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RESERVED

Court No. - 37

Case :- WRIT - C No. - 33100 of 2019

Petitioner :- Rakesh Mahajan
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Rohan Gupta, Kali Azad
Counsel for Respondent :- C.S.C., Kaushalendra Nath Singh

Connected with

Case :- WRIT - C No. - 32727 of 2019

Petitioner :- M/S Nirala Buildcon Private Limited And Another
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Gagan Mehta,Rahul Agarwal,Sri. Ravi Kant (Sr. Adv.)
Counsel for Respondent :- C.S.C.,Kaushalendra Nath Singh

Hon'ble Abhinava Upadhya,J.
Hon'ble Pankaj Bhatia,J.

(Delivered by Hon'ble Pankaj Bhatia,J.)

Heard Sri Rohan Gupta, learned counsel for the petitioner in Writ Petition No. 33100 of 2019 and Shri Gagan Mehta learned counsel for the Petitioners in Writ Petition No. 32727 of 2019, learned Standing Counsel for the State-respondent and Sri Kaushalendra Nath Singh, learned counsel, on behalf of Noida Authority.

The above two petitions are filed challenging same recovery certificate and on similar grounds and as such are being decided by this common judgment

The Petition No. 33100 of 2019 has been filed challenging the acts of the respondent authorities in trying to recover the amounts in default against PAN Realtors Pvt. Limited from the petitioner being a Director in the Company known as Nirala Developers Pvt. Limited which is a shareholder in Pan Realtors Pvt Ltd.

The Petition No. 32727 of 2019 has been filed challenging the acts of

the respondent authorities in trying to recover the amounts in default against PAN Realtors Pvt. Limited from the petitioner company being a sister concern of the Company known as Nirala Developers Pvt. Limited which is a shareholder in Pan Realtors Pvt Ltd.

The brief facts leading to the filing of the present petitions are as under:

The respondent no. 2, New Okhla Industrial Development Authority (hereinafter referred to 'Authority') floated a Scheme of allotment of plots for Group Housing at Noida for interested developers. In pursuance of the said Scheme/announcement made by respondent-Authority, one Consortium of Companies in the name of style of Pan Ventures filed an application showing interest in allotment of the land for Group Housing at Noida. In pursuance of the said application, a letter of allotment dated 21.7.2009 was issued by the respondent no. 2-Authority proposing to allot Group Housing Plot No. GH-01, Sector 70, Noida under the Group Housing Scheme GH2009(ii). The said allotment letter is on record as Annexure-1 and was issued in the name of Consortium known as PAN Venture.

A perusal of the allotment letter dated 21.7.2009 shows that the said allotment letter was issued to PAN Venture, a Consortium comprising of Patel Engineering Limited (leading member), Advance Construction Company (relevant member), Nirala Developers Pvt. Limited (relevant members) at their office situate at H-13, First Floor, Main Market, Vijay Chowk, Lakshmi Nagar, Delhi.

The said allotment letter envisaged the allotment of a plot for Group Housing Rights and manner of payment specified in the letter of allotment itself. Peculiar feature of the said allotment letter as under:

> *"You are also requested to form the SPC duly registered in ROC and also submit the Memorandum of Article of Association of SPC, List of Directors and Shareholders duly certified by CA and Board of director's Resolution of Constituted Special Purpose Company."*

It was further specified that the Special Purpose Company to be created would be comprised of following Company:

S. No.	**Name of Member**	**Share holding**	**Status**
1	Patel Engineering Ltd.	51%	Lead Member
2	Advance Construction Co. Pvt. Ltd.	24%	Relevant Member
3	Nirala Developers Pvt. Ltd.	25%	Relevant Member

It was further provided that in the event of default in payment the allotment offer would be considered as cancelled and the registration money shall be forfeited and no interest shall be paid to the proposed allottee.

It was further specified that the proposed allottee shall issue an indemnity bond indemnifying the Authority against all disputes arising out of non-completion of project, quality of construction and any dispute arising out of allotment/lease to the final purchaser. The other conditions relevant for the purposes of the present case, as contained in the allotment letter, were as under:

> *"In case the Lessee does not construct building within the time provided including extension granted, if any, for above, the allotment/lease deed as the case may be, shall be liable to be cancelled. Leasee shall lose all rights to the allotted land and buildings appurtenant thereto.*
>
> *The Authority's right to the recovery of the unearned increase and the preemptive right to purchase the property as mentioned herein before shall apply equally to involuntary sale or transfer, be it bid or through execution of decree of insolvency/court.*
>
> *The Lessee will not make, any alteration of additions to the said building or other erections for the time being on the demised premises, erect or permit to erect any new building on the demised premises without the prior written consent of the Lessor and in case of any deviation from such terms of plan, shall immediately upon receipt of notice from the Lessor requiring him to do so, correct such deviation as aforesaid.*
>
> *If the Lessee fails to correct such deviation within a*

specified period of time after the receipt of such notice, then it will be lawful for the Lessor to cause such deviation to be corrected at the expense of Lessee who hereby agrees to reimburse by paying to the lessor such amounts as may be fixed in that behalf.

In case of non-compliance of terms and directions of Authority, the Authority shall have the right to impose such penalty as the Chief Executive Officer may consider just and expedient."

Cancellation of lease deed

"In addition to the other specific clauses relating to cancellation, the Authority/Lessor, as the case may be, will be free to exercise its right of cancellation of lease/allotment in the case of:

1. Allotment being obtained through misrepresentation/suppression of material facts, mis-statement and/or fraud.

2. Any violation of directions issued or rules and regulation framed by any Authority or by any other statutory body.

3. Default on the part of the Allottee/allottee for breach/violation of terms and conditions of registration/allotment/lease and/or non-deposit of allotment amount.

