is trite law that a company is a separate juristic entity distinct from the shareholders; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation and unless fraud is asserted or *at least* alleged in the plaint, as required under Order VI Rule 4 and in such a way that it will be sustained at the time of trial, the question of lifting a corporate veil does not arise. To accept the plaintiff's submissions that there need not be any fraud or underlying element of dishonesty in formation of corporate entities would amount to violating and shaking these fundamental tenants of corporate law.

23. In my opinion, simply because the shareholders, the Directors (in this case were not common) the addresses of the two companies that own the tow ships are common or the constituted attorney who was appointed to buy the vessel is the same or that both the ships were purchased pursuant to the board meeting on the same day does not mean that the efforts of the subscribers were to conceal that fact and does not automatically mean that the intention to register the two ships in different names was to play a fraud. There is no bar in purchasing ships in different names if that is the way a person wants to do his business. There is of course an

exception that the intention was to mask the true owners and the companies are a sham.”

37. In the case of *M/T Hatati* (supra) where the owner of the arrested vessel had moved for reducing the security, the question of arrest of a ship which is not owned by the person liable for the maritime claim again arose for consideration. In the context of the submission that all the ships were owned by the companies which are subsidiaries of a common entity, a learned Single Judge of this Court enunciated that there is nothing wrong in the said method of incorporation unless it could be shown that the said *modus operandi* was adopted with an intent to defraud or the entire exercise was a sham.

38. The observations in paragraphs 29, 34 to 38 are material and hence extracted below.

“29. I am afraid, as regards his first submission that "owner" is to be read as "beneficial owner" and not "registered owner", I cannot agree with the submissions of the learned Counsel for the Plaintiffs. As to how did the Plaintiffs and what is the basis on which the Plaintiffs obtained an order of arrest has to be seen. Arrest Convention 1999 is a legal instrument to establish international uniformity in a field of arrest of ships taking into account developments in related fields. Article 3 (1) relates to arrest of a ship in respect of which a maritime claim is asserted. Article 3 (2) relates to arrest of any other ship or ships other than ship in respect of which a maritime claim is asserted. Which "any other ship or ships can be" is clearly mentioned in Article 3 (2) (a)". Those are 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 maritime claim arose a owner of the ship in respect of which a maritime claim arose. Though the Arrest Convention has not defined who the "owner" is, it certainly

means a "registered owner". The reason why it has to be meant a registered owner is because the only person who could held be liable for a claim against the ship, is the person who owns all the shares in the ship and who would be liable on the claim in an action *in personam*. The only person who can be liable for action *in personam* is the registered owner of the vessel and no one else. If the 'owner' should be meant to be beneficial owner, the convention would have said 'beneficial owner'. This is because beneficial owner need not 21 NMS - 1080 - 2013 mean he is the registered owner. On the contrary registered owner or the owner in whose name the ship is registered would also be the beneficial owner unless otherwise proved. S. 25 (b) and (c) of the Merchant Shipping Act, 1958 makes it very clear."

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34. Indian law views each company incorporated under the Companies Act as a separate and legal entity from its shareholders and other companies and the fact that the two companies have common shareholders or common Board of Directors will not convert the two companies into a single entity [INDO WIND ENERGY LTS. Vs WESCARE (INDIA) LTD. 2010 (5) SCC 306]. The apex court in *Bacha F. Guzder vs Commissioner of Income Tax AIR 1955 SC 74* held that shareholders do not buy any interest in the property of the company and an incorporated company has an identity different from that of its 24 NMS - 1080 - 2013 shareholders. It is also trite that Indian law does not permit one 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 in the absence of fraud.

39. This is the legal position in many countries. It is for that reason when it comes to arrest of ships in India, Article 3 (3) of the 1999 convention must be read to provide that arrest of a ship which is not owned by the person liable for the claim shall be permissible, which means arrest of a ship in common beneficial ownership is permissible, if Indian Law would permit.

