

Bombay High Court

Mt Pamboor 2 (Imo-9914852) And Anr vs Polygreen International Dmcc on 19 August, 2022

Bench: G.S. Patel, Gauri Godse

Polygreen International DMCC v MT Pamboor
904-COMIA-18306-2

Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY & VICE ADMIRALTY JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
INTERIM APPLICATION (L) NO. 11655 OF 2022
IN

COMMERCIAL ADMIRALTY SUIT (L) NO. 10641 OF 2022

1. MT Pamboor 2 (IMO 9914852),
(and her owners and all other persons
concerned and/or interested in her), an
oil product tanker ship registered as a
River-Sea Vessel (Type II) at Port of
Mumbai under the Merchant Shipping
Act, 1958 together with her hull, tackle,
engines, gears, plant, machinery,
articles, things, apparel, equipment,
paraphernalia and all other

SHEPHALI
SANJAY
MORMARE
Digitally signed by

appurtenances, presently at Port and

Harbour of Mumbai, within the

SHEPHALI
SANJAY
MORMARE

territorial waters of State of

Date: 2022.08.23
10:40:21 +0530

Maharashtra.

2. Shiny Shipping & Logistics
Private Limited,
a company incorporated under the
provisions of the Companies Act 2956
having its registered office at A-72,
Shiny House, Kamgar Nagar Co-
operative Housing Society, Kamgar
Nagar, Kurla, East, Mumbai 400 024

... App

In the Matter Of:

Polygreen International
DMCC,

a company incorporated under the
appropriate laws of the United Arab
Emirates, having its registered office at Unit
No. 206, HSD Tower, Plot No. JLT-PH1,
F2A, Jumeirah Lakes Towers, Dubai,
United Arab Emirates.

... Plaintiff

~ versus ~

1. MT Pamboor 2 (IMO 9914852),
(and her owners and all other persons
concerned and/or interested in her), an
oil product tanker ship registered as a
River-Sea Vessel (Type II) at Port of
Mumbai under the Merchant Shipping
Act, 1958 together with her hull, tackle,
engines, gears, plant, machinery,
articles, things, apparel, equipment,
paraphernalia and all other
appurtenances, presently at Port and
Harbour of Mumbai, within the
territorial waters of State of
Maharashtra.

2. Shiny Shipping & Logistics
Private Limited,
a company incorporated under the
provisions of the Companies Act 2956
having its registered office at A-72,
Shiny House, Kamgar Nagar Co-
operative Housing Society, Kamgar
Nagar, Kurla, East, Mumbai 400 024

... Defendants

WITH
COMMERCIAL APPEAL (L) NO. 18306 OF 2022
IN
INTERIM APPLICATION (L) NO. 11655 OF 2022
IN
COMMERCIAL ADMIRALTY SUIT (L) NO. 10641 OF 2022

1. MT Pamboor 2 (IMO 9914852),
(and her owners and all other persons
concerned and/or interested in her), an
oil product tanker ship registered as a
River-Sea Vessel (Type II) at Port of
Mumbai under the Merchant Shipping
Act, 1958 together with her hull, tackle,
engines, gears, plant, machinery,
articles, things, apparel, equipment,
paraphernalia, and all other
appurtenances, presently at Port and
Harbour of Mumbai, within the
territorial waters of State of
Maharashtra.
2. Shiny Shipping & Logistics
Private Limited,
a company incorporated under the
provisions of the Companies Act 2956
having its registered office at A-72,
Shiny House, Kamgar Nagar Co-
operative Housing Society, Kamgar
Nagar, Kurla, East, Mumbai 400 024

...Applicants/
Appellants

~ versus ~

Page 3 of 33
19th August 2022
Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

Polygreen International
DMCC,
a company incorporated under the
appropriate laws of the United Arab
Emirates, having its registered office at Unit
No. 206, HSD Tower, Plot No. JLT-PH1,

F2A, Jumeirah Lakes Towers, Dubai,
United Arab Emirates.

...Respondent

A PPEARANCES for the appellants Mr Venkatesh Dhond, Senior (orig defendants) Advocate, with Balaji Harish Iyer & Ram Jay Narayan, i/b Ashwin Shanker.

for the respondent
to the appeal (orig
plaintiff)

Mr Shyam Kapadia, with Aditya
Krishnamurthy & A Mukherjee,
i/b Bose & Mitra & Co.

CORAM : G.S.Patel &

Gauri Godse, JJ

DATED : 19th August 2022

ORAL JUDGMENT (Per GS Patel J):-

1. This order disposes of the original Defendants' (present Appellants') Interim Application No.(L) No.11655 of 2022 in the main suit, along with the Commercial Appeal (L) No 18306 of 2022.

