Neutral Citation No. - 2024:AHC:36190-DB

AFR

Reserved on 21.12.2023

Delivered on 29.02.2024

Court No…..

Case :- WRIT - C No. - 41110 of 2019
Petitioner :- Nirmal Singh
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Pankaj Dubey,Neha Singh,Prateek Sinha,Rishu Mishra
Counsel for Respondent :- C.S.C.,Kartikeya Saran,Kaushalendra Nath Singh,Shivam Yadav

With

Case :- WRIT - C No. - 4532 of 2020
Petitioner :- Surpreet Singh Suri
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Raghav Dev Garg,Anurag Khanna (Senior Adv.)
Counsel for Respondent :- C.S.C.,Anuj Srivastava,Kartikeya Saran,Kaushalendra Nath Singh,Shivam Yadav

With

Case :- WRIT - C No. - 40693 of 2019
Petitioner :- Vidur Bhardwaj
Respondent :- State Of U P And 4 Others
Counsel for Petitioner :- Pankaj Dubey,Rishu Mishra
Counsel for Respondent :- C.S.C.,Kartikeya Saran,Kaushalendra Nath Singh

With

Case :- WRIT - C No. - 20251 of 2021
Petitioner :- Lotus 300 Apartment Owners Association And Another
Respondent :- State Of U.P. And 7 Others
Counsel for Petitioner :- Rahul Agarwal
Counsel for Respondent :- C.S.C.,Abhinav Gaur,Aushim Luthra,Kaushalendra Nath Singh,Raghav Dev Garg,Yashaswin Venugopal Bajpai

Hon'ble Mahesh Chandra Tripathi,J.
Hon'ble Prashant Kumar,J.

(Delivered by Hon’ble Prashant Kumar, J.)

1. Heard Sri Shashi Nandan, learned Senior Advocate and Sri Anupam Lal Das, learned Senior Advocate assisted by Sri Prateek Sinha, learned counsel for the petitioner in (Writ-C No.41110 of 2019, Sri Anurag Khanna, learned Senior Advocate assisted by Sri Raghav Dev Garg, learned counsel for the petitioner in (Writ-C No.4532 of 2020), Sri Vinayak Mithal, learned counsel for the petitioner in (Writ-C No.40693 of 2019), Sri Rahul Agarwal, learned counsel for the petitioners in (Writ-C No.20251 of 2021), Sri

Kartikeya Saran, learned counsel for Home Buyers, Sri Amit Saxena, learned Senior Advocate assisted by Sri Shivam Yadav and Sri Kaushlendra Nath Singh, learned counsel for Noida Authority, Sri Ambrish Shukla, Ms. Uttara Bahuguna, learned Additional Chief Standing Counsels for the State respondents.

2. Since all the four petitions are arising out of the same issue relating to the same project therefore, all of them are clubbed and heard together.

PROLOGUE

3. This is a classic case of conning, as to how the promoters without investing any amount gets huge tracts of prime land allotted, launches a project and collects Rs.636 crores from the home buyers, out of which they again syphon off almost Rs.190 crores (then sell off a portion of land to a 3rd company, pocket and then syphon the entire sale proceeds (Rs.236 crores), and pay a pittance to Noida Authority, towards the cost of land/premium for land and lease rent, which they were supposed to pay, and defrauded the home buyers, Noida Authority, Banks and other creditors. Not only this but they have also defrauded hundreds of other home buyers in various other projects similarly launched by them with different names. As a part of that conning scheme, after launching a project, they collected money, diverted it to different other companies and then resigned from directorship of the company, and push the company into insolvency and get over with all civil or criminal liabilities. Surprisingly, even after conning everyone they have been going scot free, neither the State nor the authorities are in a position to recover the said amount.

4. The entire proceedings in this case as it gets unfurled, manifests the intention of promoters for defrauding and cheating everyone.

FACTUAL MATRIX

5. Facts of the case are that the Noida Authority floated a scheme for allotment of plots for group housing, being scheme code GH2010 ID in

pursuance whereof a consortium of companies applied for, and the Noida Authority found them suitable for allotment of land in GH01 Sector107 Noida. As per the prevailing commercial practice, the allottee consortium companies were supposed to choose one of the consortium partner company to be a lead partner, who would be responsible for planning, construction and completion of the project. However, the consortium members would form a special purpose company for the execution of the project. Accordingly, in the instant matter the consortium members floated a special purpose company known as M/s Hacienda Projects Private Limited (here-in-after for the sake of brevity has been referred to as "HPPL"). This special purpose company had the following Stakeholders:-

Sl.No.	*Name of Member*	*Share Holdings*	*Status*
1.	*M/s Pebbles Infosoftech Pvt. Ltd.*	*27.73%*	*Lead Member*
2.	*M/s Three Platinum Softech Pvt. Ltd.*	*13.36%*	*Relevant Member*
3.	*M/s Credence Information Technologies Pvt. Lt.*	*13.36%*	*Relevant Member*
4.	*M/s Pebbles Prolease Pvt. Ltd.*	*17.82%*	*Relevant Member*
5.	*M/s Horizon Crest India Real Estate*	*27.00%*	*Relevant Member*
6.	*M/s Twilzon Limited*	*0.73%*	*Relevant Member*

6. In the year 2010, Noida authority after bifurcation allotted 67,941.95 square meters of land to M/s Hacienda Project Private Limited to build and develop a residential project located in Sector 107, Noida. The Noida Authority on 31.03.2010 executed a lease deed with M/s Hacienda Projects Private Limited (HPPL) for 67,941.45 square meters land to build a housing project on it. At the time of signing of the lease deed, Mr. Nirmal Singh, Mr. Surpreet Singh Suri and Mr. Vidur Bhardwaj were the Promoters/Directors of the HPPL.

The relevant clauses of the lease deed executed between the HPPL and the Noida Authority are as follows:-

SCHEDULE OF PAYMENT

Sl.No.	*Due Date*	*Instalment (in Rs.)*	*Interest (in Rs.)*	*Total (in Rs.)*

1.	*25.09.2010*	*–*	*231034073*	*231034073*
2.	*25.03.2011*	*–*	*231034073*	*231034073*
3.	*25.09.2011*	*–*	*231034073*	*231034073*
4.	*25.03.2012*	*–*	*231034073*	*231034073*
5.	*25.09.2012*	*262538719*	*231034080*	*493572799*
6.	*25.03.2013*	*262538719*	*216594450*	*479133169*
7.	*25.09.2013*	*262538719*	*202154820*	*464693539*
8.	*25.03.2014*	*262538719*	*187715190*	*450253909*
9.	*25.09.2014*	*262538719*	*173275560*	*435814279*
10.	*25.03.2015*	*262538719*	*158835930*	*421374649*
11.	*25.09.2015*	*262538719*	*144396300*	*406935019*
12.	*25.03.2016*	*262538719*	*129956670*	*392495389*
13.	*25.09.2016*	*262538719*	*115517040*	*378055759*
14.	*25.03.2017*	*262538719*	*101077410*	*363616129*
15.	*25.09.2017*	*262538719*	*86637780*	*349176499*
16.	*25.03.2018*	*262538719*	*72198150*	*334736869*
17.	*25.09.2018*	*262538719*	*57758520*	*320297239*
18.	*25.03.2019*	*262538719*	*43318890*	*305857609*
19.	*25.09.2019*	*262538719*	*28879260*	*291417979*
20.	*25.03.2020*	*262538719*	*14439630*	*276978349*

