

*Corporate veil can be pierced by the authorities under a statute only where the statute itself permits lifting of corporate veil for realisation of dues thereunder.*

## **[Case Brief] Assistant Provident Fund Commissioner Versus Vijaya Bank And Ors**

**Case name:** Assistant Provident Fund Commissioner. Versus Vijaya Bank And Ors

**Case number:** W.P.(C) No.4970/2016

**Court:** THE HIGH COURT OF DELHI

**Bench:** RAJIV SAHAI ENDLAW, J

**Decided on:** 26th May, 2016

**Relevant Act/Sections:** The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002

### ➤ **BRIEF FACTS AND PROCEDURAL HISTORY:**

1. The petition impugns the E-Auction Sale Notice dated 20th April, 2016 of the respondent no.1 Vijaya Bank (Bank), in pursuance to the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, of the two properties at Noida of the respondent no.3 M/s. G.K. Products Pvt. Ltd. and respondent no.4 M/s. Well Computer Exim Pvt. Ltd. (Companies) who had stood as guarantors for the financial assistance granted by the respondent no.1 Bank to the respondent no.2 Creative Home Fashions Pvt. Ltd. (Company). The respondents no.5 to 9 are stated to be Directors in each of the respondents no.2 to 4 Companies.
2. It is *inter alia* the claim of the petitioner Assistant Provident Fund Commissioner that the petitioner has a charge over the properties being auctioned on account of Provident Fund (PF)

dues owed by the respondent no.2 Company. 5. The respondent no.1 Bank had attempted sale of the aforesaid properties as far back as in the year 2011 and which sale has been held up since then for the reason of the said objection of the petitioner. 6. Earlier, the petitioner passed orders dated 20th January, 2012 prohibiting the respondent no.1 Bank from auctioning the said properties, compelling the respondent no.1 Bank to file W.P.(C) No.1726/2012 in this Court impugning the said orders of the petitioner.

3. The said writ petition remained pending in this Court till 30th July, 2014 when it was allowed, reasoning that the respondents no.3&4 Companies are separate juridical entities than the respondent no.2 Company which is stated to owe PF dues to the petitioner and that the assets of the respondents no.3&4 Companies cannot be proceeded against for recovery of PF dues of the respondent no.2 Company.
4. The contention of the petitioner then also, of the respondents no.2 to 4 Companies being one and the same entity, was rejected and it was held that the three were separate Companies incorporated under the Companies Act, 1956 and that the petitioner had not commenced any proceeding where this issue had been adjudicated. It was further noted that no proceedings even had been initiated by the petitioner against the respondents no.3&4 Companies and the petitioner could not assume that the three were the same. It was further noted that under Section 8F(3) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (PF Act) though the petitioner was authorised to recover its dues from third parties which owed the said dues to the entity owing PF to the petitioner but the same had also not been done and it had not been established that the respondents no.3&4 Companies owed any money to the respondent no.2 Company which was stated to be owing PF dues to the petitioner.
5. The petitioner preferred LPA No.23/2016 against the aforesaid judgment allowing the writ petition of the respondent no.1 Bank but which LPA was dismissed vide order dated 13th January, 2016 affirming the reasoning given by the learned Single Judge.
6. Taking a cue from the aforesaid reasoning, the Recovery Officer of the petitioner claims to have issued a notice dated 22nd March, 2016 to the respondent no.1 Bank and to the respondents no.2 to 9 to show cause why the corporate veil should not be lifted and to have vide a very well written and reasoned order dated 17th May, 2016, after considering the reply of the respondent no.1 Bank to the show cause notice (none of the other notices responded) found a) all the three respondents 2 to 4 Companies to be operating and carrying on business from the said properties; b) the respondents no.5 to 9 to be Directors in all the three respondents no.2 to 4 Companies and thus having the same management; c) the motive of

respondents no.2 to 4 Companies being to defraud the revenue under social legislation; d) CBI also was investigating all three companies and their Directors; e) both, respondents no.2 & 4 Companies were making PF compliance through one code till caught; f) that thus all the three respondents no.2 to 4 Companies were hand in glove with each other; and accordingly lifted the corporate veil and held the respondents no.5 to 9 directors of the respondent no.2 Company to be the owners of the properties aforesaid at Noida being auctioned by the respondent no.1 Bank and attached the said properties for the recovery of PF dues of Rs.2,96,87,014/- and penal damages / interest to the tune of Rs.3,44,77,868/- owed by the respondent no.2 company.