2. The reason the Interim Application itself comes before us requires explanation.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

3. The Plaintiff, Polygreen International DMCC ("Polygreen") is a foreign company incorporated in the UAE. It provides salvage services and assistance to ships in distress. It also undertakes emergency oil spill response services.

4. The 1st Defendant, MT Pamboor 2, is a vessel owned by the 2nd Defendant company, Shiny Shipping and Logistics Private Limited ("Shiny Shipping"). MT Pamboor 2 operates possibly as a lighter, or, at any rate, as a barge ferrying cargo to vessels either from other vessels or from land-based installations. MT Pamboor 2 (IMO 9914852) is a registered river sea vessel (type II). The vessel operates only in Indian territorial waters so far; specifically, its present contractual operations are in Mumbai Harbour and within the Mumbai Port Trust and the Jawaharlal Nehru Port Trust limits.

5. Polygreen brought suit on 1st April 2022 and, on the basis of that a case set out in the plaint, to which we will return shortly, obtained an order of arrest against MT Pamboor 2.

6. On 8th April 2022, MT Pamboor 2 and Shiny Shipping filed the captioned Interim Application (L) No. 11655 of 2022 to vacate the order of arrest. It seems that on 20th May 2022, MT Pamboor 2 and Shiny Shipping moved the learned Vacation Judge for ad- interim relief. The specific ad-interim relief sought was that upon MT Pamboor 2 and Shiny Shipping's undertaking not to move the vessel outside the Indian territorial waters, MT Pamboor 2 should be allowed to continue to perform its

contracts and go about its routine business without providing security. This application was 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc opposed. On 6th June 2022, the learned single Judge passed an order, one that is assailed in the present Appeal. By that order, the learned single Judge ordered the Defendants, MT Pamboor 2 and Shiny Shipping, to provide security in the full amount of the claim US\$ 1,416,293 either by a deposit or by a bank guarantee of a nationalised bank, the bank guarantee to carry interest at 4.5 % per annum; and then said that upon the Defendants making this deposit, MT Pamboor 2 would be permitted to ply within 12 Nautical Miles within territorial waters "while under arrest".

7. The Defendants came up in Appeal. The principal ground canvassed, and we think rightly, by Mr Dhond for the Appellants was that the impugned order could not have required both the furnishing of a full security and yet continued the arrest. We believe Mr Dhond is correct. It is much too well settled to admit of any repetition or need for an authority that when a vessel is arrested, that order of arrest can always be vacated upon furnishing full security. Indeed, that is the right of the arrested Defendant vessel, and of its owner. Indeed, the order of arrest itself says as much. Thus, after requiring furnishing a full security, MT Pamboor 2 could not possibly have been ordered to remain "under arrest". That order was plainly contrary to settled law and would have had to be set aside.

8. Mr Dhond pointed out that there were other errors in the impugned order including, for instance, a finding that once arrested, even third party cargo on board the vessel would stand arrested or attached.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc

9. As it happens, we need not examine the Appeal itself or the impugned order in any detail. The reason is that both sides specifically accepted our suggestion that, with their consent, we would withdraw the Defendants' Interim Application for vacating the order of arrest to ourselves and decide it here rather than requesting an already overburdened learned Single Judge to give the matter priority. That the matter needed priority was, to our minds not in doubt, because, as Mr Dhond pointed out, Shiny Shipping was incurring significant losses on account of the arrest. It had to pay EMI and bank dues. The arrest resulted in a complete stoppage of its earnings. Therefore, the urgency. We specifically pointed out to both sides that should they accept our suggestion, each side would undoubtedly lose the right of an intra-court Appeal. Both sides sought time to take instructions. They did so, and finally consented to our hearing the Interim Application (L) No. 11655 of 2022. We have noted some of this in our order of 20th July 2022. Five days later, on 25th July 2022, we noted specifically that both sides, having obtained instructions, consented to the main Interim Application (L) No. 11655 of 2022 being withdrawn to this Court for final disposal.

10. It is in these circumstances that we have heard both sides on the Interim Application. Perhaps as a matter of formality and for good order, we allow the Appeal itself. The impugned ad-interim order of 6th June 2022 is, by consent, quashed and set aside. The result is that the order of arrest has continued until today when we are pronouncing judgment.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

11. We begin with some undisputed facts. We will then turn to the averments made in the Plaintiff and in the Interim Application. There is no doubt that Polygreen has no direct commercial/contractual relationship with Shiny Shipping and has rendered no service to MT Pamboor 2. This is central to the discussion that follows. It is Mr Kapadia's case for Polygreen that a direct connection or relationship is not required in view of the averments made in the Plaintiff and on the basis of which the order of arrest was granted.

