CASE NO 686/91

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

THE SHIPPING CORPORATION OF INDIA LTD

.....

.....APPELLANT

versus

EVDOMON CORPORATION ..... FIRST RESPONDENT

and

THE PRESIDENT OF INDIA ..... SECOND RESPONDENT

CORAM: Corbett CJ, Botha, Milne, Goldstone, et Van den Heever JJA.

DATE OF HEARING: 27 August 1993

DATE OF JUDGMENT: 12 November 1993

J U D G M E N T

/CORBETT CJ:
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CORBETT CJ:

The first respondent, Evdomon Corporation of Liberia ("Evdomon"), carries on business, inter alia, as the owner and charterer of ships. In terms of a charterparty signed by the charterer in New Delhi, India and dated 30 September 1988 second respondent, the President of India, acting on behalf of the Government of India, chartered the vessel MV "Kavo Peiratis" from Evdomon, the latter acting as the disponent owner thereof. The purpose of the charter was to carry a cargo of bagged rice from Thailand to India. The vessel duly completed this voyage and fully discharged the cargo on 25 December 1988. The Government of India failed to pay portion of the freight due under the charterparty and despite continuous pressure by the managers of the "Kavo Peiratis" remained in default in the sum of US$109 962,47.

3 In September 1990 Evdomon ascertained that the MV "Vallabhbhai Patel" ("the vessel") was berthed in the port of Saldanha Bay, where she had been undergoing repairs. Claiming that the vessel belonged to the Government of India and in the belief that the vessel was imminently due to depart Saldanha Bay Evdomon on 9 September 1990 brought an urgent ex parte application before the Cape of Good Hope Provincial Division, exercising its admiralty jurisdiction ("the CPD"), for the attachment of the vessel and certain property aboard the vessel in order to found or confirm the jurisdiction of that Court to entertain an action in personam to be instituted by Evdomon against the Government of India for payment of the freight still due under the charterparty relating to the "Kavo Peiratis". The application was brought in terms of sec 3(2)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act").

In the founding affidavit filed in support of

application it was alleged, inter alia, that although the charterparty provided for all disputes thereunder to be settled by arbitration in India, the Government of India had employed what may be described as delaying tactics; that the arbitration proceedings were likely to take "several years"; that in terms of a recent decision of the Supreme Court of India the arbitrators were not empowered to order the payment of interest on the sum awarded; and that it was improbable that any favourable award which might eventually be made in first respondent's favour would be "speedily settled" by the Indian Government. For these reasons, so Evdomon averred, it had no confidence in obtaining "true commercial justice" should it proceed with an arbitration in India, whereas it was confident that should the matter proceed before the CPD both parties would be afforded a "fair and expeditious trial".

On this application the Court made an order of

attachment as prayed and ordered, inter alia, that a rule nisi should issue calling upon all persons interested to show cause why the attachment should not be confirmed. The order also authorised the release of the vessel and other property attached upon the furnishing of security to the satisfaction of the Registrar of the CPD. Such security was indeed furnished and a release warrant was issued on 12 September 1990.

The Government of India did not respond to the rule nisi, but appellant did: it intervened as an interested party. Appellant is the Shipping Corporation of India Limited ("SCI") and it intervened on the basis that the vessel was owned "as to all of its 64 shares" by it, and not by the Government of India. It accordingly asked for the discharge of the order of attachment, the effect of which would be the release of the security lodged, and the costs of its intervention.

The matter was heard by King J. Before him it

common cause that SCI was a private company registered under the Indian Companies Act, 1956 and that the vessel was duly registered in the name of SCI and was its property; but that SCI's entire issued share capital was actually or beneficially owned by the Government of India. It was Evdomon's basic contention that by reason of the fact that SCI was a wholly-owned subsidiary of the Government of India and of the degree of control exercised by the Government of India over the policies, operations and business activities of SCI, the latter was in truth an "organ, department or instrumentality" of the Government of India, with the result that SCI's property belonged to the Government of India and was, therefore, attachable in order to found or confirm jurisdiction for an action in personam against the Government of India in terms of sec 3(2)(b) of the Act.. SCI disputed these averments and legal conclusions. King J found in favour of Evdomon on its basic

contention and made an order confirming the attachment and ordering SCI to pay the costs of its intervention. With the leave of the Judge of first instance SCI now appeals to this Court.

It is clear, and not in dispute, that in order to obtain confirmation by the Court of the order of attachment Evdomon had to establish on a balance of probabilities that the vessel and other goods were at the time of attachment the property of the Government of India (Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1976 (4) SA 464 (A), at 489 B-C; cf Cargo Laden and Lately Laden on Board the MV Thalassini AVGI v M V Dimitris 1989 (3) SA 820 (A), at 834 D-F) . In this connection, no distinction is to be drawn between the vessel and the other property attached and so for the sake of brevity I shall henceforth refer merely to the vessel.