SPECIAL TERMS AND CONDITIONS OF ALLOTMENT:

K. INDEMNITY

The, Lessee/Sub-lessee (s) shall execute an Indemnity bond, indemnifying the NOIDA against all disputes arising out of:

1. Non-completion of Project.

2. Quantity of construction.

3. Any legal dispute arising out of allotment/lease/Sub-lease (s).

The Lessee shall wholly and solely be responsible for implementation of the Project and also for ensuring quality, development and subsequent maintenance of building and services till such time, alternate agency for such work/responsibility is identified legally by the Lessee. Thereafter the agency appointed by the Lessee will be responsible to the NOIDA for the maintenance of the service to the constructed flats/ building.

O. MORTGAGE

The mortgage permission shall be granted (where the plot is not cancelled or any show cause notice is not served) in favour of a scheduled Bank/Got. organization/financial institution approved by the Reserve Bank of India for the purpose of raising resources, for construction on the allotted plot. The Lessee/Sub-lessee (s) should have valid time period for construction as per terms of the lease deed/sub-lease deed or have obtained valid extension of time for construction and should have cleared up-to-date dues of the plot premium and lease rent.

The Lessee/Sub-lessee (s) will submit the following documents:

1. Sanction letter of the scheduled Bank/Govt. organization/financial institution approved by the Government of India.
2. An affidavit on non-judicial stamp paper of Rs.10/- duly notarized stating that there is no unauthorised construction and commercial activities on the Residential Area (Group Housing).
3. Clearance of upto date dues of the NOIDA.

NOIDA shall have the first charge on the plot towards payment of all dues of NOIDA.

Provided that in the event of sale or foreclosure of the mortgaged/charged property, the NOIDA shall be entitled to claim and recover such percentage, as decided by the NOIDA, of the unearned increase in values of properties in respect of the market value of the said land as first charge, having priority over the said mortgage charge. The decision of the NOIDA in respect of the market value of the said land shall be final and binding on all the parties concerned.

The NOIDA's right to the recovery of the unearned increase and the premptive right to purchase the property as mentioned herein before shall apply equally to involunary shall or transfer, be it bid or through execution of decree of insolvency from a court of law.

U. CANCELLATION OF LEASE AND SUB-LEASE DEED.

In addition to the other specific clauses relating to the cancellation, the NOIDA will be free to exercise its right of cancellation of allotment/lease/sub-lease in the case of:

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

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

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

4. If at the same time of such cancellation, the plot is occupied by the Lessee/sub-lessee, 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 NOIa with structure(s) thereon, if any, and the Lessee/sub-lessee will have no right to claim any compensation thereof. The balance, if any, shall be refunded without any interest and no separate notice shall be given in this regiard.

5. If the allotment is cancelled on the ground mentioned in para U(1) above, the entire amount deposited by the Lessee/sub-lessee, till the date of cancellation shall be forfeited by the NOIDA and no claim whatsoever shall be entertained in this regard.

***OTHER CLAUSES**.*

1. The NOIDA/Lessor reserves the right to make such additions/alternations or modifications in the terms and conditions of allotment/lease deed/sub-lease deed from time to time, as may be considered just and expedient and approved by the NOIDA.

5. Any dispute between the NOIDA and Lessee/Sub-Lessee(s) 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.

7. After allotment of the land, the project was named as Lotus 300, the advertisement given by the company stated that only 300 apartments would be built on an area of 67,941.95 square meters. A lot of people got attracted to the vast openness in the project and booked flats in this project. Allotments were made by the HPPL in favour of the respective buyers. The Builder Buyers Agreement was executed in the year 2011. This Builder

Buyers Agreement had unilateral terms and conditions and the buyers were made to sign on a printed agreement and whereunder the builder was supposed to charge a fine at the rate of 18% per annum on the delay of payment by an allottee. Floor plan was sanctioned in the year 2011 with three hundred flats on the entire area. Thereafter, the builders on 15.02.2012 sold 27,941.95 square meters of land from this project to some other company for an amount of **Rs.236 crores.** The effect of selling of 27,941.95 square meters was that the area on which 300 flats were to be built have substantially been reduced without taking flat buyers concurrence. Further 30 apartments were added in the project which was far more than the sanctioned floor-plan of 2011. The builder applied for a fresh plan sanction in April, 2013 for these additional 30 flats. All the 330 flats in six towers of the project were sold and the developer collected a whopping sum of **Rs.636 crores** from the sale/booking of the flats to the home-buyers. The project was to be completed in 39 months, however, the completion date for the project was revised to July, 2017. The HPPL is said to have completed four out of six towers and handed over possession to the flat owners.

8. The builders had collected Rs.636 crores from the booking of flats. Out of which the promoters of HPPL had syphoned away almost **Rs.190 crores,** which was supposed to be utilised for construction/development of the project. Instead of developing the project, money was diverted from the company and interest-free loans were given to other companies of the promoters, where these three promoters themselves were promoters/directors/shareholders or had other business interest. This diversion was substantiated by the balance sheet of the HPPL company.

9. The petitioner, Mr. Nirmal Singh claims to be the promoter/director in HPPL up to 15.07.2014 and also in M/s Pebbles Infosoftec Private Limited which was the lead member of the consortium to whom the land was allotted and also 50% shareholder of HPPL. According to the petitioner the resignation as directors of HPPL was tendered as follows:-

I. Nirmal Singh 15.07.2014
II.Vidur Bhardwaj 03.03.2015
III. Surpreet Singh Suri 03.03.2015

10. Towers 1 to 4 were completed and possession was handed over, but in spite of the fact that the flat owners of tower no.5 and 6 had paid the entire amount, the builder/HPPL did not complete the project, neither provided the other amenities, which was promised by the builder at the time of booking. The builder went to the extent of conveying the flat owners to take the possession of the incomplete/unfurnished flat as it is. The situation for the buyers was 'take it or leave it'. The flat owners, who had no choice took possession of the incomplete flat out of desperation. They continued asking the company and the promoters to complete the project but for the reasons best known to them they chose not to complete it.