12. What is also undisputed is that there exists another company Tresta Trading, incorporated in Mauritius. This company owns another vessel MT Tresta Star. Tresta Trading is a wholly-owned 100% subsidiary of Shiny Shipping. That there is a commonality of shareholders is also undisputed. The same family runs both entities. Shiny Shipping was established in 2000. Tresta Trading was incorporated in Mauritius in 2019. Tresta Trading through and with MT Tresta Star has contracts with Indian Oil (Mauritius) Limited or IOML, a wholly owned subsidiary of Indian Oil Company Ltd, or IOCL. This is an Indian company, as we all know, but IOML is the third largest entity in its segment in Mauritius. Tresta Trading does the work of bunkering in Mauritius. Its vessel, MT Tresta Star, flies a foreign flag, i.e., the flag of Mauritius. There is no dispute that as a matter of record, Tresta Trading alone owns MT Tresta Star, and Shiny Shipping alone owns MT Pamboor 2.

13. This is what happened. On 3rd February 2022, MT Tresta Star was caught in a tropical cyclone Batsirai. The vessel ran 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc aground at Réunion island in the Indian Ocean, an overseas department (one of four such) and region of France. Réunion lies is about 950 km east of the island Madagascar and 175 km southwest of the island Mauritius. MT Tresta Star was stranded near Saint Philippe on the southeast side of Réunion at the foot of the Piton De La Fournaise shield volcano. This volcano has erupted more than 100 times since 1640, most recently on 2nd April 2020. The seabed on which MT Tresta Star was stranded comprises volcanic rock from an eruption in April 2007. This resulted in a cliff face of about 15 meters.

14. On 3rd February 2022, the very date of the accident, Ms Shiny Noronha of Tresta Trading, with an email address shiny@trestatr.com sent an email message to Polygreen asking Polygreen to send a rescue tug to tow MT Tresta Star back to Port Louis in Mauritius. Copied on this mail was Miss Noronha's brother Shaun, shaun@shinyshipping.com. Ms Noronha's mail said that "our" P&I Insurance would cover all costs and liabilities that may be incurred during this operation.

15. Even according to Mr Kapadia, this is the heart of Polygreen's claim against the present Defendants, MT Pamboor 2 and Shiny Shipping. Matters were obviously proceeding with great urgency, and that was perfectly understandable. On that very day, 3rd February 2022, Polygreen forwarded what is called a Lloyd's Standard Form Salvage Agreement (also dated 3rd February 2022 and referred as the LOF Salvage Agreement) by email to Ms Noronha and others copied on her originating mail. A copy of this of 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc the LOF Salvage form is included in the compilation at page

265. It has several boxes with entries. This is two column tabular format. Box 8 is captioned "persons signing for and on behalf of the contractors" viz., Polygreen. Box 9 says:

"captain or other persons signing for and on behalf of the property Tresta Trading Limited (followed by the address) and/or Shiny Shipping and Logistics Private."

16. The Lloyd's form came back that very day, 3rd February 2022, to Polygreen with a rubber stamp of and only of Tresta Trading. The signature was that of one Samarjit H Velayudhan, an Indian National and employee of (and only of) Tresta Trading. The signatory admittedly did not strike of the endorsement "and/or Shiny Shipping and Logistic Private". This was emailed to all those copied on Ms Noronha's originating email including Shaun Noronha at his shinyshipping.com email id.

17. Between 3rd and 18th February 2022, according to Polygreen, it removed various environmentally damaging materials from the stranded MT Tresta Star. The situation was so bad that Polygreen had to access the site by helicopter. According to the Plaintiff massive ecological damage was averted.

18. The LOF Salvage Agreement has what is called a SCOPIC clause (copy at Exhibit "H" at page 103). On 4th February 2022, Polygreen formally notified Shiny Shipping that pursuant to clause (7) of the LOF Salvage Agreement, Polygreen would invoke the SCOPIC clause in the LOF Salvage Agreement. The SCOPIC clause is clearly supplementary to the LOF Salvage Agreement, 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc which is on a no cure no pay basis incorporating the provisions of Article 14 of the International Convention on Salvage 1989. Clause 2 of the SCOPIC clause says that the contractor has the option by written notice to the vessel's owners to invoke the SCOPIC clause at any time of his choosing regardless of the circumstances and irrespective of whether or not there is a threat of damage to the environment. Under clause 3(1) of the SCOPIC clause, the owners of the stranded vessel MT Tresta Star were to provide Polygreen, as the salvor, with initial security within two working days of receiving written intimation of the invocation of the SCOPIC clause.

19. On 5th February 2022 the insurers of Tresta Star emailed Polygreen, copying Ms Noronha and Mr Llyod Noronha at shinyshipping. According to Mr Kapadia, this email, because it was copied to Mr Lloyd Noronha of Shiny Shipping, was a representation that Shiny Shipping "was the owner of the Tresta Star", i.e., not Tresta Trading. Mr & Mrs Lloyd Noronha are the only directors and shareholders of Shiny Shipping. They are the parents of the Shiny Noronha and Shaun Noronha.