The evidence placed before the Court on

affidavit by both parties canvassed in considerable detail the political and constitutional background to the formation of SCI and the nature of its relationship with the Government of. India. The facts are for the most part common cause, but where they are not, there having been no resort to oral evidence, I shall apply the well-known principles enunciated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), at 634 E - 635 C. The facts are fully set forth in the careful judgment of King J and I shall endeavour to give merely a precis thereof.

The State of India, was founded in 1947. From the outset the Government of India pursued a policy of active State participation in industrial and economic development. Certain industries were earmarked as State monopolies; other "basic industries of importance" were subjected to a large measure of central ownership, regulation and control. The latter included sea

transport.

In 1956 the Companies Act, 1 of 1956, was passed by the Indian Parliament. Sec 396 of this Act empowered the Central Government, whenever it was satisfied that this was essential in the public interest, to order the amalgamation of two or more companies into a single company. In 1961 and in the exercise of this power the Government of India ordered the amalgamation of the Eastern Shipping Corporation, a public company incorporated under the Indian Companies Act of 1913, and the Western Shipping Corporation Limited, a private company incorporated under the Companies Act of 1956, both of which companies were engaged in the business of shipping goods to and from India. The order stated that the Central Government was satisfied that for "the purpose of securing co-ordination in policy and the efficient economical expansion and the carrying on of the shipping business in the public sector in India" it was

essential in the public interest that the amalgamation take place. SCI was the company which came into existence as a result of this amalgamation.

SCI is a wholly-owned subsidiary of the Government of India. All but 204 of the approximately 7 000 000 issued shares in SCI are held by the Government of India, through the President of India. These 204 shares are held by executives of SCI in their capacity as government servants. In terms of the articles of association (as amended) invitation to the public to subscribe for shares in SCI is prohibited. The allotment of shares by the board of SCI is made subject to the directions of the President of India; and shares may be transferred only to persons approved by the President. The articles entitle the President to have a representative at any meeting of the company and this representative is empowered to vote on his behalf. The President is further given wide powers in regard to the

appointment, removal and substitution of directors and alternate directors of SCI and of the chairman of the board and the managing director. He also fixes their remuneration.

The general management of the company is placed in the hands of the managing director, subject to the control and supervision of the board; certain matters relating to the working of the company may, on the initiative of the chairman or the managing director, be reserved for the consideration of the President of India; and the latter's prior approval must be obtained in regard to, inter alia, certain appointments to posts within the company, schemes involving capital expenditure above a stipulated amount, the disposal of property other than ships for scrapping purposes over a certain value, the formation of subsidiaries and proposals for the raising or reduction of capital. The articles also give the President powers of approval of company budgets and

there is a general article (no 37) commencing:

> "Notwithstanding anything contained in any of these Articles, the President may from time to time issue such directions or instructions as he may consider necessary in regard to the affairs or the conduct of the business of the Company or Directors thereof and in like manner may vary and annul any such directions or instructions."

In practice, according to the company secretary of SCI, Mr S Ramamurthy, the company, together with other wholly-owned Government of India undertakings, are subject to the general supervisory control of their financial functioning by the Government ministry concerned (in the case of SCI the Ministry of Surface Transport). But, explains Mr Ramamurthy -

> "Exercise of such control is done by the concerned Ministries by issuing guidelines, from time to time, with regard to the procedure the wholly owned

> Government of India undertakings should, as far as practicable, follow with regard to matters of financial importance and particularly in respect of matters that may be conveniently referred to as concerning 'policy decisions'. Beyond such general supervision the concerned Ministries have hardly had any role to play. The day to day administration of SCI is attended to by its various departments, under an overall control of its Board of Directors. The Board of Directors of SCI enjoys full autonomy as far as the decision making powers vested in it under the Articles of Association is concerned. In exceptional instances the Board of SCI refers some matters to the Ministry, for its general advice, but such instances are few and far between."

In his affidavit Mr Ramamurthy also rejected suggestions in an affidavit filed on behalf of Evdomon that the board of SCI is not entitled to take decisions regarding the repair of ships and generally that all significant

decisions of the board require approval of the Government of India. Mr Ramamurthy reiterated that the board of SCI enjoyed full autonomy and that all decisions with regard to the day-to-day functioning of SCI were taken by the board itself.

Finally, it should be noted that in terms of the first paragraph of the objects clause in SCI's memorandum of association, the company is empowered, inter alia, to -

> "...purchase, charter, hire or otherwise acquire... ships or vessels, of any description with all equipment and furniture.....".