36. Indian law says shareholders are not the owners of the assets of the company. Therefore, to arrest a ship which is not owned by the person liable for the claim, which means arrest of a ship under common beneficial ownership, is not permissible unless fraud is established.

37. Here is a case where Plaintiffs have obtained an order of arrest of the 1st Defendant-Vessel. The order of arrest obtained is a very drastic step and moreover it is obtained ex-parte. An incorporated company has an independent identity and is different and distinct from that of its shareholders. The submission of the Plaintiffs that the 25 NMS - 1080 - 2013 concept of beneficial owner by itself requires the lifting

of corporate veil is not sustainable. None of the case relied upon by the Plaintiffs permitted lifting of corporate veil to make the shareholders of a corporate entity the owner of a property belonging to the corporate entity. None of the judgment relied upon by the Plaintiffs support the fact that the order of arrest can be obtained of a vessel which is owned by a different entity not by the entity that owned the vessel against which the maritime claim arose just because both the entities are owned by a common holding entity.

38. In some cases the Court could look behind the registered owner to determine the beneficial ownership. It could lift the veil not once but more than once but the necessary ingredient for doing so is that the independent companies are nothing but sham to defraud the creditors. For two or more ships to be called sister ships they have to be registered under the same ownership. For two ships owned by different entities to be called sister ships, the corporate veil has to be pierced. To pierce corporate veil fraud has to be established. Fraud has to be *prima face* established at the time of obtaining the order of arrest. A mere bald averment in the plaint is not enough. There has to be *prima face* evidence which would show that the intention of the owners to register the ships in different names was to play a fraud on the creditors or a sham to mask the true owners and it should be such that 26 NMS - 1080 - 2013 in all likelihood this allegation will be sustained during the final hearing of the Suit. Otherwise it would set a wrong trend. As illustrated in *M.V. Dong DO* (Supra) in India various government companies are in existence who are independent of each other having a distinct identity. In foreign jurisdictions a Shipping Corporation of India ship might get arrested for a claim against ONGC by simply showing common ownership and baldly alleging fraud and the judgments of our Courts will be used for persuasive effect.”

40. All these judgments were again considered by the Division Bench in the case of *MT Pamboor 2* (supra) and the legal position was expounded in the following words:

“53. Can this alter ego / pierced corporate veil jurisprudence be invoked willy-nilly every time it is found that one company is the holding company or parent of another? There is enough law to indicate that there is nothing so very wrong in one family setting up with common shareholding multiple companies, each holding different assets. A different consideration may arise when a company is a debtor, and it deliberately incorporates another

company to move assets away to put them beyond the reach of the creditors. There, courts have frowned upon these attempts and have always allowed a creditor to follow the assets into the hands of the so-called separate company. But what is required is that there must be an element of deceit, an attempt at fraud, something colourable. In *Cox & Kings Ltd v SAP India Pvt Ltd & Anr*, (2022 SCC Online SC 570; paragraph 90), the Supreme Court said that corporate law doctrines such as piercing the veil and alter ego are a means by which to identify fraudulent activity. Though this was in the context of binding third parties to arbitration clauses, the principle remains. Similarly, in *Vodafone International Holdings BV v Union of India*, (2012) 6 SCC 613; paragraph 74 the Supreme Court held (in the context of taxation) that to properly invoke the doctrines of beneficial ownership, lifting the corporate veil or concept of alter ego, it must be shown that the transaction was a colourable device. When this is successfully done, the separate corporate juristic entity principle will be ignored, being seen as a device or a conduit "in the pejorative sense".

55. Therefore, to deploy the 'alter ego' doctrine justifying a piercing of the corporate veil, the defendant or debtor must, to use a Dickensian phrase, be shown to be an "Artful Dodger". Otherwise, the very essence of corporate/company law and its fundamental precept that every company is a distinct legal entity would get effaced. The mere commonality or common directorships or interlocking shareholding are by themselves not even *prima facie* evidence or one being the alter ego of the other."