20. We will pass over some of the other assertions made in the plaint regarding opinions obtained from Polygreen's solicitors in England and actions by the authorities at Réunion, and come to 8th February 2022, when Polygreen received an email from P&I Club saying that the P&I Club did not insure the owners for SCOPIC in respect of this particular incident.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc

21. On 10th February 2022, Polygreen wrote to Shiny Shipping and to Tresta Trading demanding security. It said that it had continually provided on-site services.

22. On 16th February 2022, Polygreen informed Shiny Shipping and Tresta Trading that the LOI Salvage Agreement had now come to an end.

23. On 1st April 2022, Polygreen filed the present suit and obtained an order of arrest.

24. MT Tresta Star remained stranded and was never fully salvaged. MT Tresta Star was completely stranded on the rocks at the island and it was not possible to re-float her (or at any rate was prohibitively expensive to do). A large rock was jammed against her port hull at the aft end of the fo'c'sle deck. There were other rocks in the vicinity, and these prevented the forward bow from being moved. The starboard side was wedged against the shoreline. It was impossible to rotate the vessel or to re-float it, given the rupture in the hull.

25. We turn to the plaint. In paragraph 4, Polygreen says that it has an in personam claim against Shiny Shipping under the LOF Salvage Agreement. As we shall presently see, this is a critical averment to Mr Kapadia's formulation of his case justifying an arrest of MT Pamboor 2.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

26. Then in paragraph 6, again critical to Polygreen, there is an assertion that Shiny Shipping "owns and/or beneficially owns" both MT Pamboor 2 and MT Tresta Star, thereby making both vessels 'sister ships'.

27. Polygreen then claims, and this is the third component that is critical, that its in personam claim against Shiny Shipping for SCOPIC remuneration under the LOF Salvage Agreement is indeed a maritime claim recognized under Section 4(1)(i) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017 ("the Admiralty Act").

28. The assertion is that Shiny Shipping, as the registered owner of MT Pamboor 2, is in personam liable for the maritime claim made by Polygreen.

29. At no point is there an assertion that Polygreen ever provided services to MT Pamboor 2. There is also no assertion, other than the LOF Salvage Agreements and emails referred to above, that Polygreen and Shiny Shipping had any independent contractual relationship.

30. Then there are averments regarding the emails and documents to which we have referred to above. These are set out from paragraphs 13 onward to mount the claim that Tresta Trading is a mere "brass plate" subsidiary of Shiny Shipping. Therefore, the assertion is, that which binds Tresta Trading will necessarily bind Shiny Shipping. The case is sought to be buttressed by saying that 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc Polygreen was misled, deceived, deluded and hoodwinked into

believing that the two corporates were one and the same and therefore the assets of the subsidiary were effectively the assets of the holding company. Averments are made about the family holdings in the two companies, and it is alleged that Shiny Shipping exercises overarching dominion and control over its so-called 'brass plate' subsidiary Tresta Trading. The subsidiary, Tresta Trading, is said to be "bound hand and foot" to the dictates of Shiny Shipping. In paragraph 20 there is a specific assertion that Tresta Trading is "a shell company" with no significant asset other than Tresta Star, which is now a wreck. Paragraph 21 tells us that Polygreen is pursuing its claim against Tresta Trading in arbitration in London and the claim in the present suit is only against the Shiny Shipping. Once again there is a repetition in some later paragraphs of so called false representations said to have been made by the Noronhas to Polygreen.

31. What we have therefore is a case that is clearly positioned as there being a complete unity of identity between the 2nd Defendant, Shiny Shipping, and its Mauritian subsidiary, Tresta Trading. Commonality of directorships and shareholders are cited. We are asked therefore to effectively 'pierce the corporate veil' and to hold that Shiny Shipping is the 'alter ego' of Tresta Trading or vice versa. This, we are told, must be done because Tresta Trading is apparently a 'brass plate' subsidiary. Reference is made to a usher's report which says that Tresta Trading was not found as its registered office in Mauritius. Importantly, there is no case other than on account of this alter ego/brass plate construct that Shiny Shipping is 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc a debtor to Polygreen. Polygreen has no maritime lien or maritime claim over MT Pamboor 2 independently.

32. The essence of the case is that Polygreen has an in personam claim against Tresta Trading, and since Tresta Trading is an alter ego of Shiny Shipping, or because the corporate veil must be pierced, therefore Polygreen can pursue its claim against Tresta Trading in India against Shiny Shipping and Shiny Shipping's asset, MT Pamboor 2. On account of this 'alter ego' construct, the asset of one company is the asset of the other, and therefore the two vessels are 'sister ships'.