11. The flat owners after paying the entire amount, were left high and dry and were cheated, so the home buyers on 24.03.2018 lodged an FIR, under Sections 420, 409 and 120B IPC, with the Economic Offence Wing, Delhi. Thereafter, detailed investigation was carried by the Economic Offences Wing. A charge-sheet was filed in which it was found that the builder had diverted huge amount of money out of the amount collected from the allottees to its subsidiary companies as interest free inter-corporate loan. Apart from it, the builders had started selling basement car parking for Rs. 3 lakhs. The accused persons had jointly conspired with dishonest intentions of cheating the complainants. The accused had committed offence of cheating and committed wrongful gain to themselves and loss to the flat-owners.

12 In pursuance of the F.I.R. lodged by the flat owners of HPPL, all the three directors were arrested on 30.11.2018.

13. Immediately upon their arrest, they expressed their willingness to pay up 60 crore rupees which was required to complete the project, and to avoid arrest, they entered into an MOU, where they agreed to arrange for the required fund and to complete the project in a particular time frame and

obtain a ‘Completion Certificate’. This MOU was signed between HPPL as a first party and Home Buyers Association as a second party. However, the confirming parties were Nirmal Singh, Vidur Bharadwaj and Surpreet Singh Suri, who had signed on behalf of the company HPPL. This MOU was a personal guarantee given by them to the home buyers to infuse funds to complete the project and pay the dues of Noida Authority.

14. In Clause 2 of the MOU, the HPPL and the promoters, who were the confirming parties agreed that they will complete the project in 9 months commencing from 15.12.2018 and further agreed that the balance cost of construction of the project which was Rs.60 crores would be paid by the first party that is HPPL and the confirming party was the three promoters (petitioners herein) Nirmal Singh, Surpreet Singh Suri and Vidur Bhardwaj who would arrange another 25 crores and infuse the same in the designated escrow accounts in the following manner- (a) 5 crores would be handed over to the second party on 04.12.2018, (b) another 5 crores would be infused on 15.01.2019 (c) 10 crores would be arranged by way of sale of plot no.16, Sector 127 Noida by the first party and the confirming party (d) a further sum of 5 crores would be infused before 03.02.2019.The first party will ensure M/s Udishi Constructions Private Limited to infuse 12 crores for the construction of unsold inventory. The first party HPPL has entered into agreement with Udishi Constructions Pvt. Ltd. wherein Udishi Constructions would infuse Rs.12 crores for construction against security of his unsolved inventory. Further, in addition to the above, any deficit amount after realizing the receivables from the allottees/buyer and after arranging funds as above shall be arranged by the first party and the confirming party by way of placing additional asset as collateral to ensure completion of the project.

15. In clause 10 of this MOU, it was further admitted that the first party, HPPL and the confirming party, which are the three promoters will arrange the funds and pay the dues of the Noida Authority.

16. On the basis of this MOU, a bail application was moved in the Court of Chief Metropolitan Magistrate, South Saket Court, Delhi wherein the Court of CMM passed the following order on 04.12.2018:-

> *"FIR No.74/18*
> *PS:EOW*
> *U/s:409/420/120B IPC*
> *State Vs. (i) Supreet Singh Suri (ii) Vidur Bhardwaj (iii) Nirmal Singh*
> *04.12.2018*
> *Present: Ld Substitute APP for the State*
>
> *The reply to the bail application moved on behalf of accused Nirmal Singh has been filed by the IO.*
>
> *At this stage, it is submitted by Ld. Counsel for accused Vidur Bhardwaj and Spurpreet Singh Suri that the bail applications moved on behalf of accused Vidur Bhardeaj and Surpreet Singh Suri are also listed for today and the aforesaid applications may also be considered.*
>
> *At this stage, IO submits that the role of all the accused persons are similar to the effect that they all were the Promoters of Hcienda Projects Pvt. Ltd.*
>
> *At this stage, the copy of MOU dated 03.12.2018 between the accused company M/s Hacienda Projects Pvt. Ltd. and M/s Lotus 300 Buyers Association has been filed stating therein that a settlement agreement amongst the parties of this case has been entered into and there is going to be a general body meeting on 16.12.2018 in which every stakeholder would take part for retification of the MOU arrived between the parties.*
>
> *Ld. Counsels for the accused persons submit that the prime concern of the flat buyers is to ensure that they get the delivery of the flats within stipulated time frame as mentioned in the abovesaid MOU and the interest of the flat buyers association has been taken into consideration and the demand draft for the amount of Rs.5 crores would be deposited in the escrow account, which is already opened, to ensure the compliance of the MOU as well as to ensure the construction work so that the flats may be delivered to the flat buyers who are the aggrieved parties herein.*
>
> *At this stage, the demand draft bearing no.344504 dated 03.12.2018 drawn on Kotak Mahindra Bank, Sector-18, Noida branch, UP for 1 crore and demand draft bearing no.037735 dated 03.12.2018 drawn on Federal Bank, Nehru Place branch, New Delhi for Rs.4 Crore have been handed over to Sh. Pankaj Jolly. President of Lotus 300 Buyers Association who submits that he would deposit the aforesaid demand drafts into the escrow account by tomorrow.*
>
> *At this stage, the MOU dated 03.12.2018 has been signed by the accused persons who are present today and produced from police custody.*
>
> *Considering the facts and circumstances, submissions made and the MOU dated 03.12.2018, accused persons namely Nirmal Singh, Vidur Bhardwaj and Surpreet Singh Suri are hereby admitted to interim bail till 20.12.2018 on furnishing personal bond in the sum of Rs.5 lacs each with one surety each in the like amount. It is made clear that the interim bail has been granted to accused persons without going into merits of this case and subject to strict compliance of MOU dated 03.12.2018 failing which the interim bail granted to accused Nirmal Singh, Vidur Bhardwaj and Surpreet Singh Suri would be cancelled. Futher, the accused persons shall not leave the country without permission of the Court and that they shall cooperate the IO in the investigation of this case. Bail bonds furnished and accepted till 19.12.1018 and bail bonds be put with the bail applications on 20.12.2018.*
>
> *At request, put up for arguments on the bail applications on 20.12.2018 at 12.30 pm.*

17. The interim bail was granted on a condition that there should be strict compliance of the MOU. The petitioners herein flouted the terms of the MOU, thereafter, an application was moved by the home buyers for

cancellation of bail. Surprisingly, rather shockingly, the learned Court vide its order dated 21.05.2019 confirmed the interim bail and held as under:-

"Vide this common order I shall decide the bail applications of applicant Nirmal Singh, Surpreet Surri and Vidur Bhardwaj.

It is stated in the applications that the applicants are founder of '3C Group of Companies' and are directors of M/s Hacienda Project Pvt. Ltd and are involved in the work of construction. It is further stated that in the year 2011, the company got approval for construction of a project 'Lotus 300' comprising of 300 apartments but in the year 2014 on account of the order of the National Green Tribunal, the construction work got affected. It is further stated that the land acquisition proceedings were also got quashed by the Supreme Court vide order dated 05.08.2013 in civil appeal no.6353/13. It is further stated that following the difficulties in the completion of the project, complaints were filed by the investors and the present FIR was lodged. It is further stated that the applicants have fully cooperated with the investigation and no purpose will be served keeping them in custody. It is further stated that there is no apprehension that the applicants shall tamper with the evidence or free from the justice.