41. The Division Bench has thus held in clear terms that there is nothing so very wrong in one family setting up with common share holding multiple companies, each holding different assets. The mere commonality or common ownership, directorship or interlocking share-holding are by themselves not even *prima facie* evidence of one being the alter ego of the other. There must be an element of deceit, an attempt at fraud, something colourable.

42. In the light of the aforesaid exposition of law, reverting to the facts of the case, it becomes abundantly clear that the plaintiff has made no effort to attribute an element of fraud. At best, the case of the plaintiff is that for the sake of convenience and to represent the word that NYK Line is the carrier with a huge fleet and make people repose trust in the NYK Ship Line, defendant No.2 represents the word that it is the owner of all the vessels, though the nominees of defendant No.2 are its registered owners. This assertion, even if taken at par, in my view, is not sufficient to justify piercing of the corporate veil.

43. Mr. Kamat would further urge that in the light of the averments in the plaint and the material on record the question as to whether defendant No.2 was the real owner of defendant No.1 - Vessel must be determined at the trial, and not at this stage. To bolster up this submission reliance was placed on a decision of this Court in the case of *MSC Mediterranean Shipping Company S.A. in the matter between The State of Maharashtra vs. MV MSC Clementina*⁴.

44. I have perused the aforesaid judgment. It becomes evident that the decision therein was rendered in the peculiar facts of the case wherein the allegation was that on account of oil spill

4 2015 SCC Online Bom 4224.

and dangerous cargo being off loaded due to collision of the vessels, there was environmental damage. In that context, the Court held that the question whether defendant No.2 was the beneficial owner of defendant Nos.4 and 5 and consequently defendant No.1 therein and MV MSC Chitra were sister ships could only be determined at the trial. The decision having been rendered in a completely different fact situation, would not assist the cause of the submission on behalf of the plaintiff.

45. In the case at hand, as noted above, no effort was made to show as to who was the registered owner of M.V. CCNI ARAUCO 6327 against whom the maritime claim primarily arose. Secondly, there is a bare denial that the defendant No.2 is the time charterer of defendant No.1 Vessel. It is not the case of the plaintiff that defendant No.2 is the demise charter of defendant No.1 – Vessel, even in the alternative. Thirdly, the plaint is conspicuously silent about the alleged claim of fraud or dishonest intent on the part of defendant No.2 so as to justify the lifting of the corporate veil. Fourthly, the *modus operandi* pleaded by the plaintiff, without anything more, does not render the necessary assurance to draw an inference that the said *modus operandi* was actuated by a design to defraud, or it was a colourable exercise.

46. In the circumstances, I find it difficult to accede to the submission on behalf of the plaintiff that the arrest of defendant No.1 – Vessel could be legitimately had by invoking the provisions contained in Section 5(2) of the Admiralty Act, 2017. The security furnished by defendant No.2 to obviate the arrest of defendant No.1, on without prejudice basis, is thus required to be refunded along with the interest accrued thereon.

47. A necessary corollary of the aforesaid finding is that the plaintiff has no right to proceed in rem against defendant No.1 – Vessel as jural relationship between defendant No.1 and defendant No.2, gets snapped. If the plaint does not indicate that for *in personam* action against defendant No.2, defendant No.1 – Vessel could be proceeded with in rem, the suit qua defendant No.1 – Vessel becomes completely untenable as it is not at all the case of the plaintiff that it has an independent maritime claim against defendant No.1 – Vessel. Arrest of defendant No.1 – Vessel was sought to be effected only on the premise that defendant No.2 is the real, though not the registered owner, of defendant No.1 – Vessel. As this claim of the plaintiff is not found to be, *prima facie*, sustainable, the interim application preferred on behalf of defendant No.1 –

Vessel to have the suit dismissed qua defendant No.1 – Vessel deserves to be allowed.

48. Dismissal of the suit qua defendant No.1 – Vessel, however, does not entail the consequence of dismissal of the suit as a whole. Jural relationship of the consignor and the carrier between the plaintiff and defendant Nos.2 and 3, is not disputed. Plaintiff has also sued as a bailor for damages and prosecutes action against defendant Nos.2 and 3, *in personam*.