33. More importantly we do not find, apart from the references to the emails, any case made out that Tresta Trading was set up as a fraud or device to defeat creditors or to move assets away from creditors' reach. Tresta Trading was set up years ago as we have noted. It has independent contracts and pays tax in Mauritius. Its contracts are with IOML, said to be the third largest such company in Mauritius.

34. More interestingly, we find that the entire edifice of this case is built on the failure by Tresta Trading or its employee to strike out the words "and/or Shiny Shipping and Logistics Private". But in paragraph 14 at page 49 of the Complaint, the Plaintiffs say that they inserted this clause themselves deliberately. Now it is perfectly understandable that in the flurry of activity on 3rd February 2022, this detail may have been overlooked. What is unexplained is why on that date Polygreen included the name of Shiny Shipping. Much is 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc sought to be made of the fact that Ms Noronha had copied her brother at his shinyshipping email address. But we ask ourselves, therefore what? A person may have multiple email addresses. The fact that a particular email address is used does not per se establish the existence of a 'brass plate' subsidiary or of there being an alter ego.

35. Now the SCOPIC clause at page 103 in our reading has to be invoked by notice to "the owners of the vessel". Clause 2 specifically says so. The only registered owner of MT Pamboor 2 is Shiny Shipping. No notice could ever have been properly given to Shiny Shipping.

36. The Interim Application by MT Pamboor 2 and Shiny Shipping goes to considerable length to point out that the two entities are entirely distinct. Mr Dhond makes the point, and we think quite correctly, that merely because one corporate entity is wholly owned by another, this does not mean that the two are the same or that one is the alter ego of the other. Something more needs to be established before that conclusion can legitimately be drawn.

37. Mr Dhond's next submission runs like this. He says that the entire plaint proceeds on the basis that Shiny Shipping, the Indian holding company, is the 'beneficial owner' of Tresta Star (and possibly of Tresta Trading, the corporate entity). The submission is that on a correct reading of the Admiralty Act, there is no longer any concept of beneficial ownership under the statute. We believe this 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc proposition is overbroad and perhaps extreme. It does not commend itself to us.

38. Mr Kapadia's submission is undoubtedly founded on an application of the alter ego/pierced corporate veil principle, to establish that MT Tresta Star and MT Pamboor 2 are 'sister ships'. This suggests commonality of ownership of both -- hence the invocation of the alter ego/pierced corporate veil principle. Mr Kapadia submits that once Polygreen has an in personam claim against Tresta Trading, and it is found to be an alter ego of Shiny Shipping, then Polygreen can move for security against MT Pamboor 2, an asset of Shiny Shipping and a 'sister ship' of MT Tresta Star, even if Polygreen has no direct maritime claim against MT Pamboor 2.

39. Section 3 of the Admiralty Act sets out Admiralty Jurisdiction and says this will vest in the respective High Court subject to the provisions of Sections 4 and 5. It is also a definition in Section 2(1)

(a). Importantly for our purposes, Section 4 defines a maritime claim. Section 2(1)(f) says that a maritime claim is one that is referred to in Section 4. Section 4 says:

"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--

(a) dispute regarding the possession or ownership of a vessel or the ownership of any share therein;

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

(b) dispute between the co-owners of a vessel as to the employment or earnings of the vessel;

(c) mortgage or a charge of the same nature on a vessel;

(d) loss or damage caused by the operation of a vessel;

(e) loss of life or personal injury occurring whether on land or on water, in direct connection with the operation of a vessel;

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

(g) agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise;

(h) agreement relating to the use or hire of the vessel, whether contained in a charter party or otherwise;

(i) salvage services, including, if applicable, special compensation relating to salvage services in respect of a vessel which by itself or its cargo threatens damage to the environment;

(j) towage;

(k) pilotage;

(l) goods, materials, perishable or non-perishable

provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable;

(m) construction, reconstruction, repair, converting or equipping of the vessel;

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

(n) dues in connection with any port, harbour, canal, dock or light tolls, other tolls, waterway or any charges of similar kind chargeable under any law for the time being in force;

(o) claim by a master or member of the crew of a vessel or their heirs and dependents for wages or any sum due out of wages or adjudged to be due which may be recoverable as wages or cost of repatriation or social insurance contribution payable on their behalf or any amount an employer is under an obligation to pay to a person as an employee, whether the obligation arose out of a contract of employment or by operation of a law (including operation of a law of any country) for the time being in force, and includes any claim arising under a manning and crew agreement relating to a vessel, notwithstanding anything contained in the provisions of sections 150 and 151 of the

Merchant Shipping Act, 1958 (44 of 1958);