In his reply submitted by the IO, it is stated that the applicants have got changed the building plan from Noina and enhanced a number of apartments from 300 to 336. It is further stated that applicants collected huge amount of money from the customers in the name of project and diverted around Rs.140 crores to the subsidiary companies. It is further stated that there are more than 50 victims in the present FIR and the alleged company has received amount to the tune of Rs.100 crores from the victims. It is further stated that there are total 328 investors and the company has received the amount to the tune of Rs.636 crores out of which the amount to the tune of Rs.219 crores has been diverted by the company into the subsidiary companies. It is further stated that there are total 6 towers in the project and all the towers have been erected and out of 6 towers, two towers are on the verge of completion. It is further stated that the accused company has applied for part completion certificate on 23.10.2018. Further, an MOU has been signed with association of buyers for completion of project on 15.05.2018 and an escrow account has been opened with one signatory from buyer side and other signatory from company side.

I have heard the arguments and perused the record.

In the present case, as per the report of the IO, all the six towers have been constructed two of which are near the completion. The applicants have also deposited Rs.25 crores and they have been complying with the conditions of the MOU dated 15.05.2018. There is no complaint or incident showing the involvement of the applicants in tampering with any evidence or intimidating any witness. The evidence in the present case is documentary in nature and all the documents have already been seized by the IO. Investors have requested that bail of the applicants may not be regularized and they should be given interim bail in accordance with the compliance of the MOU. Request is not tenable because the bail cannot be used as a tool to pressurize the accused to part with money. It's a criminal trial and the Court cannot act as a recovery agent of the investors and cannot keep handing the sword of custody over the head of the applicants in the name of compliance of the MOU. Otherwise also, extending bail of the applicants from time to time takes and considered time of the Court and it is an onerous procedure which cannot be adopted. The applicants have been enlarged on bail since a long time and there is no instance of their making any attempt to flee from the justice. There is no possibility that the presence of the applicants cannot be secured during the trial. Otherwise also, appropriate conditions can be imposed in this respect. Therefore, applicant Nirmal Singh, Surpreet Suri and Vidur Bhardwaj are admitted to bail on furnishing personal bond of Rs.5,00,000/- each with one surety each in the like amount subject to condition that applicants shall not leave the country without taking permission from this Court, they shall submit their passport in the Court, they shall not try to tamper with the evidence or intimidate any witness or commit similar offence and they will join the investigation as and when required.

Applications stands disposed of."

18. After getting the bail the Promoters (petitioners herein), who had no intention of honouring their commitment given in the MOU, defaulted to pay the entire agreed amount, and failed to complete the project, they also did not pay the Noida Authority their dues, once again they cheated the home buyers.

19. In addition to the land premium, HPPL was supposed to pay additional compensation for the land, which was supposed to be paid to the farmers by the Noida Authority, since HPPL failed to deposit Rs.54,50,51,626/- towards additional compensation and Rs.9,15,00,000/- towards time extension charge for the delayed project, hence, a recovery notice was issued to HPPL by Noida Authority on 16.09.2019 for an amount of Rs.63,65,55,626/- along with a notice for recovery to the directors of M/s Hacienda Projects Private Limited, Mr. Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj.

20. Aggrieved by the recovery notice issued to Mr. Nirmal Singh, he has filed the instant writ petition (Writ-C No. - 41110 of 2019) seeking following reliefs:-

(a) To issue a writ, order or direction in the nature of certiorari calling for the record and quashing the impugned recovery certificate dated 16.09.2019 issued by the Tehsildar, Dadri, District Gautambudh Nagar.

(b) To issue a writ, order or direction in the nature of mandamus restraining the respondent no.2 and 3 from taking any coercive action in pursuance of impugned undated recovery certificate.

(c) To issue any other order or direction which the Hon'ble Court may deem fit and proper in the circumstances of the case.

(d) To award the cost of the petition to this petitioner.

21. Identical writ petitions were also filed by other two directors, Mr. Vidur Bhardwaj, Writ-C No.40693 of 2019 and Mr. Surpreet Singh Suri, Writ-C No.4532 of 2020. All the matters were clubbed together and this Court on 17.12.2019 proceeded to pass the following order:-

"Heard Sri Ravi Kant, learned Senior Counsel assisted by Sri Pankaj Dubey, learned Counsel for the petitioner, learned Standing Counsel and Sri Kaushalendra Nath Singh, learned Counsel for respondenot no.4.

In order to recover the dues of respondent no.5, a company incorporated and registered under the Companies Act, 2013, the recovery is being pressed against the petitioner. The argument is that the petitioner had ceased to be the Director of the said company long before and that since company is a separate juristic person, its dues cannot be recovered from the personal assets of the petitioner. In support reliance has been placed upon the judgment and order dated 4.12.2019 in Writ Petition No.33100 of 2019 (Rakesh Mahajan Vs. State of U.P. & 4 others).

Learned Standing Counsel and Sri Kaushalendra Nath Singh are both directed to file counter affidavit within a period of three weeks. A week, thereafter, is granted to the petitioner for filing rejoinder affidavit.

Issue notice to respondent no.5.

List for admission/final disposal after expiry of the above period.

Until further order of this Court, the impugned recovery dated 16.9.2019 shall not be pressed against the petitioner, though it will be open for the respondents to release the outstanding dues from the respondent no.5 provided the petitioner surrenders his passport, if any, before the respondent no.2, District Magistrate, Gautambuddha Nagar and give on undertaking within a week to the District Magistrate that he would not leave the country without the permission of the Court."

IMPLEADMENT APPLICATION OF HOME BUYERS

22. The home buyers filed an impleadment application and also filed a counter affidavit in which they brought on record as to how these three directors/petitioners after collecting the money from the home buyers and after selling the land, which was part of the project, together had siphoned off (Rs.190+236=426) crores from the HPPL and invested the same in their other companies, and chose not to pay the authority the premium and the lease rent and the Noida Authority for the reason best known to it had made no efforts to get the outstanding dues.

23. The learned counsel for the home buyers submitted with vehemence that the petitioners/promoters right from the inception had the nefarious intentions to cheat the flat owners, Noida authority and the banks so they schemed out a fool proof strategy to defraud people, syphon away the money, and then go scot free. Accordingly, they tendered the resignation from the HPPL company (Nirmal Singh, w.e.f. 15.07.2014, Vidur Bharadwaj and Surpreet Singh Suri w.e.f. 03.03.2015) after diverting the funds, and making a petty employee as dummy director of the company and as such still kept the full control over the company.