The fundamental question raised by this appeal is whether, given the fact that the shareholding in SCI is wholly owned by the Government of India and given the degree of control exercisable and actually exercised over the policies, operations and business activities of SCI

the Government of India (as indicated above), SCI should be regarded as an organ, department or instrumentality of the Government of India and for that reason property belonging to SCI should be treated as being the property of the Government of India for the purpose of attachment to found or confirm jurisdiction.

Before I consider this fundamental question there is a preliminary point with which I must deal. At the hearing of the appeal the Court raised with counsel the question of the application of sec 6(1) of the Act to this case and more particularly whether in terms thereof the validity of the attachment of the vessel should be determined in accordance with the law applied by the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction (which I shall for convenience call "English admiralty law") or in accordance with the Roman-Dutch law applicable in the Republic. Counsel were not adequately prepared to deal with this point and asked

permission to file additional heads of argument thereon. This was granted and additional heads have been filed. The Court is indebted to counsel for the comprehensive and helpful nature of these heads.

Section 6(1) of the Act provides as follows:

> "Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall -
>
> (1) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
>
> (2) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic."

17 In applying this subsection to the present case, the question which arises is whether this appeal relates to a matter in respect of which a court of admiralty of the Republic had jurisdiction immediately before the commencement of the Act, i e 1 November 1983. If it does, then English admiralty law applies. If it does not, then we must apply "the Roman-Dutch law applicable in the Republic"; in other words the modern Roman-Dutch law administered by our Courts.

The first question which one asks is: what is the "matter" in the present case? To my mind the answer is clear. The matter is an application for the attachment of property alleged to belong to the Government of India in order to found or confirm the jurisdiction of the Court a quo to entertain an action in personam against the Government of India; and on appeal the particular issue is the correctness of the order of attachment granted by the Court a quo. The

action in personam itself, for the recovery of freight due under the charterparty, constitutes a related, but separate, proceeding. It is related in that without such an attachment the Court a quo would not have jurisdiction to entertain the action; but its separateness is demonstrated by the fact that at the time when the order of attachment was granted the action had not yet been commenced, and indeed the order of attachment directed that the action in personam be instituted by the issue of process within 30 days. Consequently in considering whether the "matter" is one in respect of which a South African court of admiralty had jurisdiction before 1 November 1983, the action in personam itself may be disregarded. (Cf Transol Bunker BV v M V Andrico Unity and Others; Grecian-Mar SRL v MV Andrico Unity and Others 1989 (4) SA 325 (A), 334 H - 335 A.)

The next question is whether a South African

court of admiralty did have such jurisdiction prior to 1 November 1983. The jurisdiction of such a court was governed by the Colonial Courts of Admiralty Act, 1890, a statute of the British Parliament. In terms of sec 2(2) of this Act the jurisdiction of a colonial court of admiralty was stated to be -

> "..... over the like places, persons,
> matters, and things, as the Admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty [might] exercise such jurisdiction in like manner and to as full an extent as the High Court in England..."

It has been authoritatively held that the effect of sec 2(2) was that the jurisdiction of a court of admiralty was governed by the admiralty jurisdiction of the English High Court as it existed in 1890. The sources of such jurisdiction included English statutes passed before

1890, notably the Admiralty Court Act, 1840 and the Admiralty Court Act, 1861, but not subsequent legislation. (Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A), at 274 C-D; Malilanq and Others v MV Houda Pearl 1986 (2) SA 714 (A), at 722 J - 723 B. The suggestion in LAWSA, vol 25, par 114, note 8 that the true date was 1 July 1891 is, in my view, incorrect. According to The Yuri Maru; The Woron [1927] AC 906 (PC), at 915, the critical time was "when the Act passed", which was 25 July 1890; and it does not seem to me that this is affected by the provision in sec 16 that generally the Act was to come into force on 1 July 1891.)

Furthermore the proceedings in a court of admiralty were regulated by the rules in force in 1890 under the Vice-Admiralty Courts Act, 1863 (see Tharros Shipping Corporation SA v Owner of the Ship "Golden Ocean" 1972 (4) SA 316 (N), at 319 A). I shall refer to these as "the Rules".

English admiralty law recognised two

procedures: actions in rem and actions in personam. The origin and nature of the action in rem, which was peculiar to admiralty law, is thus described in Halsbury's Laws of England, 4 ed reissue. Vol I, par 305:

> "Originally a suit in Admiralty was commenced by the arrest either of the person of the defendant or of his goods, whether or not the ship or goods in question constituted the subject matter of the offence, the purpose being to make the defendant put up bail or provide a fund for securing compliance with the judgment, if any, when it was obtained against him. The result of the conflict between the Court of Admiralty and the, common law courts was that this method of procedure became obsolete, but the Admiralty Court succeeded in establishing a right to arrest property which was the subject matter of a dispute, and to enforce its judgments against the property so arrested, on the theory that a maritime lien to the extent of the claim attached to the property from the moment of the

> creation of such claim. Such an action became known as an action in rem. The right to enforce a maritime lien by an action in rem was confined to the property by which the damage was caused or in relation to which the claim arose, and was enforceable against the property in the hands of an innocent purchaser."