(p) disbursements incurred on behalf of the vessel or its owners;

(q) particular average or general average;

(r) dispute arising out of a contract for the sale of the vessel;

(s) insurance premium (including mutual insurance calls) in respect of the vessel, payable by or on behalf of the vessel owners or demise charterers;

(t) commission, brokerage or agency fees payable in respect of the vessel by or on behalf of the vessel owner or demise charterer;

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc (u) damage or threat of damage caused by the vessel to the environment, coastline or related interests; measures taken to prevent, minimise, or remove such damage;

compensation for such damage; costs of reasonable measures for the restoration of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; or any other damage, costs, or loss of a similar nature to those identified in this clause;

(v) costs or expenses relating to raising, removal, recovery, destruction or the rendering harmless of a vessel which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel, and costs or expenses relating to the preservation of an abandoned vessel and maintenance of its crew; and (w) maritime lien.

Explanation.--For the purposes of clause (q), the expressions "particular average" and "general average" shall have the same meanings as assigned to them in sub-section (1) of section 64 and sub-section (2) of section 66 respectively of the Marine Insurance Act, 1963(11 of 1963).

(2) While exercising jurisdiction under sub-section (1), the High Court may settle any account outstanding and unsettled between the parties in relation to a vessel, and direct that the vessel, or any share thereof, shall be sold, or make such other order as it may think fit.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc (3) Where the High Court orders any vessel to be sold, it may hear and determine any question arising as to the title to the proceeds of the sale.

(4) Any vessel ordered to be arrested or any proceeds of a vessel on sale under this Act shall be held as security against any claim pending final outcome of the admiralty proceeding."

(Emphasis added) The present case is under Section 4(1)(i) for salvage services.

40. We then come to the contentious Section 5:

"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 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc 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."

(Emphasis added)

41. Mr Kapadia would suggest that Section 5 has made a conscious departure from the wording of the Arrest Convention of 1999. Specifically, he contends that under Section 5(1) there need not be a maritime claim at all against the vessel sought to be arrested. The reason is, that the expression "in respect of which" in Article 3 of the Convention have been consciously omitted in Section 5. Therefore, the legislature permitted arrest of even a vessel against which there is no maritime claim at all, without anything further, under Section 5(1).

42. Mr Dhond on the other hand argues that this is an unviable interpretation. The requirements of Section 5(1) are that it must be the same ship, and there must be the same owner. The ownership must be continuing, and the liability must be that of the owner. Then sub-clauses (b), (c), (d) and (e) speak of other situations such as demise charters and so on. Sub-clause (e) includes a manager and operator and speaks of a maritime lien.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

43. Sub-section (2) however uses a specific phraseology. It says that the High Court may also order arrest 'of any other vessel ...' This would necessarily inform the interpretation of Section 5(1). The reason is simple. If what Mr Kapadia suggests is correct, that a vessel against which there is no maritime claim can be arrested under Section 5(1) without requiring anything further, then Section 5(2) is entirely unnecessary and otiose.

44. We believe Mr Dhond is correct, and Mr Kapadia's submission is as overbroad as Mr Dhond's regarding beneficial ownership. A more accurate interpretation perhaps would be that Section 5(1) requires that there be a maritime claim against the vessel sought to be arrested. Section 5(2) is the fallback position; if the vessel against which there is a maritime claim cannot be arrested, then any other vessel can be arrested, but this has to be lieu of the vessel against which there is a maritime claim. The maritime claim itself must exist in both cases. An action positioned under Section 5(2) is subject to its proviso. Arrest of a 'sister ship' is thus also entirely within the frame of Section 5(2).

45. Indeed, we believe this interpretation actually assists Mr Kapadia and is in his favour. For, if he can establish Polygreen's case of (i) the two companies being alter egos, of piercing the corporate veil, and of beneficial ownership, and (ii) there existing an in personam claim against Tresta Trading (which is nothing but Shiny Shipping), then the arrest of MT Pamboor 2 might be justified. But the argument of 'beneficial ownership' and the attaching of the in personam claim against Tresta Trading to Shiny Shipping are both 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc dependent on Mr Kapadia being able to establish that the two companies are alter egos, not juridically distinct, and that the corporate veil can legitimately be lifted.

46. There are possibly several ways Polygreen could go about fusing identities (to establish its case of beneficial ownership, alter ego, brass plate identity and so on). It could endeavour to show that Shiny Shipping is nothing but Tresta Trading and vice versa. Thus, it might contend that any in personam claim against Tresta Trading is a valid in personam claim against Shiny Shipping and any vessel owned by Shiny Shipping, such as MT Pamboor 2, could then be arrested. Polygreen may also assert a case on fraud, but that is problematic because the case on fraud would have to be established at trial, and no arrest could be maintained until then. The concept of a 'sister ship' cannot be divorced from common ownership -- by establishing beneficial ownership -- and which, in turn, takes us back to Polygreen being able to make out a case of alter egos and unity of corporate identity.