24. He submitted that the petitioners/promoters, who had cheated the home buyers, so the home buyers had lodged an FIR, in which after the investigation a charge sheet was filed, under Sections 409, 420 and 120B IPC. Referring to the balance sheet of HPPL with the impleadment application. He submitted that it goes to show that almost Rs.190 crores had been diverted from the company and given to other companies, which was directly or indirectly owned by the promoters, or where they had business interest. He invited attention to an order of this Court, annexed with impleadment application in which the present Director, Anand Ram, who happens to be the Store Keeper, appeared in the Court and said that he is simply an employee of the company and he has appeared before the Court on the direction of Personal Secretary of one of the Promoters, Vidur Bharadwaj, which goes to show that the petitioners even after resigning had full control of the company.

25. Learned counsel further submitted that once the promoters after their arrest had executed a MOU wherein they had undertaken before the court to comply with the conditions of Memorandum of Understanding including the payment of NOIDA dues, and had taken joint and several responsibility to comply with the said condition, hence, they cannot say now that they will not pay the dues of the Noida Authority. Therefore, the relief prayed for in the present writ petitions is not maintainable. The NOIDA dues, if payable, are to be recovered from the personal assets of the petitioners who have already undertaken personal guarantee to execute the project and pay the dues of the Noida Authority.

26. He next submitted that when the builder had abandoned the project and the home buyers were forced to take possession of incomplete flat under great duress and it is this helplessness that is being taken advantage of, by the builder to represent, as if the said flats had been fully constructed/developed. Amounts already charged towards furnishing of flats and providing other amenities, which were promised but never provided as

the funds were diverted to some other companies. Later, the home buyers further had to shell out huge amount of money to make the flats habitable. There was no permanent electricity connection which was obtained by the home buyers themselves at their own cost.

27. He further submitted that the promoters had not denied anywhere in any of their affidavit/supplementary affidavit that out of Rs.636 crores collected from the home buyers, Rs.190 crores were not diverted from Hacienda's (HPPL) accounts. This fund was to be utilized only for construction/development of the project, instead of utilizing for the same, the promoters gave interest free loans to sister concerns (where the three petitioners themselves were directors or had business interest), or utilized for servicing of loans that were not related to the project. The same conclusion has been arrived at by the Economic Offences Wingh, Delhi Police, in the charge sheet filed against the three promoters/petitioners. The sale of 27,941.95 square meter land and diversion of the sale consideration has also been established by Economic Offences Wing in their charge-sheet.

28. To buttress his argument, the learned counsel further submitted that ownership structure of the group of these companies clearly establishes how the three promoters Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj, were in complete ownership of a web of companies, including Hacienda. As far as the applicant knew, these promoters have around 60 companies. These three promoters were common directors in all the companies, where they had the same *modus operandi* of siphoning off the funds and then tender their resignation as directors of the company to escape civil and criminal liabilities and make their petty employee a director of these companies and still have full control of the companies. The order dated 30.04.2019 passed by this Hon'ble Court in Arbitration & Conciliation Application No.39 of 2018 and the emails brought on record goes to show that the petitioners were the actual persons controlling the affairs of HPPL even after having purportedly resigned therefrom.

29. He further submitted that IndusInd Bank granted a loan to HPPL in 2017, (on the personal guarantees of the three promoters) even though the project was fully financed by the homebuyers there was no need for the company to take loan still the loan was asked for, and the same was approved by the bank. Subsequently, on account of its poor financial condition and non-serving of said loan, IndusInd Bank filed an Insolvency Petition before the NCLT claiming about Rs.33 crores. Surprisingly, the bank has chosen not to invoke the personal guarantee of these three promoters. It is quite strange as to how the bank had given loans without carrying out the proper due diligence of the project or of the promoters, especially since Hacienda's (HPPL) balance sheets clearly showed diversion of funds to the tune of Rs.190 crores. Surprisingly, the bank after disbursing the loan did not seem to bother to check as to where the loan amount was spent. The loan amount was never put to use in the project, and was in fact, once again diverted to other entities controlled by the petitioners for their benefit. Though as per the RBI guidelines the bank has to monitor and see whether the loan amount is spent for the purpose of the loan for which it was taken or not.

30. He further submitted that the entire fraud had been committed in clear connivance of the Noida Authority, even as per the stand of Noida Authority in their affidavit only first seven instalments were paid and the eighth instalment, which fall due on 25.03.2014 onwards are still outstanding and a recovery certificate was issued only for additional compensation and not for the outstanding instalments, which included land premium and the interest. Noida Authority had failed to monitor the project and made no effort to even ascertain the reasons for more than a decade's delay in completion of the project and payment of dues owned to it.

31. Learned counsel for the home buyers further submitted that it has become practice with all the fly by night, real-estate companies to sell the flats, and pump out all the booking amount not complete the projects, and

then resign from the company and appoint dummy directors. This practice is not adopted by one company, but most of the real-estate companies are doing the same, and the State and Noida Authority keeps a blind eye on this.

32. He argues that after the interim order was passed by this Court, there was a stalemate and the builders had stopped carrying out the construction or completion of the project. The home-buyers who were left in lurch filed an impleadment application in this petition which was allowed.

33. He further argued that though the home buyers had filed an impleadment application in the writ petition filed by the promoters of HPPL but since no substantial relief could have been granted in that writ so the home buyers had filed a separate substantive writ petition, which was numbered as Writ-C No.20251 of 2021, in which the State, Noida Authority, HPPL, all the three promoters and M/s Three C Universal Developers Pvt. Ltd were the parties. This writ was tagged along with the other writ petitions filed by the promoters/directors. In this writ petition of the flat buyers, following prayers were made:-

> *"(a) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to issue Occupancy/Completion Certificate for the residential apartment complex "Lotus 300" at Section 107 Noida and to the respondents to execute Registered Tripartite Lease Deeds with the home buyers (including the members of the Petitioner Association) without demanding any outstanding dues of the developer from them;*
>
> *(b) Issue a writ, order or direction in the nature of mandamus directing the respondent nos.1 & 2 to provide all essential services and amenities such as water, electricity, sanitation, access to the residential apartment complex "Lotus 300" at Sector 107 Noida;*
>
> *(c) Issue a writ, order or direction in the nature of mandamus directing the respondent no.1 to issue such concessions, exemption or other incentives to the home buyers (including the members of the Petitioner Association) of the residential apartment complex "Lotus 300" at Sector 107 Noida from payment of stamp duty and/or other dues as compensation for the gross delay in the completion of the project on account of the dereliction of their statutory duties and trust by the respondent nos.1 and 2;*
>
> *(d) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to recover all dues relating to the land and building of the residential apartment complex "Lotus 300" at Sector 107 Noida from respondent nos.3 to 7 and restrain them from taking any coercive measures against the home buyers (including the members of the Petitioner Association) for this purpose;*
>
> *(e) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to ensure that respondent nos.3 to 7 jointly and severally bring in the funds diverted/ siphoned off funds paid by the petitioner buyers and/or to deposit Rs.65/- crores into an escro account of the petitioners (created for the purpose of securing funds received from the respondent developer) to complete the residential apartment complex "Lotus 300" at*

Section 107 Noida and complete the handover of possession of the apartments to home buyers (including the members of the petitioner association) with all amenities in accordance with original master layout plan;

(f) Issue a writ, order or direction in the nature of mandamus restraining the respondent no.s3 to 7 to sell, transfer, alienate or create any third party rights with respect to the residential apartment complex "Lotus 300" at Sector 107 Noida, their personal assets as well as the assets owned by their subsidiary/group/affiliate associate companies without the permission of this Hon'ble Court;

(g) Issue a writ, order or direction in the nature of mandamus restraining the respondent nos.4 to 6 from travelling abroad without seeking permission from this Hon'ble Court;

(h) Issue a writ, order or direction in the nature of mandamus directing the respondent nos.1 to 2 to get a forensic audit conducted into the entire assets of respondent nos.4 to 6 including their group/subsidiary companies as well as personal assets of respondent nos.4 to 6;

(i) Issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

(j) Award costs of the petition to the petitioner throughout.