In regard to the action in personam Halsbury, ibid, par 306 has this to say:

> "The inherent jurisdiction possessed by the Court of Admiralty was exercised not only by proceedings in rem brought to enforce the maritime liens attaching to the res in each case, but, where the ship was lost or for some other reason could not be arrested, a plaintiff having a claim cognisable by the court, other than a claim on a bottomry or respondentia bond or to the possession of the ship, might take proceedings in personam against the owners of the property which would have been arrested if the proceedings had been in rem. Subsequently, in 1854, the High

> Court of Admiralty was empowered by-statute to institute proceedings by personal service of a monition upon owners of the property the subject matter of the dispute, without the necessity of issuing a warrant to arrest the property."

The statute in question, the Admiralty Court Act of 1854, provided, in sec 13, that -

> "In all cases in which a party has a cause or right of action in the High Court of Admiralty of England against any ship, or freight, goods, or other effects whatever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition, citing the owner or owners of such ship, freight, goods, or other effects to appear and defend the suit, and upon satisfactory proof being given that the said monition has been personally served upon such owner or owners, the said Court may proceed to hear and determine the suit, and may make

such order in the premises as to it shall seem right."

A "monition" was in admiralty practice the process, similar to a writ of summons, whereby an action was commenced (see Walker, The Oxford Companion to Law, sv. "monition"). For reasons which are not clear to me the Admiralty Court Act of 1854 was repealed in 1892, but since this was legislation subsequent to 1890 it may be disregarded.

Moreover, in the various text-books on English admiralty law and practice published towards the end of the last century and at the beginning of the present century, to which counsel referred us, there is no suggestion that arrest or attachment to found jurisdiction was then part of the procedure relating to actions in personam before the English courts of admiralty (see e g Roscoe, A Treatise on the Jurisdiction and Practice of the Admiralty Division, 3 ed (1903), pp

317; Williams' and Brace's Admiralty Practice, 3 ed (1902), 321-30). The same conclusion is to be drawn from the Rules which refer specifically to both actions _ in rem and actions in personam, but which make provision for the issue of a warrant for the arrest of property only in the case of an action in rem (see Rules 29 to 38).

Finally, this conclusion receives strong support from the decision of the Court of Appeal in The Beldis [1935] All ER Rep 760 (CA). This case actually dealt with the statutory admiralty jurisdiction conferred upon county courts by the County Courts (Admiralty Jurisdiction) Amendment Act, 1869. The plaintiff had instituted proceedings in rem, by arrest, against the steamship Beldis in order to enforce an arbitration award in its favour arising from a claim under a charter-party of the steamship Belfri. Both ships belonged to the same owner. One of the questions which arose was

whether an action in rem in the county court could be based upon the arrest of property of the defendant owner other than that in respect of which the cause of action arose. The Court of Appeal held that it could not. In the course of their judgments (with both of which Swift J agreed) Sir Boyd Merriman P and Scott LJ traced the history of arrest of the person and the property of the defendant in order to found jurisdiction and concluded that it had become obsolete in the High Court of Admiralty before the beginning of the 19th century and that the only type of arrest recognized was that of the vessel (and freight, goods or other effects) in relation to which the cause of action arose, in an action in rem; and that the same position obtained in the county court.

Scott LJ put it thus (at 775 D-I):

"In many continental systems of law and procedure (e.g., in Germany, Sweden, Belgium, and to a certain extent in France) there is a right of arrest for founding

jurisdiction and obtaining bail in respect of any ship or other property of a defendant, although wholly unconnected with the cause of action sued on. But in England I have never heard of such an arrest, and I do not believe any attempt has ever been made here to exercise such a right in practice within the memory of any living practitioner in the Admiralty Court, until the plaintiffs in the present action made it. In my view, there is no such right

in English law to-day.....,.....There is little doubt that historically the jurisdiction of the Admiralty Court was originally exercised by employing either of two methods of procedure for bringing the defendant before the court: (i) The arrest of his person; (ii) the seizure of his goods. There is more than one case in MARSDEN'S SELECT PLEAS OF THE COURT OF ADMIRALTY which illustrates the arrest of goods other than the goods or ship concerned in the particular cause of action for the purpose of founding jurisdiction. But it seems to be equally clear that both methods had fallen into disuse before the beginning of the

> nineteenth century, probably as a result of the incessant war of jurisdiction waged by the common law courts on the Admiralty Court in the sixteenth and seventeenth centuries."