4. If at the same time of cancellation, the plot is occupied by the Lessee thereon, the amount equivalent to 25% of the total premium of the plot shall be forfeited and possession of the plot will be resumed by the Authority with structure thereon, if any, and the Lessee will have no right to claim compensation thereof. The balance, if any shall be refunded without any interest. The forfeited amount shall not exceed the deposited amount with the Authority and no separate notice shall be given in this regard.

5. If the allotment is cancelled on the ground mentioned in para S.1 above, the entire amount deposited by the Lessee, till the date of cancellation shall be forfeited by the Authority and no claim whatsoever shall be entertained in this regard."

Other Clauses

"The Authority/Lessor reserves the right to make such additions/alternations or modifications in the terms and conditions of allotment/lease deed from time to time, as may be considered just and expedient.

Any dispute between the Authority and Lessee/Sub-Lessee

> *shall be subject to the territorial jurisdiction of the Civil Courts having jurisdiction over District Gautam Budh Nagar or the Courts designated by the Hon'ble High Court of Judicature at Allahabad.*
>
> *The Lease agreement/allotment will be governed by the provisions of the U.P. Industrial Area Development Act, 1976 (U.P. Act No. 6 of 1976) and by the rules and/or regulations made or directions issued, under this act."*

In terms of the said allotment letter, a Company was incorporated in the name and style of 'PAN Realtors Pvt. Limited' on 26.8.2009, as a Special Purpose Company. The first Directors in the said Company i.e. PAN Realtors Pvt. Limited were Shri Danish Mohd. Ali Merchant, Shri Bhimsen Prabhudayal Batra, Shri Shitul Dhirajlal Patel, Sri Suresh Kumar Garg and Sri Anil Kumar Sharma.

In terms of the allotment letter and on incorporation of the Special Purpose Company, a lease deed was executed on 12.10.2009 in between New Okhla Industrial Development Authority and PAN Realtors Pvt. Limited in respect of Plot No. GH-01, Sector-70, Noida for a total consideration of Rs. 155,06,27,787/-. The said lease deed detailed the entire installment plan for payment of the consideration.

A perusal of the lease deed filed on record as Annexure-3 reveals that the lease was to abide by the regulations bye-laws, direction and guidelines of the lessor, framed under Sections 8, 9 and 10 or any other provision of U.P. Industrial Area Development Act, 1976. It further provides:

> *"In case of non-compliance of terms and directions of Lessor, the Lessor shall have the right to impose such penalty as the Chief Executive Officer may consider just and expedient."*

The lease deed also provides for the eventuality in which the lease deed should be cancelled and are as under:

> **Cancellation of lease deed**
>
> *"In addition to the other specific clauses relating to cancellation, the Lessor, as the case may be, will be free to exercise its right of cancellation of lease in the case of:-*

1. Allotment being obtained through misrepresentation/suppression of materials facts, mis-statement and for fraud.

2. Any violation of directions issued or rules and regulation framed by Lessor or by any other statutory body.

3. Default on the part of the lessee for breach/violation of terms and conditions of registration/allotment/lease and/or non-deposit of allotment amount.

4. If at the same time of cancellation, the plot is occupied by the Lessee thereon, the amount equivalent to 25% of the total premium of the plot shall be fortified and possession of the plot will be resumed by the Lessor with structure thereon, if any, and, the lessee will have no right to claim compensation thereof. The balance, if any shall be refunded without any interest. The forfeited amount shall not exceed the deposited amount with the Lessor no separate notice shall be given in this regard.

5. If the allotment is cancelled on the ground mentioned in sub-clause 1 above, then the entire amount deposited by the lessee, till the date of cancellation shall be forfeited by the Lessor and no claim whatsoever shall be entertained in this regard;.

In all cases of cancellation a proper show cause notice to the lessee will be sent by the lessor."

It has been submitted by learned counsel for the petitioner that subsequently the share holding pattern was mutually shuffled and Nirala Developers Pvt. Limited became a minority shareholder, subsequently, a few of the Directors resigned from the Company, a chart showing change of shareholding pattern of PAN Realtors Pvt. Limited over the years as under:

Company Name	**2015**	**2016**	**2917**	**2018**
Patel Engineering Ltd.	36%	38%	37.57%	37.57%
Advance Cont. Co.	39%	37%	37.43%	37.43%
Nirala Developers Pvt. Ltd.	25%	25%	25%	25%

It is also stated that on 31.3.2007 the Directors of PAN Realtors Pvt. Limited were Shri Pravin Arjunbhai Patel and Sri Dhirajlal Nathalal Patel and no Director of Nirala Developers Pvt. Limited were on board.

On 28.9.2019, a recovery certificate dated 12.9.2019 was affixed on

the rented premises of the petitioner Rakesh Mahajan i.e. House No. H-121, Sector 63, Noida, Uttar Pradesh, a copy whereof has been filed as Annexure-9 to the Writ Petition No. 33100/2019.

A perusal of the recovery certificate shows that the same was issued in the name of “PAN Realtors Pvt. Limited, shareholder, Rakesh Mahajan".

The petitioner Rakesh Mahajan claims that on coming to know of the said recovery certificate petitioner moved a detailed representation on 4.10.2019 before the respondents no. 2, 3 and 4 seeking withdrawal of the recovery certificate as against the petitioner, however, nothing was done and no orders have been passed on the said representation.

The petitioner claims that in terms of the recovery certificate the respondents no. 3 and 4 are threatening to adopt coercive measures against the petitioner for the alleged dues of PAN Realtors Pvt. Limited and thus approached this Court by filing the present petition seeking the following reliefs:

> *“(i) To issue a suitable writ, order or direction nature of certiorari quashing the impugned recovery certificate dated 12.9.2019 (served on the petitioner on 28.9.2019) (Anneure-7) issued by the Tehsildar Dadri, Gautam Budh Nagar.*
>
> *(ii) To issue a suitable writ, order or direction nature of mandamus restraining the respondents no. 3 and 4 from taking any coercive action against the petitioner in pursuance of recovery certificate dated 12.9.2019 (Annexure-7).”*

Similarly the said Recovery certificate was also pasted at the Leased Registered office of Nirala Buildcon Pvt. Ltd. at H-121, sector 63, Noida.