34. He further submitted that the incomplete flat given by the builder had been completed by the flat buyers from their own fund, so the Noida Authority may issue occupancy certificate and also execute a tripartite lease deed without asking for the outstanding dues from the flat buyers.

35. He further submitted that the Court should direct respondent no.3 to 7 (HPPL, the three promoters, and M/s Three C Universal Developers Pvt. Ltd.) to bring back the money which has been transferred to other entities. If this money is brought back then that will be sufficient to pay all the dues of Noida Authority, bank and also the home buyers who have spent in completion of the project.

36. Lastly he submitted that in the interest of justice an exhaustive audit should be conducted for the entire assets of the three promoters/directors including their group companies/subsidiary companies as well as the personal assets of these three promoters/directors. Since all the transactions and diversion of funds were sham and just to escape the legal liabilities had been done by the petitioners and even after their resigning, they still were in full control of the company, hence, it is necessary for piercing corporate veil to see who are the key personnel responsible for all the frauds and sham done under the facade of a separate juristic person.

STAND OF NOIDA AUTHORITY

37. The Noida Authority has filed a counter affidavit in June, 2020 wherein they stated that the recovery has been initiated by the Noida Authority for the additional compensation, which was to be paid to the farmers. This amount was Rs.54,50,55,626/- along with time extension charges for the delayed project, which was Rs.9,15,00,000/-, this amounted to a total of Rs.63,65.55,626/- out of which the HPPL have only paid a sum of Rs.1,20,75,781. They further submitted that the land was allotted way back and since then the company is in arrears which warrants extreme steps to be taken against the company and its directors.

38. The Noida Authority in its counter affidavit further stated that these group of companies had applied for allotment of the plot and after allotment, a Special Purpose Company, “HPPL” was created just for the ease of doing business. Later on, sub-division of the allotted plot was allowed by the Noida Authority vide its letter/order dated 02.02.2012. It also carried a tabular chart which shows the list of directors of the participating consortium companies. It is relevant to point out here that in every company the petitioner has been shown as director, along with that the petitioners are the face of the consortium and that is why the Noida Authority has decided to issue the impugned citation against him, in order to recover the money. The company is under heavy dues of the authority and there is no response from it, as such it becomes imperative upon the Noida Authority to take coercive steps against the important members/directors of the company in order to secure the recovery of the dues.

39. The Noida Authority filed another counter affidavit on 05.09.2021 in which it stated that the petitioner is the main shareholder and partner in the HPPL, however, to save themselves from any liability, they have found an easy way out by making someone else a director in the company. As on 05.09.2021, the total amount due towards the Noida Authority is

Rs.**107,46,62,317/-** for which the Noida Authority has sent notices from time to time. It is further stated that the petitioners are also the directors of M/s Three C Realtors Pvt. Ltd., which is a 100% subsidiary of M/s Hacienda Project Pvt. Ltd.

40. The Noida Authority issued a recovery certificate on 05.09.2019 against M/s Hacienda Project Pvt. Ltd. and on 16.09.2019 against the petitioner as they were the key persons in HPPL.

41. The Noida Authority in its counter affidavit further stated that the petitioners are in charge of the affairs of the company and that is why they entered into a MOU on 30.12.2018 and they have only resigned from the post of director just to escape the liability of the company. The MOU signed on 30.12.2018 amounts to guarantee of payment of dues towards Noida Authority.

INSOLVENCY PROCEEDINGS

42. During pendency of this case it transpires that the IndusInd Bank who had advanced loan to HPPL had moved an application under the Insolvency and Bankruptcy Code (for short “IB Code”) before the NCLT, Delhi and vide order dated 11.11.2022, NCLT, Delhi (IndusInd Bank v. Hiscenda Projects) admitted the application and corporate insolvency resolution process was initiated. IRP was appointed who was directed to take over affairs of the company. Once the CIRP proceedings have commenced under the IB Code, 2016 any proceedings against the Corporate Debtors stands suspended and are covered under the moratorium as per Section 14 of the IB Code. The said moratorium period is applicable till approval of Resolution Plan or passing of the liquidation order by the NCLT. Section 238 of the IB Code supersedes any other law, which may be contrary to its provisions.

ARGUMENT ON BEHALF OF THE PETITIONERS/PROMOTERS

43. Mr. Shashi Nandan and Mr. Anupam Lal Das, learned Senior Counsel assisted by Sri Prateek Sinha, appearing on behalf of Mr. Nirmal Singh

argued that the demand of Rs.63 crores was completely incorrect. In 2017 Noida Authority had issued a no dues certificate and at that point of time there was no demand, however, in 2019 suddenly demand of Rs.63 crores comes in, which has no basis. He has filed an objection to this demand stating that they have already paid a sum of Rs.60.85 crores towards premium and lease rent. Since the objection was not decided, so, all the three directors of HPPL (against whom recovery certificate was issued) preferred the instant writ petition. It was further submitted that the Recovery Certificate was also issued against the company, and since the liability is of the company, hence, no liability of the company can be fastened upon the directors individually.

44. Learned counsel for the petitioner/promoter/director submitted that the project got delayed because of no fault attributable to the promoters. After the inception, the project was stopped by an order of NGT. It took considerable amount of time when the order was vacated. Thereafter, the acquisition of the land in question was subject matter of challenge and the acquisition was set aside. Later on, the land was given/resorted back to the company on a condition that additional compensation was to be paid to the farmers and this took considerable amount of time. He further submitted that the payment due for the period w.e.f. 25.09.2010 till 25.09.2013 could not sustain as at that point of time, the land was restored to the farmers and the Noida Authority has no legal authority to collect the premium from the petitioner. Only after the land was restored, they could realise the outstanding dues and that too from the company.