(See also Merriman P at 771 C-E; The "Monica S" [1967] 2 Ll.L Rep. 113, at 123, 127-8; Wiswall, The Development of Admiralty Jurisdiction and Practice since 1800, 40.) The attachment procedure provided for by sec 3(2)(b) of the Act in the case of actions in personam is obviously derived from our common law, which in general, unlike English law, allowed a peregrine defendant in a personal action to be sued and process to be served by edictal citation provided that property of the defendant was attached to found or confirm jurisdiction (T.W. Beckett & Co Ltd v H Kroomer, Ltd 1912 AD 324, at 336). The detailed principles and rules relating to attachment to found jurisdiction (which is distinct from arrest in _ an action in rem - see The Owners, Master and Crew of the

SS "Humber" v The Owners and Master of the SS "Answald" 1912 AD 546, at 556-7) are discussed in Siemens Ltd v Offshore Marine Engineering Ltd 1993 (3) SA 913 (A); see also Pollak on Jurisdiction, 2 ed, pp 82 ff. In passing, it may be mentioned that in conferring jurisdiction on the Court by attachment of property in an action in personam where both parties are peregrini and where the cause of action has no connection with this country, sec 3(2)(b) goes well beyond the jurisdictional grounds recognized at common law (see "SS Humber" case, supra; Siemens case, supra; Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another 1986 (4) SA 329 (D), at 335 F-J and cases there cited) . It was different in the case of an action in rem. There, even before the passing of the Act, a South African court sitting as a court of admiralty had jurisdiction by virtue of the arrest of the ship, even though the parties were peregrini and the cause of action arose outside the

Court's area of jurisdiction (see Kandagasabapathy and Others v MV Melina Tsiris; Hethumuni and Others v MV Antigoni Tsiris 1981 (3) SA 950 (N), at 952 C-D; Magat -and Others v MV Houda Pearl 1982 (2) SA 37 (N), at 39 A-B).

For these reasons I conclude that prior to 1 November 1983 a South African court of admiralty would not have had jurisdiction to make the kind of order of attachment sought and obtained in this case. It follows that, in terms of sec 6(1) of the Act, the Roman-Dutch law must be applied. This was also the conclusion reached by counsel in their additional heads of argument.

I might add that even if, contrary to what I have held, regard be had to the action in personam itself in applying the provisions of sec 6(1) of the Act, the position would be no different. I say this because it is clear that as at 1890 the High Court of

Admiralty in England did not have jurisdiction in respect of charterparties (The Yuri Maru; The Woron, supra, at 909; The Beldis, supra, at 771 F-G;, 772 F; Brown and Sons v The Russian Ship Alina (1880) 127 LT 494 (CA); Wiswall, op cit, 40; Tharros Shipping Corporation SA v Owner of the Ship "Golden Ocean", supra, at 322A).

I return now to what I have called the fundamental question. In the case of Banco De Mozambique v Inter-Science Research and Development Services (Pty) Ltd 1982 (3) SA 330 (T) the Court was concerned with an application to set aside an order of attachment granted in order to found or confirm jurisdiction in an action which the respondent (Inter-Science Research and Development Services (Pty) Ltd) proposed to bring against the Goverment of Mozambique for payment of certain moneys and damages. (For the judgment ordering the attachment see Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mozambique 1980 (2) SA 111

(T).) The assets ordered to be attached consisted of moneys standing to the credit of the applicant (the Banco de Mozambique, of Maputo) in the books of the Bank of Lisbon in Johannesburg. In the application for the order of attachment it had been alleged that the applicant was a "State Bank" and that its "assets were owned by the Republic of Mozambique". In the application to set aside the order of attachment this allegation was challenged and applicant's case was that it had not been established, on a balance of probabilities, that the moneys in question belonged to the Government of Mozambique or that the Government had an attachable interest therein. The Court (Goldstone J) granted the application and set aside the attachment. The respondent sought to justify the attachment on three grounds: (i) that the applicant, though a corporation established by decree, was actually an organ or department of the Government and that its assets in

reality belonged to the Government; (ii) that applicant's corporate veil should be lifted and its assets dealt with as being those of the Government; and (iii) that in fact the moneys attached belonged to the Government. The Court rejected all three grounds. In dealing with the first ground and having remarked that there was no South African authority on the question whether and, if so, in what circumstances the assets of a public corporation might be attached in satisfaction of a debt of the Government which created it, the learned Judge referred to an article by Mr Mr V K Moorthy in 30 (1980) International and Comparative Law Quarterly 638, entitled "The Malaysian National Oil Corporation - Is it a Government Instrumentality?". In this article a number of decisions in England, Australia, New Zealand and Canada are referred to. The author states (at 640-1):

"The Courts have evaluated the relationship between the Government and a

statutory corporation for the purpose of determining whether or not the corporation is a Government instrumentality by the application of various tests.