The said Nirala Buildcon Pvt. Limited have filed Petition No 32727 of 2019 for following reliefs;

> *“(i) To issue appropriate writ, order or direction nature of certiorari quashing the Recovery/Demand Notice dated 12.9.2019 (Annex-2) issued by Tehsildar, Dadari, District*

Gautam Budh Nagar."

"(ii) To issue appropriate writ, order or direction nature of certiorari directing the respondents authorities not to seal the premises of M/s Nirala Buildcon Private Limited, Office-H-121, Sector-63, Noida".

Sri Rohan Gupta and Shri Gagan Mehta, learned counsels appearing for the petitioners, submit as under:

The dues of the Company PAN Realtors Pvt. Limited cannot be recovered from the petitioner as the petitioners are neither a shareholders nor stakeholders in the Company PAN Realtors Pvt. Limited.

No recovery can be initiated against the petitioners for the dues of PAN Realtors Pvt. Limited as the petitioner Rakesh mahajan is only a minority shareholder in the Company Nirala Developers Private Limited which in turn is a minority shareholder of PAN Realtors Pvt. Limited. He submits that PAN Realtors Pvt. Limited is a separate and distinct entity in the eyes of law, distinct from its shareholders and it is well settled that the amounts due against a Company cannot be recovered against its shareholders/Directors and in the present case, the petitioner being neither a shareholder nor a Director of PAN Realtors Pvt. Limited cannot be proceeded against for the recovery of alleged dues against the PAN Realtors Pvt. Limited.

No notice/opportunity was accorded to the petitioner in his personal capacity prior to initiating the recovery proceedings against the petitioner in his personal capacity and as such on that count also the steps being taken against the petitioner are wholly arbitrary and illegal.

Counsel appearing for Nirala Buildcon Pvt Lts adds to the submissions and argues that Nirala Buildcon is neither a share holder nor a member of Pan Realtors Private Limited and is a seperate and distinct legal entity even from Nirala Developers Pvt. Limited as such cannot be proceeded against.

Sri Kaushalendra Nath Singh, learned counsel appearing on behalf

of Noida Authority has filed a counter affidavit bringing on record the fact that the Noida Authority had executed a lease deed in favour of PAN Realtors Pvt. Limited. He further states that in terms of the lease deed an amount of Rs. 15,50,62,778.78 being 10% of the total amounts was paid by the Special Purpose Company PAN Realtors Pvt. Limited at the time of execution of the lease deed and the remaining amount was to be paid in installments along with interest at the rate of 11% per annum, compounded half yearly, with a further provision for default penal interest and as PAN Realtors Pvt. Limited defaulted in making the payments of the installments on time, several letters were issued, which have been collectively filed and marked as (CA1) to the counter affidavit.

A perusal of the said show cause notices (CA-1)reveals that all the notices were sent to PAN Realtors Pvt. Limited, S-406 (LG), Greater Kailash-II, New Delhi. None of the said notices filed as CA-1 have been sent to both the petitioners.

Sri Kaushalendra Nath Singh, learned counsel for Noida Authority, further states that as the amounts were not paid by PAN Realtors Pvt. Limited, a letter was written to the Collector, Gautam Budh Nagar for collecting the amounts as arrears of land revenue from the shareholders and Directors of the lessee Company PAN Realtors Pvt. Limited. The said letter dated 26.8.2009 is on record as CA-2, along with the said letter details of the Directors of the lessee Company were disclosed which included the names of the Directors of PAN Realtors Pvt. Limited, Directors of Patel Engineering Pvt. Limited, Directors of Nirala Developers Pvt. Limited (including the name of the petitioner) and the names of the Directors of Advance Constructions Limited.The said letter made no mention of Nirala Buildcon Pvt. Ltd.

Sri Kaushalendra Nath Singh also submits that all the companies, who are the shareholders, have the entire share holding of PAN Realtors Pvt. Limited and as such all are liable for payment of dues. He further tried to justify as to how recovery was being processed against the

petitioner Rakesh Mahajan and Nirala Buildcon Pvt. Limited, a sister concern of Nirala Developers Pvt. Limited.Justifying the steps being taken for recovery against Nirala Buildcon, Mr. Singh argued that the two companies are one and the same and have similar shareholding and are in control of Mr Rakesh Mahajan and his family.

Counter affidavit filed also states that the shareholding of Nirala Developers Pvt. Limited and Nirala Buildcon Pvt. Limited show that they are basically run/managed by similar set of people including the petitioner Rakesh Mahajan. He further relied upon the orders of the Hon'ble Supreme Court in the case of **Dr. Subroto Roy vs. Union Of India & Ors**, **2014 (8) SCC 470** and in case of **Amarpali** and states that in view of the said amounts can be recovered from the shareholders and Directors. Thus, in sum and substance, the submission of Kaushalendra Nath Singh is that the petitioner Rakesh mahajan being a Director in one of the shareholding Company i.e. Nirala Developers Private Limtied is liable to pay the outstanding dues of the Company PAN Developers (Pvt.) Ltd and Nirala Buildcon being a sister concern of Nirala developers is also liable for payment of dues of Pan Realtors Pvt. Ltd.

It is also admitted at the bar that the Lease granted to the lessee Pan Realtors has not been determined and further that the Authority had granted part completion certificate on the strength of which the lessee company has sold certain plots and created third party rights.

In view of the submissions made at the bar, what is to be considered is that :

> a) Whether the dues of PAN Realtors Pvt. Limited can be recovered against the petitioner Rakesh Mahajan being a Director of the shareholding company Nirala Developers Private Limited and from Nirala Buildcon being a sister concern of the shareholding company Nirala Developers Private Limited,
>
> And:

b) Whether in the facts of the case corporate veil of Pan Realtors Pvt Ltd and Nirala Developers Pvt Ltd can be pierced to hold the shareholders and sister concern of a share holder liable for the dues of a company.