45. Learned counsel for the petitioner submitted that during pendency of this case, IndusInd Bank who had advanced loan to HPPL has moved an application under I.B. Code before the NCLT, Delhi and vide order dated 11.11.2022, NCLT, Delhi (IndusInd Bank v. Hiscenda Projects) admitted the application and corporate insolvency resolution process was initiated. IRP was appointed who was directed to take over affairs of the company and take

steps in accordance with law. Hence, all the dues of HPPL towards Noida Authority, now would be paid by the Insolvency Resolution Professional, who has taken over the company by the tribunals' order and all the creditors should approach the IRP for payment of their dues.

46. The counsel for the promoters/petitioners further stated that the dues of the company cannot be recovered from the private assets of the directors of the company, unless it is specifically provided in the statute or warranted by law. He further submitted that no corporate veil can be pierced in the normal circumstances.

47. The counsel for the petitioner further placed reliance on a Division Bench judgement passed by this Court in the case of **Rakesh Mahajan vs. State of U.P. and Ors.**[1] in which it has been held :-

> *"50.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.*
>
> *51. 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.*
>
> *52. 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."*

1 (2020) 2 All LJ 501

48. He submitted that the ratio of **Rakesh Mahajan (supra)** is similar to the instant case, and since it cannot be said that this case is of exceptional circumstances and it does not fall under the exception elaborated in **Ben Hashem v Ali Shayif [2008] EWHC 2380.** Hence, the Court should not exercise its right in piercing of corporate veil.

49. He next submitted that since the company has gone into insolvency, the Noida Authority can only prosecute the Corporate Debtor under the IB Code, 2016. He placed reliance on judgement of Hon'ble Supreme Court in the case of **Ajay Kumar Radheshyam Goenka vs. Tourism Finance Croporation of India Ltd.[2],** wherein it was held that a creditor has no option but to join the process under the IB Code. Once a plan is approved, it would bind everyone under sun. The making of a claim under IB Code and accepting whatever share is allotted could be termed as 'Involuntary Act' on behalf of the creditor.

50. He lastly submitted that since the promoters are no longer directors and not at all involved in the affairs of the company, hence, no liability of the company can be fastened on them in personal capacity. Moreover, since the company is now in Insolvency under the Insolvency and Bankruptcy Code and the IRP has been appointed so any liability of the company has to be recovered as per provisions of the Insolvency and Bankruptcy Code.

ARGUMENT ON BEHALF OF NOIDA AUTHORITY

51. The counsel for the Noida Authority submitted that after the original allotment of land to the consortium (which was a huge chunk of land), the plot was further divided and ultimately after the division a lease was executed by Noida Authority on behalf of the consortium members with a special purpose company known as M/s Hacienda Projects Private Limited, whose promoters and directors were Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj. Apart from being the directors, they are the main

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2 2023 (10) SCC 545

shareholders in the company. After allotment of the plot to the company (HPPL) the Noida Authority had given them two years moratorium so that they can start the business and get booking from the flat owners and pay to the authority. The company was supposed to pay six monthly instalments. The company paid only seven instalments uptill 25.09.2013 and thereafter the company failed to pay instalment, which fell due from 25.03.2014 onwards. The recovery notice of Rs.63 crores, which was initially issued, was only for the additional compensation which was to be paid to the farmers, however, the total outstanding in June, 2021 against the company was Rs.107,46,62,317.

52. The counsel for the Noida Authority further submitted that the petitioners are the main shareholders and partners in the project, however, to save themselves from any liability they have found an easy way out by resigning as directors of the company just to escape the criminal and civil liabilities of the company. Even after resigning from the position of directorship of the company they are still in complete control, and have a complete charge over the company. If the Court lifts the corporate veil it will be seen that these promoters are actually running the company and have only tendered resignation to defraud the creditors and to get away without paying the dues of Noida Authority.

ARGUMENTS ON BEHALF OF HOME BUYERS

(WRIT-C No.20251 OF 2021)

53. Learned counsel for the home buyers submitted that though the petitioner and other directors had tendered resignation but they had full control over the working of the company. After the arrest, if they were not the directors they could have very well taken a stand that they were not the directors as such they cannot be arrested. However, they chose to sign a MOU with the flat buyers wherein the 2nd party to the MOU was HPPL and all the three promoters (petitioner herein) were the confirming parties. Once they have signed the MOU and agreed to pay all the dues of Noida Authority

and got the bail on the basis of MOU, they cannot be allowed to hide under the mask that they are not the directors any more and have got nothing to do with the company. The entire liability is that of the company and the company being a juristic personality is only responsible to pay the liabilities of its own.

54. Since the company itself being an artificial legal person cannot be prosecuted, it is the directors and key managerial people, who had played a fraud and are the one responsible for the conduct of the company have to be prosecuted for the the fraud done on behalf of the company. In this case, all the money was illegally syphoned off when the promoters were the directors of the company and as such culpable fraud has been played by them, and hence, they ought to be prosecuted for all the frauds done by them as directors in charge of the company.

55. Learned counsel for the home buyers further submitted that this Court may pierce the corporate veil to see as to who are actually in control of the company, who are the key persons responsible for all the fraud and sham transactions done under the facade of the company. What relations does these promoters had in those companies where the money were parked/invested and why did HPPL never asked the money back from those entities.

56. Learned counsel for the home buyers further submitted that, the promoters obtained the interim order from this Court by concealment of material fact that they have entered a MOU whereby they have given a guarantee to pay the dues of Noida Authority. The petitioner enjoyed the interim relief for more than 4 years. The promoters have not only defrauded the home buyers but also mislead this Court by concealing the facts.

57. He next submitted that it is evident from the documents filed with the ROC that Rs.191.181 crores have been siphoned off or given interest free loan to other companies owned/managed by the three promoters. Even a

loan was given to M/s Three C Universal Developers Pvt. Ltd., who is respondent no.7 in this petition and inspite of notices being issued they have not filed any reply.

58. It was further submitted that these promoters have not only cheated the home buyers in this project alone but have launched various other identical projects and have cheated hundreds of other gullible home buyers. In all the projects they have followed the same modus operandi of launching the project, collecting money from the buyers, diverting the funds to various other companies and then resigning from the directorship of the company so as to avoid any civil and criminal liabilities.

59. Learned counsel for the home buyers further submitted that these three promoters, Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj have not only swindled the money from this project alone but they have also cheated hundreds of other home buyers of their money in other projects and in all the projects these three persons were the directors and had the same *modus operandi* of resigning from the directorship and making their petty employees as a poppet director. He further submitted that the FIRs have been lodged by various home buyers of different projects against these three persons, details of which are as follows:-

I. FIR No.137 of 24.08.2017 – EOW – New Delhi – Project Greenopoils.
II. FIR No. 28.8.2017 – P.S. GK New Delhi – Against Vidur Bhardwaj – Project Delhi One.
III. FIR No.72 of 19.03.2018 – EOW – New Delhi – Hacienda Pvt. Ltd-Lotus 300 – Sector 107.
IV. FIR No.74 of 24.03.2018 – EOW – New Delhi – Hacienda Pvt. Ltd- Lotus 300 – Sector 107.
V. FIR No.107 of 15.05.2018 – EOW – New Delhi – Boulevard Projects Pvt. Ltd.- Sector 100.
VI. FIR No.117 of 23.05.2018 – EOW – New Delhi – Granite Gate Properties Pvt. Ltd – Penache – Sector 110.
VII. FIR No.40 of 24.03.2020 – EOW – New Delhi - Arena Superstructures – Sector 79.