The tests are as follows:

(1) Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;

(3) Whether the property vested in the corporation is held by it for and on behalf of the Government;

(4) Whether the corporation has any financial autonomy;

(4) Whether the functions of the corporation are Governmental functions."

For the purposes of the case before him Goldstone J accepted these tests for determining whether a corporation should be classed as an instrumentality, servant or organ of the Government or State concerned and accepted, too, that where the corporation was so to be classified it would follow that property entrusted to

such a corporation belonged in fact to the Government or State (see judgment at 333H - 335D). Having considered in detail the nature and status of the applicant and its relationship with the Government of Mozambique the learned Judge concluded that the respondent had failed to establish that the applicant was the alter ego or an organ of the Government. He further held that no grounds had been advanced for piercing or lifting the corporate veil; and that there was no proof that the moneys in question belonged to the Government.

In the present appeal what was stated in regard to the law in Banco De Mozambique formed the corner-stone of Evdomon's case. As appears from the judgment of Goldstone J and Mr Moorthy's article, the vast majority of the cases in which the question has arisen as to whether a body or corporation should be regarded as an organ, instrumentality or department of the Government concerned have related to the doctrine of sovereign

immunity, i e the rule of international law, which is applied by the domestic courts of many countries, that "a sovereign state should not be impleaded in the courts of another sovereign state against its will" (per Denning MR in Trendtex Trading Corporation Ltd v Central Bank of Nigeria [1977] 1 All ER 881 (CA), at 888 b-c). As Lord Denning pointed out in the case just referred to, the courts of individual countries differed in their definition and application of the doctrine and the bounds of sovereign immunity had changed greatly in the 30 years prior to the Trendtex case (at 888 c-e, 889 g-h). Originally England and most other countries adopted the so-called doctrine of absolute immunity, which protected the sovereign in all situations; but lately there had developed a doctrine of restrictive immunity (at 890 b-f). Lord Denning described this latter concept thus (at 890 f-h):

"In the last 50 years there has been a

> complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state - or creates its own legal entities - which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to -acts of a governmental nature, described in Latin as jure imperii, but no immunity to acts of a commercial nature, jure gestionis."

In the, Trendtex case the majority of the Court (Denning MR and Shaw LJ) opted for the doctrine of restrictive immunity and this decision was approved by the House of

Lords in I Conqreso del Partido [1981] 2 All ER 1064 (HL). In the meanwhile the British Parliament had passed the State Immunity Act 1978 (which was not applicable to the facts in the I Conqreso del Partido case) . In general this Act draws the same distinction between acts of a governmental nature and commercial transactions, and restricts sovereign immunity to the former (see e g Alcorn Ltd v Republic of Colombia (Barclays Bank plc and another, garnishees) [1984] 2 All ER 6 (HL)).

The legal position in this country regarding the doctrine of sovereign immunity was carefully and comprehensively surveyed by the full bench of the Transvaal Provincial Division in the case of Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mozambique, supra. As this survey shows. South African courts initially applied the doctrine of absolute immunity, but in the Inter-Science

case the Court (Margo J, Franklin and Preiss JJ concur-ring) decided to follow the world-wide trend and to apply the restrictive doctrine. Shortly thereafter the Legislature stepped in and passed the Foreign States Immunities Act 87 of 1981, which, modelled on the English Act, also does not accord immunity to a foreign state in respect of commercial transactions.

Over the years another area of uncertainty in the application of the doctrine of sovereign immunity has related to the bodies or institutions entitled to claim such immunity on the ground that they were to be regarded as organs or departments or instrumentalities of the State. Illustrative of debate about this in the English courts are, inter alia, Krajina v The Tass Agency and Another [1949] 2 All ER 274 (CA); Baccus SRL v Servicio Nacional Del Triqo [1956]3 All ER 715 (CA); Rahimtoola v H E H The Nizam of Hyderabad and Others [1957] 3 All ER 441 (HL); Mellenger and another v New Brunswick

Development Corporation [1971] 2 All ER 593 (CA); the Trendtex case, supra. It is not necessary to analyse these cases. In some of them the body or corporation concerned was held to be an organ, or department or instrumentality of a foreign State and, therefore, entitled to sovereign immunity; in others not. Some cases gave rise to sharp differences of judicial opinion. It was clearly a mobile area of the law in which conflicting considerations arose. As Shaw LJ put it in the Trendtex case (supra, at 907 b) -

> "A consequence of the doctrine of immunity is that in protecting sovereign bodies from the indignities and disadvantages of adverse judicial process, it operates to deprive other persons of the benefits and advantages of that process in relation to rights which they possess and which would otherwise be susceptible of enforcement."