Both the counsels for the Petitioners have extensively relied upon the following judgements:

1.Gillete India Limited vs. Delhi Development Authority, 260 (2019) DLT 416

2. Balwant Rai Saluja and another vs. Air India Limited and others, (2014) 9 SCC 407

3. Bacha F. Gauzdar vs. Commissioner of Income Tax, Bombay, Air 1855 SC 74

4. Meekin Transmission Ltd. vs. State of Uttar Pradesh, 2008 4 All LJ 789 (DB)

5. The Tata Engineering and Locomotive Co. Ltd. And another vs. State of Bihar and others, AIR 1965 SC 40

6. Arcelormittal India Private Limited vs. Satish Kumar Gupta and others, (2019) 2 SCC 1

7. Vodafone International Holdings B.V vs Union of India (2012) 6 SCC 613

Sri Kaushalendra Nath Singh, learned counsel for the Noida Authority, on the other hand, has relied upon an order of this Court dated 7.8.2019, passed **in Writ C No. 25554 of 2019 (Ashish Gupta vs. State of U.P. and 5 others)** and the judgement of this Court in **Writ Tax No. 1464 of 2005 (Jagbir Singh vs. State of U.P. and others)** to argue that the recovery against the petitioners is justified.

Coming to the judgements cited by the petitioners, the Delhi High Court in the case of **Gillete India Limited vs. Delhi Development Authority** (supra) was called upon to consider the question of demand of

unearned increase and the consequential refund. The petitioner company came into possession of certain lands in terms of the Scheme sanctioned by BIFR and were called upon to pay the dues of a Company which was declared as a sick Company by the Board of Industrial Financial Reconstruction. The Delhi High Court observed as under:

> ***39.*** *It is trite law that an incorporated company is an entity separate from its shareholders. In Bacha F. Guzdar v. Commissioner of Income Tax: AIR 1955 SC 74, the Constitution Bench of the Supreme Court had held that the nature of income in the hands of a company was not the nature of income in the hands of its shareholders. It held that dividends in the hands of the shareholders of a company declared from agricultural income received by that company could not be considered as agricultural income. The said decision rested on the fundamental principle that a company is a separate juristic entity distinct from its shareholders.*
>
> ***40.*** *In the aforementioned case, the Supreme Court referred to the Halsbury‟s Laws of England, Vol. 6 (3rdEdn.), p. 234 and set forth the following passage regarding the attributes of shares:-*
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> > *"A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate."*
>
> ***41.*** *It is well settled that shares of a company are a separate asset wholly distinct from the assets held by the company.*
>
> ***42.*** *In the present case, there was dilution of the share capital of TGC as well as transfer of shares held by the TGC in the petitioner company. The transfer of shares of the petitioner company cannot be construed as transfer of the assets of the petitioner company.*
>
> ***43.*** *In Rustom Cavasjee Cooper vs. Union of India: (1970) 1 SCC 248, the constitution bench of the Supreme Court reiterated the above settled principle in the following words:*
>
> > *"11. A company registered under the Companies Act is a legal person, separate, and distinct from its individual members. Property of the Company is not the property of the shareholders. A*

> *shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the distributed profit. Again a director of a Company is merely its agent for the purpose of management. The holder of a deposit account in a Company is its creditor: he is not the owner of any specific fund lying with the Company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the Company, unless by the action impugned by him, his rights are also infringed."*

> ***44.*** *In a recent decision of the Supreme Court in Vodafone International Holdings B.V. v. Union of India and Anr.: (2012) 6 SCC 613, the Supreme Court rejected the contention that a transfer of shares of an overseas holding company would amount to transfer of assets held by the subsidiary in India. In the said case, the Supreme Court applied the "look at" test to view the transaction relating to transfer of shares by overseas holding companies. The transaction must be viewed as it looks and a dissecting approach is not warranted.*

The next judgment cited by Sri Rohan Gupta is the case of **Balwant Rai Saluja and another vs. Air India Limited and others (supra)**, wherein the Apex Court was considering whether the workman engaged in statutory canteens through a Contractor should be treated as employees of the principal establishment. The Supreme Court made the following observations in para nos. 67 to 74 which is as under:

> ***"67.*** *The Companies Act in India and all over the world have statutorily recognized subsidiary company as a separate legal entity. Section 2(47) of the Companies Act, 1956 (for short "the Act, 1956") defines 'subsidiary company' or 'subsidiary', to mean a subsidiary company within the meaning of Section 4 of the Act, 1956. For the purpose of the Act, 1956, a company shall be, subject to the provisions of sub-section (3) of Section 4, of the Act, 1956, deemed to be subsidiary of another. Clause (1) of Section 4 of the Act, 1956 further imposes certain preconditions for a company to be a subsidiary of another. The other such company must exercise control over the composition of the Board of Directors of the subsidiary company, and have a controlling interest of over 50% of the equity shares and voting rights of the given subsidiary company.*

68. *In a concurring judgment by K.S.P. Radhakrishnan, J., in the case of Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613, the following was observed:*

> *"Holding company and subsidiary company ....*
>
> *257. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. ...*
>
> *258. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any Director if it so desires by a resolution in the general [pic]body meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary is allowed decentralized management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries."*

69. *The Vodafone case (supra), further made reference to a decision of the US Supreme Court in United States v. Bestfoods [141 L Ed 2d 43: 524 US 51 (1998)]. In that case, the US Supreme Court explained that as a general principle of corporate law a parent corporation is not liable for the acts of its subsidiary. The US Supreme Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, only if it is shown that the corporal form is misused to accomplish certain wrongful purposes, and further that the parent company is directly a participant in the wrong complained of. Mere ownership, parental control, management, etc. of a subsidiary was held not to be sufficient to pierce the status of their relationship and, to hold parent company liable.*