47. Shiny Shipping asserts that it was never a guarantor for the purchase of MT Tresta Star. The Equasis folder seems to show both companies as registered owners of Tresta Star. Prima facie that is an error; it is nobody's case that the two companies hold fractional shares in MT Tresta Star. But even that might not be sufficient to show that MT Pamboor 2 is a 'sister ship' of MT Tresta Star, for there is no assertion anywhere that Tresta Trading has any stake in MT Pamboor 2 (independently of the alter ego theory).

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc

48. Mr Dhond's case is that in order to sustain an order of arrest or, more accurately to defeat his application to vacate the arrest, Polygreen must now make out a prima facie case and the usual requirements apply. The earlier distinction between the utter hopelessness of the plaintiff's case and a prima facie case has now blurred and there is sufficient authority to show this. Mr Dhond invites attention to the commentary in Meeson and Kimbell on Admiralty Jurisdiction and Practice¹ and paragraphs 3.48 to 3.59. The commentary sets out the principle that a court may look behind the registered owner to ascertain true and beneficial ownership. This has long been the law, and as accepted by our courts, especially prior to the Admiralty Act. But the commentary also says in paragraph 3.52 that there is no requirement that one company must own all vessels. It is perfectly legitimate to have a one-ship company and owners of fleets may often legitimately do this; and, equally, may do this in multiple jurisdictions.

49. Then there is a reference to the decision of a learned Single Judge of this Court KR Shriram J in Universal Marine & Anr v MT Hartati.² Here, the learned single Judge said in paragraph 29:

"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 1 Fifth Ed., Routledge.

² 2014 SCC OnLine Bom 223 : (2014) 3 AIR Bom R 311.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr
904-COMIA-18306-2022-J.doc 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. It reads as under: ...

(Emphasis added)

50. Then in paragraph 34, KR Shriram J correctly held that Indian company law views each company as a separate and distinct legal entity, different and distinct from its shareholders and other companies. Commonality of shareholders or directors will not convert two companies into one. Shareholders are also not the 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc owners of the assets of the company. Therefore, it is not possible to arrest a ship not owned by a person not liable for the claim, unless fraud is established. In some cases, Courts may indeed look behind the registered owner, but it can do this (and do it more than once) only if the necessary ingredient is satisfied that the independent company is nothing but a sham, an attempt to defraud creditors. Otherwise, an in personam claim lies only against the registered owner.

51. We do not see how it can possibly be said of Tresta Trading today that it is a sham, a camouflage or anything of the kind. It was set up many years ago. It has independent contracts. It pays tax overseas. There is no question of an asset being moved by Tresta Trading to defeat a creditor and no such case is pleaded. Even in MT Hartati, all the ships were owned by companies that were subsidiaries; and Shriram J asked himself this question: what is so very wrong in that? Alarmist cries of 'holding company' and 'subsidiary' do not serve the purpose.

52. Then there is the reference to the decision of Shriram J again in Condor Maritime Dienstleistung GmbH & Co. KG v mv Western Light & Ors³ on an application made by the 2nd defendant there, Kimiya Shipping Inc. Both ships in that question were not owned by the same entity but by different entities. Shriram J was asked to pierce the corporate veil. He then, like we are today, was faced with the alter ego argument based on commonality of shareholding and directors. It was alleged there that there was indeed a fraud. In 3 2014 SCC Online Bom 257 : (2014) 7 Bom CR 39.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc paragraph 15, Shriram J correctly held that lifting of the corporate veil even on the basis of alter ego theory can be done only where a fraud is intended to be prevented. There has to be an underlying element of dishonesty. In that matter, no such case was made out. Shriram J specifically held that merely because shareholders, directors, addresses were the same, and even constituted attorneys were common, this would not automatically mean that the intention of registering two ships in different names was fraudulent.

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*,⁴ 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*,⁵ the Supreme Court held (in the context of taxation) 4 2022 SCC OnLine SC 570; paragraph 90.

5 (2012) 6 SCC 613; paragraph 74.

19th August 2022

Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc 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".

54. An instructive recent decision is that of the Supreme Court in *Gemini Bay Transcription (P) Ltd v Integrated Sales Service Ltd*.⁶ That was a case of enforcement of a foreign award. The arbitrator, seated in Delaware, USA, had to decide, among other things, whether the 'alter ego' doctrine warranted piercing the corporate veil. ⁷ This was answered by the tribunal by saying that before it could pierce a corporate veil, the tribunal had to "carefully review a complex set of factual, documentary and testimonial evidence". In other words, the corporate veil could not be pierced for the mere asking. A bundle of criteria must be considered, including control but also whether the corporate form was used as a façade to commit a fraud.⁸ As the tribunal said, the devil is in the details. The Supreme Court considered the tribunal's approach in paragraph 58 and said that the conclusion was arrived at after an appreciation of the oral and documentary evidence, and supported by reasons.