49. To seek the dismissal of the suit, as a whole, against all the defendants, Mr. Dhond made an endeavour to demonstrate that the plea of the defendants was not in the nature of an application for rejection of the plaint. It was urged that for non-compliance of the statutory mandate the suit deserves to be dismissed. As indicated above, the bar of limitation and jurisdiction were sought to be pressed into service.

50. On the aspect of limitation, Mr. Dhond would urge that in view of the provisions contained in Clause (6) of Article III of the Act, 1925, the carrier stands discharged from all liability unless the suit was brought within one year after the delivery of the goods or the date when the goods should have been delivered. It was urged that this provision has been interpreted to mean that the liability of the carrier stands totally extinguished and not

only the remedy as regards the liability is destroyed. Reliance was placed on the decisions of the Supreme Court in the cases of *The East and West Steamship Company, Georgetown, Madras, vs. S. K. Ramalingam Chettiar*⁵ and *Bhagwandas B. Ramchandani vs. British Airways*⁶

51. Per contra, Mr. Kamat would urge that the very applicability of the provisions contained in the Act, 1925 is a matter in contest. Inviting the attention of the Court to the provisions contained in Section 4 of the Act, 1925 which provide that every Bill of Lading, or similar document of title, issued in India which contains or is evidence of any contract to which the Rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by the said Act, it was urged that there is no stipulation in the Bill of Lading that the Rules will have the application to the contract in question. In any event, according to Mr. Kamat, the question of limitation cannot be decided in abstract and requires evidence as it is a mixed question of fact and law. To buttress this submission as well, reliance was placed on the decision in the case of *MV MSC Clementina* (supra).

5 AIR 1960 SC 1058.

6 2022 SCC Online SC 939.

52. Section 2 of the Act, 1925 provides that subject to the provisions of the said Act, the Rule set out in the Schedule appended thereto shall have effect in relation to and in connection with the carriage of goods by sea in ship carrying goods from any Port in India to any other Port, whether in or outside India. Twin conditions need to be satisfied. One, there should be carriage of goods by sea in ships. Two, such carriage of goods shall be from any port in India to any other port within or beyond India. Both the conditions, appear to be satisfied as the goods were carried by the ship M.V. CCNI ARAUCO 6327 from Nhava Sheva Port in India to the Gateway Port, UK.

53. The relevant part of Clause 6 of Article III under the caption of Responsibilities and Liabilities reads as under:

“In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. [This period may, however, be extended if the parties so agree the cause of action has arisen:

Provided that a suit may be brought after the expiry of the period of one year referred to in this sub-paragraph within a further period of not more than three months as allowed by the Court.]

54. Third paragraph of Clause 6, extracted above, provides that the carrier shall be discharged from all liabilities in respect of loss or damage to the goods unless the suit is brought within one year after delivery of goods or the date when the goods

should have been delivered. The proviso empowers the Court to extend the period of limitation for not more than three months.

55. In *East and West Tin Sheet (supra)* the Supreme Court held that the Court found it difficult to draw any reasonable distinction between the words, “absolve from liability” and “discharge from liability” and thought that the words, “discharge from liability” were intended to mean and do mean that the liability has totally disappeared and not only that the remedy as regards the liability has disappeared.

56. In the case at hand, the plaintiff claims the cause of action first arose on 3rd November, 2016 when the goods were delivered by the defendant to the GlaxoSmithKline in UK, then on 16th February, 2017 when those goods were rejected by the consignee and, also on 16th October, 2017 when the plaintiff received the goods at its factory at Hyderabad. The institution of the suit on 5th September, 2019, the defendants allege is, therefore, clearly barred by limitation.

57. The plaint proceeds on the premise that the claim is within the period of limitation as the suit came to be instituted within three years of the accrual of the cause of action. Alternatively, the plaintiff asserts its claim is also based in negligence for which the period of limitation is three years. The

question that would arise for consideration is whether the provisions contained in the Act, 1925 or the provisions of Limitation Act, 1963 would govern the suit.