70. *The doctrine of 'piercing the corporate veil' stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its*

own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. A Salomon & Co Ltd., [1897] AC 22. Lord Halsbury LC (paragraphs 31–33), negating the applicability of this doctrine to the facts of the case, stated that:

> *"...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself ..., whatever may have been the ideas or schemes of those who brought it into existence."*
>
> *Most of the cases subsequent to the Salomon case (supra), attributed the doctrine of piercing the veil to the fact that the company was a 'sham' or a 'façade'. However, there was yet to be any clarity on applicability of the said doctrine.*

71. *In recent times, the law has been crystallized around the six principles formulated by Munby J. in Ben Hashem v. Ali Shayif, [2008] EWHC 2380 (Fam).* ***The six principles, as found at paragraphs 159– 164 of the case are as follows- (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the Court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must be linked to the use of the company structure to avoid or conceal liability; (v) to justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and (vi) the company may be a 'façade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The Court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.***

- *The principles laid down by the Ben Hashem case (supra) have been reiterated by UK Supreme Court by Lord Neuberger in Prest v. Petrodel Resources Limited and others, [2013] UKSC 34, at paragraph 64. Lord Sumption, in the Prest case (supra), finally observed as follows:*

> *"35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The Court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."*

- *The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in Life Insurance Corporation of India v. Escorts Ltd. & Ors., (1986) 1 SCC 264, while discussing the doctrine of corporate veil, held that:*

> *"90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."*

74. *Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done*

> *by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case."*

The next judgement relied upon by Sri Rohan Gupta is the case of **Bacha F. Gauzdar vs. Commissioner of Income Tax, Bombay (supra)**, wherein the Apex Court was called upon to decide the question of exemption under section 4 (3)(viii) of the Income Tax Act *the Constitution Bench of the Supreme Court held that the nature of income in the hands of a company was not the nature of income in the hands of its shareholders. It held that dividends in the hands of the shareholders of a company declared from agricultural income received by that company could not be considered as agricultural income. The said decision rested on the fundamental principle that a company is a separate juristic entity distinct from its shareholders.*

Referring to the leading pronouncement of the Constitution Bench of the Apex court in the case of **Tata Engineering and Locomotive Co. Ltd. And another vs. State of Bihar and others (supra)**. The Apex court following the cherished judgement of **Salomon vs. Salomon & Co., 1897 AC 22** observed held as under:

> ***"24.*** *The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well-established ever since the decision in the case of Salomon v. Salomon & Co., 1897 AC 22 was pronounced in 1897; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the*

application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.

26. *It is unnecessary to refer to the facts in these two cases and the principles enunciated by them, because it is not disputed by the respondents that some exceptions have been recognised to the rule that a corporation or a company has a juristic or legal separate entity. The doctrine of the lifting of the veil has been applied in the words of Palmer in five categories of cases : where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control; and in the law relating to trading with the enemy where the test of control is adopted (1). In some of these cases, judicial decisions have no doubt lifted the veil and considered the substance of the matter.*

27. *Gower has similarly summarised this position with the observation that in a number of important respects, the legislature has rent the veil woven by the Salomon case. Particularly is this so, 'says Gower, in the sphere of taxation and in the steps which have been taken towards the recognition of enterprise-entity rather than corporate-entity. It is significant, however, that according to Gower, the courts have only construed statutes as "cracking open the corporate shell" when compelled to do so by the clear words of the statute; indeed they have gone' out of their way to avoid this construction whenever possible. Thus, at present, the judicial approach in cracking open the corporate shell is somewhat cautious and circumspect. It is only where the legislative provision justifies the adoption of such a*

> *course that the veil has been lifted. In exceptional cases where courts have felt "themselves able to ignore the corporate entity and to treat the individual shareholders as liable for its acts", (2) the same course has been adopted. Summarising his conclusions, Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation."*

The Apex Court very recently in the case of **Arcelormittal India Private Limited vs. Satish Kumar Gupta and others (supra)** while deciding the validity of Section 29-A(c) of the IBC observed as under:

> ***"35.*** *Similarly in Balwant Rai Saluja & Anr. etc. etc. v. Air India Ltd. & Ors., (2014) 9 SCC 407, this Court in following Escorts Ltd. (supra.), held:*
>
> > *"70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. Salomon & Co. Ltd. [1897 AC 22] Lord Halsbury LC, negating the applicability of this doctrine to the facts of the case, stated that: (AC pp. 30 & 31)*
> >
> > *"[a company] must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself … whatever may have been the ideas or schemes of those who brought it into existence."*
> >
> > *Most of the cases subsequent to Salomon case [1897 AC 22], attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "façade". However, there was yet to be any clarity on applicability of the said doctrine.*

71. In recent times, the law has been crystallised around the six principles formulated by Munby, J. in Ben Hashem v. Ali Shayif [Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)]. The six principles, as found at paras 159-64 of the case are as follows:

(i) Ownership and control of a company were not enough to justify piercing the corporate veil;

(ii) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;

(iii) The corporate veil can be pierced only if there is some impropriety;

(iv) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;

(v) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

(vi) The company may be a "façade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

72. The principles laid down by Ben Hashem case [Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)] have been reiterated by the UK Supreme Court by Lord Neuberger in Prest v. Petrodel Resources Ltd. [(2013) 2 AC 415], UKSC at para 64. Lord Sumption, in Prest case [(2013) 2 AC 415], finally observed as follows: (AC p. 488, para 35)

"35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he

deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in LIC v. Escorts Ltd. [(1986) 1 SCC 264], while discussing the doctrine of corporate veil, held that: (SCC pp. 335-36, para 90)

"90. … Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc.""

36. *Similarly in Delhi Development Authority v. Skipper Construction Company (P) Ltd. & Another, (1996) 4 SCC 622, this Court held:*

"24. In Salomon v. Salomon & Co. Ltd. [1897 AC 22] the House of Lords had observed,

"the company is at law a different person altogether from the subscribers …; and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the

manner provided by that Act."

