

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 26th May, 2016**

+ **W.P.(C) No.4970/2016 & CM No.20687/2016 (for stay).**

ASSISTANT PROVIDENT FUND COMMISSIONER. Petitioner

Through: Mr. Pankaj Garg, Mr. Milind Garg
and Mr. A.S.M. Tripathi, Advs.

versus

VIJAYA BANK AND ORS

..... Respondents

Through: Mr. Vaibhav Dang, Adv. for R-1 with
Mr. Surender Singh, Law Officer.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.20686/2016 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

W.P.(C) No.4970/2016 & CM No.20687/2016 (for stay).

3. 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.

4. 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. 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. 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.

7. 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.

8. 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 noticees 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.

9. I have enquired from the counsel for the petitioner as to what is the power of the petitioner or its Recovery Officer to lift the corporate veil.

10. The counsel for the petitioner, save for generally stating that the petitioner exercises judicial functions, is unable to cite any provision under which the petitioner may have been authorised by law to undertake an exercise as of lifting of corporate veil.

11. The order dated 17th May, 2016 is in a proceeding under Sections 8B to 8G of the PF Act and which provisions also are not found to be so authorising or empowering the petitioner. Section 8B authorises the petitioner to issue to the Recovery Officer (RO) a certificate specifying the amount of arrears and empowers the RO to on receipt of such certificate proceed to recover the amount “from the establishment or, as the case may be, the employer by one or more of the modes” prescribed therein, namely by attachment and sale of movable or immovable property of the establishment or, as the case may be of the employer or by arrest of the employer and his detention in prison or by appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, of the employer. The remaining provisions 8C to 8G are found to be procedural in nature. However, Section 8G makes

applicable the provisions of the Second and Third Schedules of the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 to the said proceedings.

12. The counsel for the petitioner has drawn attention to Clauses 82 and 83 of the Second Schedule of the Income Tax Act. Clause 82 provides that a Commissioner and the Tax Recovery Officer in the discharge of their functions under the Schedule shall be deemed to be acting judicially within the meaning of the Judicial Officers Protection Act, 1850 and Clause 83 provides that the said officers shall have the powers of a Civil Court while trying a suit for the purpose of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the production of documents.

13. The said provisions, in my view would not make the petitioner or its Recovery Officer a Court, as the counsel for the petitioner contends. All that the said provisions vest in the petitioner are certain powers of the Civil Court and which would not include the inherent adjudicatory powers as in the Civil Court.

14. I however find:

- (a) 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;

- (b) 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’;
- (c) *M/s L. N. Gadodia and Son Pvt. Ltd. Vs. Regional Provident Fund Commissioner* MANU/DE/9834/2007 where also clubbing of the employees of two companies for applying the provisions of the PF Act was upheld;
- (d) *G.V. Films Ltd. Vs. S. Priyadarshan* MANU/TN/2550/2005 where a Single Judge of the High Court of Madras to have held that the Tax Recovery Officer, acting under Rules 82 and 83 of the Second Schedule to the Income Tax Act, 1961, is entitled to lift the veil of corporate entity and pay regard to the realities; though a number of judgments were relied upon but if I may respectfully say so, none is with respect to the power of the authorities such as the petitioner herein or its RO and are in the context of the power of the Court to lift the corporate veil;

- (e) ***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;
- (f) ***K. Ramasamy Vs. Commissioner of Income Tax*** MANU/TN/2670/2002 where a Division Bench of the High Court of Madras held that income tax authorities are entitled to pierce the veil of corporate personality and look at the reality of transaction;
- (g) ***Bhaskar Tea & Industries Ltd. Vs. Employees' Regional Provident Fund Organization*** MANU/WB/0483/2014 also 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 such statutory dues.

15. Though a reading of the aforesaid judgments would indicate that the petitioner / its RO is entitled and empowered to pierce the corporate veil but I 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. The judgment supra of this court is also in the same vein. Though the High Courts of Madras, Bombay and Calcutta have held so, but I do not find any judgment of this Court and entertain doubt whether the authorities under the PF Act can be held to be so empowered. In fact the High Court of Bombay in *Universal Pollution Control (I) P. Ltd. Vs. Regional Provident Fund Commissioner* 2006 (3) Mh. L.J.831 held that there is no provision in the PF Act that a liability of one company can be fastened on the other company even by lifting the corporate veil. Mention may also be made to *Regional Provident Fund Commissioner Vs. ABS Spinning Orissa Ltd.* MANU/SC/8103/2008 where a holding company was held to be not liable for provident fund dues of its subsidiary.

16. In my view, corporate veil can be lifted either where it is permitted by a statute or where it is contractually so agreed or under the common law.

17. The question is not whether the corporate veil can be pierced or not. It definitely can be. There is also no doubt that avoidance of statutory liabilities under a social welfare legislation is a reason enough to lift the corporate veil. The question which however arises for adjudication is, whether the corporate veil can be pierced/lifted by the authorities under the PF Act. Again, in my view, 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. I am further of the view that 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. To me it *prima facie* appears that the petitioner, if desirous of lifting corporate veil, will have to approach the Civil Court. The Bombay High Court in ***Oil and Natural Gas Corporation Ltd. Vs. Jindal Drilling and Industries Limited*** MANU/MH/0735/2015 and in ***Wind World (India) Limited Vs. Enercon GmbH*** MANU/MH/0411/2016 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.

18. However, I do not deem it necessary to entertain this petition to finally adjudicate the said legal question or to render a final view on the said aspect, being of the view that the present petition is liable to be dismissed for other reasons.

19. Piercing of corporate veil, even if permitted to the petitioner / its Recovery Officer, has to be in public interest. I am of the view that it is not in the larger public interest to stall any further the auction scheduled for today by the respondent no.1 Bank.

20. It cannot be lost sight of that the dues for recovery whereof the respondent no.1 Bank is proceeding to auction the properties aforesaid are also public dues and the said auction has been stalled at the instance of the petitioner for the last nearly five years. The petitioner even now has merely attached the properties and if were to proceed with the sale of the property, it may take another five years or so and of which there is no certainty also as of now. On the contrary, the respondent no.1 Bank is on the threshold of selling the property and realization of sale proceeds thereof. It is not deemed appropriate to at this stage interfere with such sale.

21. I need in this context refer only to *Vikas Singh Vs. Lieutenant Governor* 227 (2016) DLT 333 (DB), *Manisha Sharma Vs. Commissioner of Delhi Police* MANU/DE/3411/2015 and *Delhi Development Authority Vs. Manav Shiksha Samiti (Regd.)* MANU/DE/0815/2012 (DB) holding that this Court in exercise of power under Article 226 of the Constitution of India is empowered to deny a relief even if the petitioner is entitled thereto,

if otherwise granting of such relief is not found to be just or proper. I fear that if this Court were to interfere with the sale today and / or to entertain this petition, the property will be wasted further, benefiting neither the petitioner nor the respondent no.1 Bank and may be to the benefit of the respondents no.2 to 9.

22. There is another reason for not entertaining the petition. I am of the view that 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. 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. To the said extent, none of the observations contained in this order shall come in the way of the petitioner.

24. The petition is accordingly dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

MAY 26, 2016
'pp'/gsr..