And in deciding these matters the accent fell not so much

the extent to which the separate legal personae of corporation and state could and should be merged, but rather on the extent to which one should extend the protective cloak of sovereign immunity. With the wide-spread adoption of the restrictive immunity doctrine, however, the scope for the application of the instrumentality principle has been greatly limited since in most such cases the cause of action relates to a commercial transaction entered into by the body or corporation concerned.

In the present case the issue is an entirely different one and different considerations arise. The issue is whether, because of the status of SCI and its relationship with the Government of India, its property should be treated as being the property of the Government. Here one immediately encounters the basic rule spelt out by Innes CJ in Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530, at 550-1:

"A registered company is a legal persona distinct from the members who compose it. In the words of LORD MACNAGHTEN (Salomon v. Salomon & Co., 1897, A.C., at p 51), 'the company is at law a different person altogether from the subscribers to its memorandum; and though it may be that, after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them.' That result follows from the separate legal existence with which such corporations are by statute endowed, and the principle has been accepted in our practice. Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested

in all or any of its members." (My emphasis.)

(See also the judgment of Solomon JA at 556-7; Francis George Hill Family Trust v South African Reserve Bank and Others 1992 (3) SA 91 (A), at 102 F-H.) It seems to me that generally it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other

improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words "device", "stratagem", "cloak" and "sham" have been used (see the discussions in Lateqan and Another NNO v Boyes and Another 1980 (4) SA 191 (T), at 200 E - 202 A; Dithaba Platinum (Pty) Ltd v Erconovaal Ltd and Another 1985 (4) SA 615 (T), at 624 B - 625 J; and the recent decision of the English Court of Appeal in the case of Adams and others v Cape Industries plc and another [1991] 1 All ER 929 (CA), at 1022b-j, 1024d -1025f) . In my view, no ground has been shown for piercing the corporate veil in the present case.

Nor do I think that there is any other basis upon which the vesting of ownership of the vessel in SCI can be ignored and the attachment thereof upheld by treating the Government of India as the lawful owner thereof. It does not take much imagination to visualize the chaos that could arise from such a blurring of the

principles relating to the ownership of property in this, or any other, field.

In the judgment of King J reference is made to several decisions of the Courts of India, and more particularly to the monumental judgment of Madon J in the Supreme Court case of Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly and Another 1986 Company Cases vol. 60, p 797. This case concerned Article 12 of the Indian Constitution which contained the following definition of the term "the State":

> "'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local and other authorities within the territory of India or under the control of the Government of India."

The Central Inland Water Transport Corporation Ltd ("the Corporation") was a "Government company" in that all its shares were held by the Central Government of India and

two State Governments. The question which arose was whether the Corporation fell within the definition of "the State", for upon the answer to this question depended whether the Corporation was bound by the guarantee of fundamental rights contained in the Indian Constitution. The Court held that for the purposes of applying Article 12 -

> "... one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrument-ality or agency of the State."

It further held that the Corporation -

> ".... squarely falls within these observations and it also satisfies the various tests which have been laid down.
> ..... It is nothing but the Government
> operating behind a corporate veil, carrying out a governmental activity and governmental functions of vital public importance. There can thus be no doubt that the Corporation is 'the State' within

the meaning of article 12 of the Constitution."

This case was thus concerned essentially with the interpretation to be placed on Article 12 of the Constitution, which in turn determined the scope of application of the guarantee of fundamental rights. It is far removed from the issue in the present appeal which relates to the ownership of property legally vested in a corporation which is a wholly-owned subsidiary of a government. I consequently do not find the decision in the Central Inland Water case to be of any persuasive assistance in this case.

In support of the contention that by virtue of the instrumentality principle ownership of the vessel vested in the Government of India, counsel for Evdomon cited the English decision of Perry v Eames; Salaman v Eames; Mercers' Company v Eames [1891] 1 Ch. 658 and that of the High Court of Australia in The Repatriation

Commission v Kirkland (1923) 32 CLR 1. In my view, neither case advances Evdomon's case.