Since then, however, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is "when the corporate personality is being blatantly used as a cloak for fraud or improper conduct". [Gower: Modern Company Law — 4th Edn. (1979) at p. 137.] Pennington (Company Law — 5th Edn. 1985 at p. 53) also states that "where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the court will disregard the corporate veil. A Professor of Law, S. Ottolenghi in his article "From peeping behind the Corporate Veil, to ignoring it completely" says

> *"the concept of 'piercing the veil' in the United States is much more developed than in the UK. The motto, which was laid down by Sanborn, J.and cited since then as the law, is that 'when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons'. The same can be seen in various European jurisdictions."*

Indeed, as far back as 1912, another American Professor L. Maurice Wormser examined the American decisions on the subject in a brilliantly written article "Piercing the veil of corporate entity" [published in (1912) XII Columbia Law Review 496] and summarised their central holding in the following words:

> *"The various classes of cases where the concept of corporate entity should be ignored and the veil drawn aside have now been briefly reviewed. What general rule, if any, can be laid down? The nearest approximation to generalisation which the present state of the authorities would warrant is this: When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."*
>
> *25. In Palmer's Company Law, this topic is discussed in Part II of Vol. I. Several situations*

where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception. It runs:

"The courts have further shown themselves willing to 'lifting the veil' where the device of incorporation is used for some illegal or improper purpose…. Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere 'sham' and made an order for specific performance against both the vendor and the company."

Similar views have been expressed by all the commentators on the Company Law which we do not think necessary to refer to.

26. The law as stated by Palmer and Gower has been approved by this Court in TELCO v. State of Bihar [(1964) 6 SCR 885]. The following passage from the decision is apposite:

> *"27… Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But, it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation."*

27. In DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [(1976) 3 All ER 462] the court of appeal dealt with a group of companies. Lord Denning quoted with approval the statement in Gower's Company Law that

> *"there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group".*

The learned Master of Rolls observed that "this group is virtually the same as a partnership in which all the three companies are partners". He called it a case of

> *"three in one" — and, alternatively, as "one in three".*
>
> > *28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people." (emphasis supplied)*
>
> ***37.*** *It is thus clear that, where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole."*

Now coming to the next judgment of this Court in the case of **Meekin Transmission Ltd. vs. State of Uttar Pradesh and others (supra)**, this Court was considering the notice for recovery sent to the Director of a Company for arrears of trade tax against the Company. This Court considered the entire concept of Companies, the status of the Directors and its shareholders and relying upon the cherished judgement of Salomon vs. Salomon and Co., 1897 AC 22 held as under:

> ***"71****. The cardinal principle which has been laid down in the aforesaid cases and expressly stated and reiterated in Purshottam Das Beriwal (Supra) is as under:*
>
> > *"The cardinal principle of law is that when there is a liability against a company, no recovery can be made from personal assets of its Director, unless it is specifically provided in the Statute or warranted by*

law. It is not brought to brought to our notice that there is any specific provision in the U.P. Sales Tax Act, whereunder recovery of the liability outstanding against a company can be made against the personal assets of its Director."

72. *The legal position as discerned from the above is that in a case where the corporate personality has been obtained by certain individuals as a cloak or a mask to prevent tax liability or to divert the public funds or to defraud public at large or for some illegal purposes etc., to find out as to who are those beneficiaries who have proceeded to prevent such liability or to achieve an impermissible objective by taking recourse to corporate personality, the veil of the corporate personality shall be lifted so that those persons who are so identified are made responsible. However, this doctrine is not to be applied as a matter of course, in a routine manner and as a day to day affair so as to recover the dues of a company, whenever and for whatever reason they are unrecoverable, from the personal assets of the Directors. If such a course is permitted, it would lead to not only disastrous results but would also destroy completely the concept of juristic personality conferred by various statutes like the Act in the present case and would make several enactments and their effect to be redundant and illusory. Moreover, the shallowness of arguments in favour of making Directors personally responsible can be considered from another angle. In every case the Director may not be a shareholder of the company. He may have been appointed as Director for taking advantage of his expertise in his field of vocation or profession, and for achieving goals for which the company is incorporated. Such Director is paid remuneration, if any, for the services he rendered. Otherwise he is not at all a beneficiary of the business or trade etc., as the case may be, in which the company is engaged. Such benefit would be available only to the shareholders as they would only be entitled to share the profits earned by the company in the form of dividend as decided by the Board of Directors. In such case such Director, though is an agent of the company but he is more in the nature of an officer of the company and not in the capacity of limited ownership by way of shareholding. Such a Director, in our view, unless is guilty of misfeasance, fraud or acting ultra vires, we are not able to understand as to how he can be made responsible personally for the dues of the company even if we apply the doctrine of piercing the veil. If in such a case the veil is to be lifted, the persons behind the veil, at the best, would be the promoters of the company or those who have sought to obtain corporate personality as a sham or bogus*

transaction. Similarly, in some of the companies the financial institutions, who advances funds as loan etc., nominate their Director/s to keep some kind of monitoring over the functions of the company so that it may not go on liquidation on account of negligent and careless function of the Board of Directors. Such Directors also, in our view, cannot be included in the category of the persons who would be responsible personally for the dues of the company.