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 6 (2022) 1 SCC 753.

7 *Gemini Bay*, supra, paragraph 13.

8 *Gemini Bay*, supra, paragraph 14.

19th August 2022

Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc 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.

56. Mr Kapadia says the alter ego argument is his 'fallback' argument. The first is that Shiny Shipping is liable for the salvage services of provided to Tresta Trading, i.e., as a matter of contractual obligation. This is based on the documentation to which we have referred above and this is sufficient to show 'beneficial ownership' even absent any case on fraud. 9 According to Mr Kapadia, there are three or four distinct items that establish this so-called 'beneficial ownership'. The first is Ms Noronha's 3rd February 2022 email. The second is Polygreens' reply with the LOF Salvage Agreement of 3rd February 2012. Then there is the message from the insurance brokers of Tresta Trading which gave the names of both companies, and, finally, the so-called usher's report.

57. On a careful consideration, we are unable to accept that Polygreen had in fact made out any such case for an arrest. The entirety of its case comes down to a single insertion made by Polygreen itself in the LOF Salvage Form and the failure of Shiny Shipping's employee to delete that endorsement. Whether this was to the mind of Shiny Shipping's employee, whether it was an oversight, or whether it was deliberate, are matters for trial. On their 9 There is a reference to the concept of beneficial ownership in the decision of a learned single Judge of this Court in Lufeng Shipping Co Ltd v MV Rainbow Ace & Ors, [2013 SCC OnLine Bom 1790 : (2013) 7 Bom CR 762], but this was before the 2017 Act.

19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc own or even with the other documentation, these cannot lead to the conclusion of beneficial ownership, or of one company being the alter ego of the other. The fact that the director of a holding company is copied on an email does not even prima facie establish that two are a single entity.

58. Mr Kapadia insists that Polygreen was 'deceived', 'induced', 'misled' -- and other words of that stripe -- into 'believing' that the two companies were one. This argument just makes no sense at all. There is simply no logical reason why Tresta Trading would lead Polygreen to believe that it and Shiny Shipping were one, thereby opening the door or paving the road for Polygreen to move against Shiny Shipping's asset exclusively in India, MT Pamboor 2. If Mr Kapadia's case on this is to be accepted, it completely torpedoes any case on fraud or deceit in hiding assets, and that puts paid to any invocation of the alter ego doctrine.

59. Has Polygreen been able to establish its case under Section 5(2) of the Admiralty Act? As we noted, to do that, Polygreen had to establish an in personam liability of Shiny Shipping, the registered owner of MT Pamboor 2. Polygreen may have an in personam liability against Tresta

Trading. But to cross the bridge or divide between the Tresta Trading and Shiny Trading, Polygreen had to show with far more cogent and persuasive material than we have before us that the two were indeed the same, the Tresta Trading was set up to defraud creditors, that Tresta Trading is in fact nothing but a shell company with no business and no assets. Polygreen fails on 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc every single one of these determinants. Its entire case is built on conjecture and surmise,

60. In conclusion we note that Polygreen has a pending arbitration claim in London against Tresta Trading. It might indeed be very peculiar that, while Polygreen believes it can move against Shiny Shipping here for an arrest of MT Pamboor 2, it does not, by the same token and the same logic, seek to include Shiny Shipping as part of arbitration agreement in London as well under the Group of Companies doctrine. We do not see how from the same cause of action, a plaintiff can make two such conflicting assertions.

61. The result of this discussion is that the Defendants' Interim Application (L) 11655 of 2022 succeeds. The order of arrest is vacated forthwith. In the facts and circumstances, there will be no order as to costs.

62. Mr Kapadia seeks a stay of the operation of this order. We are unable to grant this request. The arrest has run from 1st April 2022 onwards. Monthly, it costs Shiny Shipping Rs. 30 lakhs as fixed costs, apart from other losses. There is no attempt by Polygreen to suggest that it will provide security for the losses already suffered or to cover further inevitable losses if a stay is granted. The application is refused.

63. The Appeal and the Interim Application (L) 11655 of 2022 are disposed of in these terms. The costs of the appeal and of the 19th August 2022 Polygreen International DMCC v MT Pamboor 2 & Anr 904-COMIA-18306-2022-J.doc interim application, payable by the Plaintiff to the 2nd Defendant, may be recovered as costs in the suit.

(Gauri Godse, J)

(G. S. Patel, J)

19th August 2022