➤ **ISSUE BEFORE THE COURT:**

What is the power of the petitioner or its Recovery Officer to lift the corporate veil?

➤ **RATIO OF THE COURT**

1. Supreme Court in Rajasthan Prem Krishan Goods Transport Co. Vs. Regional Provident Fund Commissioner, New Delhi (1996) 9 SCC 454 to have upheld the finding recorded by the Regional Provident Fund Commissioner of clubbing all the employees of two business entities and treating two to be one entity and thereby making the provisions of the PF Act applicable, without however going into the question; however neither of the two entities was a „company“ within the meaning of the Companies Act and the question of corporate veil did not arise;
2. Supreme Court to have in Calcutta Chromotype Ltd. Vs. Collector of Central Excise, Calcutta (1998) 3 SCC 681 held that there is no bar on the authorities to lift the veil of a company to see it was not wearing that mask for not being treated as a related person when, in fact, it was one and the same person; however again, what was for adjudication was the applicability of Section 4(1)(a) of the Central Excise and Salt Act, 1944 dealing with sales „not to a related person“
3. M/s. Gujarat Sweet Mart Vs. Regional Director, Employees State Insurance MANU/MH/0378/2014 holding that in the matter of realisation of statutory dues the authorities can always lift the corporate veil to find out the real persons who are responsible for payment of said statutory dues and that the PF Act is a beneficial piece of legislation so as to ensure that the employees get their due share on superannuation; accordingly, the realisation of provident fund dues of another company from its holding company was upheld;

4. Though a reading of the aforesaid judgments would indicate that the petitioner / its RO is entitled and empowered to pierce the corporate veil but It be may mention that the judgments of the Supreme Court aforesaid are with respect to the clubbing of employees for the purpose of application of the beneficial legislations, provisions whereof are applicable only upon a certain minimum number of employees being employed therein and in the context of the definition and meaning of “establishment” and “employer” in the said statutes and the said judgments may not be applicable in the context of recovery of PF dues of one company by attachment and sale of properties of another company by lifting/piercing the corporate veil as has been done in the present case.
5. Corporate veil can be pierced by the authorities under a statute only where the statute itself permits lifting of corporate veil for realisation of dues thereunder. A perusal of the PF Act with the Second and Third Schedules of the Income Tax Act, in my opinion, neither provides for corporate veil to be pierced nor empowers the authorities under PF Act to lift corporate veil to recover the dues of one company from another. Lifting of corporate veil entails adjudication of facts and which I do not find the authorities under the PF Act to be empowered to do. Merely because Rules 82 and 83 afford protection to authorities under PF Act as available to judicial officers and vest in the said authorities powers of receiving evidence, administering oath, enforcing attendance and compelling production of documents, as in a Civil Court, will not convert the said authorities into a Civil Court to adjudicate disputed question of facts of lifting of corporate veil for recovery of dues of one company from another.
6. Even where the statute does not provide for lifting of corporate veil, it can still be lifted under the common law if public interest so demands. However such lifting of corporate veil under the common law cannot be by the authorities under the statute and can be only by the Courts.
7. The Bombay High Court in Oil and Natural Gas Corporation Ltd. Vs. Jindal Drilling and Industries Limited and in Wind World (India) Limited Vs. Enercon GmbH has held that Arbitral Tribunal has no power to lift the corporate veil and only a Court can lift a corporate veil of the company. The reason therefor, in my view is quiet obvious. In the absence of a statute permitting lifting of corporate veil and in which case lifting of veil will be for reasons given in the statute, corporate veil under common law is lifted to prevent fraud and finding in which respect can be returned only by the Court.

➤ **DECISION HELD BY COURT:**

1. The petitioner is aggrieved from the measures taken by the respondent no.1 Bank under the SARFAESI Act had the remedy available of approaching the Debt Recovery Tribunal (DRT) under Section 17 of the SARFAESI Act and which the petitioner has again failed to do. It is a well settled principle that jurisdiction under Article 226 will not be exercised when an alternative efficacious remedy is available. Reference in the said regard can be made to the recent judgment of the Supreme Court in *Joshi Technologies International Inc. Vs. Union of India* (2015) 7 SCC 728. 23.
2. Liberty is however given to the petitioner to, if is able to make out a case and if permitted in law, make a claim against the respondent no.1 Bank with respect to the sale proceeds of the aforesaid two properties.
3. To the said extent, none of the observations contained in this order shall come in the way of the petitioner. The petition is accordingly dismissed. No costs.