73. *In order to find out as to who are the persons responsible personally when the veil is lifted it would be wholly irrelevant as to whether such person is a Director or a promoter shareholder or otherwise of the company since the purpose of lifting the veil is to find out the person/s who is operating behind the corporate personality for his personal gain. Such person may be individual or group of persons belonging to a family or relatives or otherwise a small group collected with a common objective of achieving some illegal, immoral or improper purpose etc. So long as no investigation is made into various aspects, we are not able to understand as to how and what manner a Director of a company can straightway be proceeded personally for recovering dues of a company unless it is so provided by some provision of the statute.*

74. *Recently considering a similar controversy with reference to the provisions of Payment of Wages Act, the Apex Court in P.C. Agarwala Vs. Payment of Wages Inspector, M.P. and others, AIR 2006 SC 3576 has held as under:*

> *"17. It is trite law that liability of a person is dependent upon the Statutory prescriptions governing such liability. Sections 5 and 291 of the Companies Act, 1956 (in short 'Companies Act') are to be noted in this regard. Section 5 refers to officer who is in default. Section 291 on the other hand relates to general powers of the Board of Directors. In order to attract the liability under the Act, it has to be seen as to on whom the Act fixes the liability. Section 3 speaks of the responsibility for payment of wages. It speaks of the "employer" which expression is defined in Section 2(ia). Section 15 refers to the claims arising out of deductions from wages or delaying payment of wages and penalty for malicious or vexatious claims. Statutorily no liability has been fixed on the Directors.*

75. *Further in para 24 of the judgement also the Court held as under:*

"Therefore, on a plain reading of the language of the governing statute, it cannot be held that the Directors had any personal liability....."

76. *In the said judgement with respect to applicability of doctrine of lifting of veil, after referring to the learned authors like Palmer and Gower, the Court has clearly said that at present judicial approach in cracking upon the corporate shell is somewhat cautious and circumspect. It is only when the statute justifies adoption of such a course or in exceptional cases, where Courts have felt themselves satisfied to ignore the corporate entity and to treat the individual shareholder(s) liable for its acts, such a course has been adopted. Broadly, where fraud is intended to be prevented, or trading with enemy is sought to be defeated, the veil of corporation is lifted by judicial decision and the shareholders are held to be "persons who actually work for corporation".*

77. *This judgement also goes to show that normally when the veil is lifted it is the promoters, shareholders or the shareholders who are found to be working behind the veil, responsible, and the Directors as such would not be taking to be responsible for meeting the liabilities of the company unless the statute so provides or it is found that the act of the Directors is ultra vires resulting in extinction of assets and funds of company making recovery from the company impossible.*

78. *In brief, we can categories the cases in which the corporate personality of the incorporate body can be ignored and it would be better to refer the renowned author Palmer's Company Law 23rd Edition where he has categorised the cases, in which the principle of separate entity of the Company has been discarded by adopting the doctrine of lifting the veil, in 15 categories and some of which are as under:*

"(1) where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies; (2) where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; (3) in certain matters pertaining to the law of taxes; death duty and stamps, particularly where the question of the "controlling interest" is in issue; (4) in the law relating to exchange control; (5) in the law relating to trading with the enemy where the test of control is adopted; (6) where a holding company or a subsidiary company were not working in an

autonomous manner and thus were treated as forming an economic unit; (7) where the new company was formed by the members of an existing company holding 9/10 shares in the existing company and only with an object of expropriating the shares of minority share holders of the existing company; (8) where the device of incorporation is used for some illegal or improper purpose; (9) where several companies promoted by the same controlling share holders for defeating or misusing the loss pertaining to labour welfare; (10) where the facts or equitable considerations justify an exemption from the strict rule in Salomon Vs. Salomon and Co. Ltd."

79. *Another learned author L.C.B. Gower in his "Principles of Modern Company Law" 4th Edition, has also given such illustration where the veil of a corporate body has been pierced and has enumerated the same as fraudulent trading, misdescription of company, and taxation mattes where the statute require etc.*

80. *In the nutshell, the doctrine of lifting of veil or piercing the veil is now a well established principle which has been applied from time to time by the Courts in India also. There is no doubt about the proposition that whenever the circumstances so warrant, the corporate veil of the company can be lifted to look into the fact as to whose face is behind the corporate veil who is trying to play fraud or taking advantage of the corporate personality for immoral, illegal or other purpose which are against public policy. Such lifting of veil is also has to implemented whenever a statute so provided. However, it is not a matter of routine affair. It needs a detailed investigation into the facts and affairs of the company to find out as to whether the veil of the corporate personality needs to be lifted in a particular case. After lifting the veil, in a case where it is so required, it is not always that the Directors would automatically be responsible but again it is a matter of investigation as to who is/are the person/s responsible and liable who had occasioned for application of said doctrine.*

Initial burden for application of the doctrine of "Piercing of Veil":

81. *Whether in respect to tax dues or other public revenue or in other cases, if one has to discard the corporate personality, then the initial burden would lie upon it to place on record relevant material and facts to justify invocation of doctrine of lifting of veil and to plead that the corporate shell be not made a ground of defence. A personality conferred by the statute cannot be overlooked*

> *or ignored lightly and in a routine manner or on a mere asking. In fact whenever the veil is to be pierced, it would mean that somebody, individual or group of individuals, have obtained the shell of corporate personality as a pretext or mask to cover up a transaction or intention of those individual/individuals is neither legal nor otherwise in public interest. In effect the attempt of those individuals have to be shown akin to fraud or misrepresentation. The legal personality of the corporate body thus can be ignored in such cases since it is well settled that fraud vitiates everything and, therefore, the benefit of legal personality obtained by someone for purposes other than those which are lawful or even if lawful but not otherwise permissible, the corporate personality being the result of such fraudulent activity would have to be discarded but not otherwise. These are the things based on positive factual material and cannot be presumed in the absence of proper pleadings and material to be placed by the person who is pleading to invoke the doctrine of piercing the veil and to ignore the juristic personality of the corporate body. Once relevant material is made available by the authority or person concerned, thereafter it would be the responsibility of the other side to place material to meet the aforesaid facts but the mere fact that the company has failed to pay the Government dues or pubic revenue, that by itself would not invite the doctrine of piercing the veil and is not sufficient to ignore the statutory corporate personality conferred upon a company and make its Directors or shareholders responsible personally."*

In the next judgment cited at the Bar the Apex Court in the case of **Vodafone International Holdings B.V vs Union of India (2012) 6 SCC 613** extensively dealt with the liability of the parent company for the dues of its holding subsidiary company held:

> ***"78.*** *Holding structures are recognised in corporate as well as tax laws. Special purpose vehicles (SPVs) and holding companies have a place in legal structures in India, be it in company law, the Takeover Code under SEBI [**Ed.**: Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011] or even under the income tax law.*
>
> ***79.*** *When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the*

basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. However, this has to be done at the threshold.