Perry v Eames related to claims by the plaintiffs to servitudes of light over the property of the defendant, situated in the city of London, by virtue, inter alia, of an Act of Parliament, the Prescription Act, which came into operation in 1832 and which shortened the term of acquisitive prescription in certain cases to 20 years. The relevant section of the Act (the 3rd section), which dealt with the right to light, did not bind the Crown. The defendant acquired the property in 1886. Prior to this, i e from 1820 to 1886 the property had been vested in trustees, in terms of various successive Acts, in trust for the Crown, and the building thereon had been used to house the Bankruptcy Court. During this period, therefore, according to Chitty J (at 664) -

"...the legal estate was vested in

> trustees who were subjects and mere depositories of the legal estate, but the sole equitable ownership was in the Crown for the public purposes of the Acts;...."

Later in his judgment the learned Judge summed up the position as follows (at 669):

> "Now in the cases before me the Crown's absolute beneficial ownership for the purposes of the Act is expressly manifes-ted by a public statute, and it is obvious that the bare legal estate was vested in trustees merely for the purposes of more convenient administration by a department of the Queen's Government. I am of opinion, then, that the prerogative of the Crown takes these cases out of the operation of the 3rd section."

The plaintiffs' actions were dismissed. This case is clearly distinguishable from the present one. It dealt with the application of a particular statutory provision, the 3rd section of the Prescription Act, to a trust

situation, whereunder the bare legal estate in the property in question was vested in trustees and the sole equitable ownership in the Crown for the purposes of the more convenient administration of a department of government. It is no authority for ignoring the separate identity of a company and treating its property as belonging to a government by virtue of it being the sole beneficial shareholder.

In the Australian case referred to above the appellant, the Repatriation Commission, was a statutory corporation established by an Act dealing with the repatriation and re-establishment in civil life of soldiers after World War I. One Cheevers, a returned solder, acquired certain furniture in terms of a hire-purchase agreement with the Minister of State for Repatriation. A creditor of Cheevers for rent levied distress on the furniture and caused it to be impounded, but soon after the distress the Commission, in whom

ownership vested, forcibly removed the goods. The issue which arose was whether the furniture had been validly distrained, property of the Crown being exempt from distress. The Court held, according to the headnote, that the Commission, being a statutory corporation charged with the duty of carrying out objects peculiarly within the province of the Commonwealth Government and whose administration was subject to the control of a Minister of State, was entitled in respect of property vested in it to the same privileges and immunities as the Crown would have had if the property had been vested in it; and that, therefore, goods vested in the Commission were not liable to be distrained. In the judgment of Knox CJ and Starke J the position was enunciated as follows (at 8):

> "The provisions of the Act taken generally ..... establish that the Commission is in the strictest sense a department of Government, or at all events

> so practically identified with it as to be indistinguishable. It is a statutory corporation charged with the administration of an Act designed to carry out two objects which are peculiarly within the province of the Government, namely, the re-establishment in civil life of persons who have served in the defence forces, and the provision of pensions and benefits for persons incapacitated and the dependants of persons killed or incapacitated as a result of active service in those forces. Adopting the words of O'CONNOR J. in Sydney Harbour Trust Commissioners v Wailes (2), it is 'a corporation .... to which is handed over the administration of what is really a Government department.' If so, the Commission is entitled, in our opinion, in respect of the property vested in it pursuant to the Act, to the same privileges and immunities as the Crown itself would have had if the property had been vested in it." (My emphasis.)

It is clear that the Commission fulfilled a very different function from that in which SCI is engaged;

but, apart from that, this case (i) dealt with the ambit of Crown immunity to the distress of property and (ii) did so on the basis that the property in question was not legally vested in the Crown, but in the Commission. (See also Higgins J at 15, Rich J at 21-2.) In view of this, the case is no authority for Evdomon's contention in the present appeal.

For these reasons, I am of the view that the property of SCI cannot, for the purposes of attachment to found or confirm jurisdiction under sec 3(2)(b) of the Act, be regarded as the property of the Government of India. It follows that the original order of attachment was not validly granted and ought to have been discharged by the Court a quo.

At the hearing of the appeal, appellant made application for the condonation of the late filing of its notice of appeal. This was granted. For the sake of completeness I include such condonation in the order

which I now make.

It is ordered:

(5) Appellant' s application for the late filing of its notice of appeal is granted. Appellant must pay the costs occasioned by this application.

(6) The appeal is allowed with costs and the order of the Court a quo is altered to read:

"(a) The order for the attachment of the MV "Vallabhbhai Patel" granted on 9 September 1990 is discharged.

(b) The applicant (Evdomon Corporation) is ordered to return forthwith to the attorneys of the intervening party (The Shipping Corporation of India Ltd) the original of the P & I club letter of security furnished in respect of the MV "Vallabhbhai Patel"

and dated 11 September 1990.

(c) The applicant is ordered to pay the costs of the intervening party's intervention."

MM CORBETT

BOTHA JA)
MILNE JA)
GOLDSTONE JA) CONCUR
VAN DEN HEEVER JA)