58. In the case of *Bhagwandas B. Ramchandani vs. British Airways*⁷ in the context of the provisions of Rule 30 of Second Schedule Carriage by Air Act, 1972, the Supreme Court held that the expressions, “right” and “extinguished” employed by the Convention as adopted and incorporated by the Parliament in Rule 30 of the Second Schedule clearly establishes the intention of the law-giver that the *right to damages* would not subsist after the expiry of the period mentioned therein.

59. In the case of *Deep Sea Maritime Ltd. vs. Monjasa A/s (The “ALHANI”)*⁸ Queen’s Bench Division (Commercial Court) held that Article III Rule 6 is not limited to claim for breach of the Hague Rule obligation. It is generally recognized that Article III Rule 6 is not limited in its applications to claims formulated as an allegation of a breach of the Hague Rules articles, it being well established that a cargo claimant cannot circumvent the limitations and exclusions in the rules by suing the shipowner for the torts of negligence or conversion, or indeed for breach of bailment.

7 2022 SCC Online SC 939.

8 [2018] Vol 2 LLOYD’s Law Reports 563.

60. I have perused the Bill of Lading. It does not contain the statement envisaged by Section 4. Can that be of decisive significance in determining the period of limitation which would govern the instant claim for damages for damage to the cargo? When the cause of action can be said to have lastly arisen to the plaintiff? Whether the plaintiff would be entitled to sue defendant Nos.2 and 3 in bailment or negligence? And, if yes, which law would govern the action? All these questions, in my considered view, cannot be adjudicated at this stage. Some of these questions are rooted in facts. The question of limitation would then partake character of a mixed question of law and facts. It would, therefore, be appropriate to adjudicate this question at the trial.

61. The bar of jurisdiction in view of the provisions contained in terms and conditions of the contract between the parties subject to which the goods were carried also hinges upon the question as to whether the Bill of Lading was subject to the provisions of International Carriage of Goods by Sea Act, 1957 of Japan or the Hague Rules Legislation. Clause (2) (Clause Paramount) provides, *inter alia*, that if Hague Rules Legislation compulsorily applies to the Bill of Lading then the contract would be subject to the provisions of such Hague Rules

Legislation, lest it would be governed by the provisions of International Carriage of Goods by Sea Act, 1957 of Japan. By its very nature, this question also merits determination at the trial. It would therefore be appropriate to decide the question of jurisdiction after a proper issue is raised on pleadings.

62. The upshot of the aforesaid consideration is that Interim Application No.540 of 2020 deserves to be partly allowed to the extent of the prayer for the refund of the security deposit along with interest accrued thereon. Interim Application No.548 of 2020 also deserves to be allowed as the Court finds that no case to proceed against defendant No.1 Vessel in rem has been *prima facie* made out. The suit thus deserves to be dismissed qua defendant No.1 Vessel NYK Theseus. However, the suit would proceed qua defendant Nos.2 and 3.

63. Hence, the following order:

: O R D E R :

- (i) Interim Application No.540 of 2020 stands partly allowed.
- (ii) The amount of security i.e. Rs.650,77,230.68/- deposited by the defendant No.2 be returned to defendant No.2 along with interest accrued thereon

on proper identification and in accordance with the Rules.

- (iii) Interim Application No.548 of 2020 stands allowed.
- (iv) The suit stands dismissed qua defendant No.1 NYK Theseus.
- (v) The suit to proceed against defendant Nos.2 and 3.
- (vi) Costs in cause.

[N. J. JAMADAR, J.]

At this stage, Mr. Kamat, the learned Counsel for the plaintiff, seeks stay to the execution and operation of this order.

Since the deposit was made on 18th December, 2019, the direction to refund the security deposit, alongwith interest thereon, stands stayed for a period of four weeks from today.

[N. J. JAMADAR, J.]