80. *In this connection, we may reiterate the "look at" principle enunciated in Ramsay [1982 AC 300 : (1981) 2 WLR 449 : (1981) 1 All ER 865 (HL)] in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature [see Craven v.White (Stephen) [1989 AC 398 : (1988) 3 WLR 423 : (1988) 3 All ER 495 (HL)] which further observed that genuine strategic tax planning has not been abandoned by any decision of the English Courts till date].*

81. *Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the holding structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit.*

82. *In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device."*

Now reverting to the judgement cited by Sri Kaushalendra Nath Singh, the interim order dated 07.08.2019 passed in Writ - C No. 25554 of 2019 (Ashish Gupta vs. State of U.P. and 5 others), this Court while

considering the case of the petitioner proceeded to pass an interim order with the following conditions:

> *"List for admission/final disposal for adjudication of the above question of law raised immediately after one month.*
>
> *In the meantime, the petitioner who is under civil imprisonment shall be released forthwith with the following conditions-:*
>
> *(i) that on release from civil imprisonment, he shall not move out of the country without the leave of the Court;*
>
> *(ii) that he will not deal with his shares which he is having in the company Cloud Nine Project Pvt. Ltd. And any company that is a member of the consortium;*
>
> *(iii) his two residential houses situate in Meerut and the land which he possesses in Panipat (particulars of which shall be supplied by the counsel for the petitioner) shall be under attachment and;*
>
> *(iv) he is restrained with dealing with those properties in any manner and would not transfer them.*
>
> *The Sub-Registrar, Meerut and Panipat are directed not to register any deed of transfer of any property in respect of the above referred properties of the petitioner.*
>
> *The Sub-Registrar, Gautam Buddh Nagar/Ghaziabad is directed not to register any deed of transfer of any flat constructed by the respondent No.6 company on the property leased out by the NOIDA in connection with which the present dues are being claimed.*
>
> *A copy of this order may be sent to all the above Sub-Registrars with the request to ensure strict compliance of the same."*

We are afraid that no question of law has been considered or decided in the said interim order. It is well settled that an interim order cannot be a precedent as no question of law or fact is decided at the interim stage. Further, a copy of the order itself reveals that the Court had listed the matter for adjudication on the question of law as raised by the parties.

Coming to the second judgement dated 20.9.2017 in case of **Jagbir Singh vs. State of U.P. and others (supra)**, this Court has refused to interfere with the recovery against the Director as the Court was of the view that the Directors of the Company had persuaded the BIFR for

permission with fresh infusion of funds and the BIFR was used as subterfuge to avoid the payment of taxes.

We are afraid that the said judgement also has no applicability to the facts of the present case for two reasons: one that the said case related to a Director of a Company which is not the present case and secondly the matter arose out of proceedings from BIFR and related to default in payment of taxes which again is not a case in the present case.

Thus, the legal position that can broadly culled out from the above judgments are:

> a) That a Company is a separate and distinct entity from its shareholders and directors.
>
> b) Corporate veil can be pierced
>
> (i) only in exceptional circumstances by the courts with caution and circumspection and in a restrictive manner.
>
> (ii) For lifting of corporate veil it is essential that the case falls within the exceptions as elaborated and crstalised by Munby J. in Ben Hashem v Ali Shayif,[2008] EWHC 2380 and approved by the Apex Court in Balwant Rai Saluja (supra) and Arcelormittal India (supra)
>
> (iii) Where the statute itself permits lifting of veil.

The facts of the present case demonstrate that the petitioner Rakesh Mahajan was never a Director of PAN Realtors Pvt. Limited and is not even a shareholder of PAN Realtors Pvt. Limited in his personal capacity. Further, there is nothing on record to even suggest that PAN Realtors Pvt. Limited was incorporated as a 'sham' or a 'facade' for execution of the lease in question, in fact the Company was incorporated at the insistence of Noida Authority which is clear from the allotment letter. The lease deed executed in between Noida and PAN Realtors Pvt. Limited still subsists and has not even been determined.

Further, there is no material to suggest that the petitioners herein Rakesh Mahajan or Nirala Buildcon exercised pervasive control over Pan Developers (Pvt.) Limited. The statute in question being U.P. Urban Planning Development Act, 1973 does not have any provision for lifting

the corporate veil. The petitioners are not even a signatory to the lease deed in question and thus no case is made out for piercing the veil for recovery of alleged dues of PAN Realtors Pvt. Limited from the petitioners.

It is well settled that any action of the “State” or “an instrumentality of State” has to be in conformity with law and has to satisfy the twin tests of having followed “substantive due process of law” and “procedural due process of law” and failure on any of the twin tests renders the action violative of Article 14 of the Constitution of India.

We have no hesitation in holding that the actions of the authority against both the petitioner falls miserably short of the twin tests and are thus violative of Article 14 of the Constitution of India.

Accordingly, the Recovery Certificate dated 26.8.2019, issued by the respondent no. 2 and the Citation dated 12.9.2019, issued by the respondent no. 4, insofar it relates to the petitioners, are hereby quashed.

We clarify that the question of non-grant of opportunity of hearing prior to issuance of a recovery certificate has not been gone into in the present case as we are satisfied that the recovery against the petitioners for the alleged dues of PAN Realtors Pvt. Limited, is wholly illegal.

We clarify that the present case is confined only in respect of Petitioners herein and the Authority is at liberty to take steps for recovery of its dues against the persons liable to pay them.

The writ petitions are allowed.

Order Date :- 04.12.2019
Puspendra

(Pankaj Bhatia,J.) (Abhinava Upadhya,J.)