VIII. FIR No.06 of 12.01.2018 PS GB Nagar – 3C Universal Developers.
IX. FIR No.54 of 15.05.2020 – EOW New Delhi – Project Piyush IT – Nirmal Singh.
X. FIR No.49 of 27.03.2019 – EOW New Delhi – Project – Three C Projects Pvt. Ltd.
XI. FIR No.59 of 16.06.2020 – EOW New Delhi – Project Three C Shelters.

60. In this backdrop the learned counsel for home buyers submitted that a suitable investigation should be carried out by an agency competent to investigate in the siphoning off the funds and also to see who is responsible and in actual control of HPPL and further suitable endeavours should be made to get the syphoned money back into the company and appropriate legal action should be taken against all those who had conned and illegally transferred funds from HPPL .

61. He further submitted that the petitioners/builder/HPPL after collecting the entire value of the flats did not pay Noida Authority their dues and Noida Authority for the reasons best known to them never took any steps to recover the same. Now the builder has run away/gone into insolvency and hence the Noida Authority at the cost of home buyers, cannot hold back the occupancy certificate on the ground that dues of the Noida Authority have not been paid.

62. The home buyers further referred to a judgement passed by Hon'ble Supreme Court in the matter of **Bikam Chatterji and Ors. Vs. Union of India (UOI) and Ors.**[3]**,** relevant portion of which reads as under:-

> *"We have also found* ***that non-payment of dues of the Noida*** *and Greater Noida Authorities and the banks cannot come in the way of occupation of flats by home buyers* ***as money of home buyers has been diverted due to the inaction of Officials of Noida/*** *Greater Noida Authorities. They cannot sell the buildings or demolish them nor can enforce the charge against homebuyers/ leased land/ projects in the facts of the case. Similarly, the banks cannot recover money from projects as it has not been invested in projects.* ***Homebuyers money has been diverted fraudulently, thus, fraud cannot be perpetuated against them*** *by selling the flats and depriving them of hard-earned money and savings of entire life. They cannot be cheated once over again by sale of the projects*

3 2019 (19) SCC 161

raised by their funds. The Noida and Greater Noida Authorities have to issue the Completion/ Part Completion Certificate, as the case may be, to execute tripartite agreement and registered deeds in favour of the buyers on partcompletion or completion of the buildings, as the case may be or where the inhabitants are residing, within a period of one month."

63. He further submitted that this is a perfect case, where the corporate veil has to be lifted. The Delhi High Court in its judgement in **Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd.[4],** has held as under:-

"93. As would be evident from the decisions rendered across jurisdictions and noticed above, the doctrine of a separate legal personality of a corporation and the situations where that veil could be pierced or lifted is well embedded. While legal systems around the world have evolved their own tests or grounds on the basis of which that doctrine may be applied, it is manifest that the shield of a separate legal personality is neither inviolable nor impenetrable. The Court is essentially called upon to ascertain and articulate the circumstances in which that principle may be justifiably invoked in law. While the tests of façade, sham, or where the corporate structure is set up to evade legal obligations are well settled, the issue which arises is whether a court would be justified in law to invoke the piercing principle absent allegations of fraud, façade or evasion of taxes or any other obligations.

94. On a review of the legal position as it prevails today across various jurisdictions, it is manifest that the doctrine of lifting of the corporate veil is no longer recognized to be applicable only in the context of the facade and sham tests that have held the field for centuries. The said principle may also in an appropriate case be liable to be ***resorted to where equity and the ends of justice may sanction such a recourse, where legal obligations are sought to be avoided as also in a setting where public policy or public*** *interest so demand and require. A decree or judgment of a competent court must necessarily be enforced. Courts of justice would be failing in their duty if a decree were left to be a mere dead letter. If decrees and judgments of courts were to be rendered inexecutable and courts were to simply be forced to stand on the sideline, it would clearly shake the confidence of the people in the legal system and its very efficacy. An obligation which flows from a decree or an award must not only be duly recognized but also enforced in accordance with law. Taking any other view would render the entire adjudicatory process meaningless and an exercise in futility.*

99. As modern commerce and the regulatory regime in respect thereof has evolved over the decades, courts have leaned towards jettisoning a rigidity of approach or being tied down by principles which may have lost relevancy. Law in any case must grow and evolve bearing in mind the felt societal needs of the time and at the same time taking into consideration technological and social changes. It must keep abreast with the march of civilization itself. Commerce today straddles borders and boundaries of regions and countries. That has indubitably thrown up its own share of original and novel questions. These transformational and normative changes warrant this Court to observe that the evolution of the laws cannot be tied down to conventional creeds. The web of complex corporate structures and which many a time spread across jurisdictions commands the

4 (2023) SCC OnLine Del. 1619

courts to develop and adapt. On a more foundational ground, ***this Court deems it appropriate to recall the famous words of Cardozo and Hand both of whom had commended for acceptance the basic principle that a corporate structure should not frustrate the enforcement of an obligation or leave a party remediless. Courts should desist from becoming a mere mute spectator.***

100. The decisions of our Supreme Court noticed above had prophetically observed that the doctrine of lifting of the corporate veil must be left to develop and evolve. Those decisions had in any case, and in the considered opinion of this Court, deliberately and consciously refrained from exhaustively chronicling or enumerating the myriad circumstances in which that precept could be applied. None of those decisions are liable to be read as recognizing fraud, façade or sham as being the solitary tests for application of the lifting doctrine. ***The power of the Court to peep behind the veil thus must be recognised and held to be justifiably invoked where questions of public policy, public interest or enforcement of settled legal obligations arise.*** *The aforesaid three factors must be recognised as being the cornerstones of our judicial system itself.* ***The precedents noticed above had resorted to the lifting of the veil doctrine where to overcome injustice and inequitable circumstances or results.***

101. Judgments and decrees handed down by a competent court represent and symbolize declarations which bind parties to the lis. ***No party should be permitted to wriggle out from the obligations*** *which flow therefrom. T****aking any other view would result in a systemic breakdown of the adjudicatory mechanism that has evolved over centuries.*** *It is in such situations that the issues of public policy and public interest assume significance. A corporate veil in any case should not come in the way of execution of a binding and well settled legal obligation.*

102. It would be relevant to note that when the corporate veil is pierced in situations like the present, the action is not really one which is aimed at the shareholder as ordinarily understood in law. The shareholder is identified by the court principally since it represents the body and the soul of the corporate entity itself. ***It is the absolute control*** *exercised by the shareholder over that corporate body which would convince and justify a court to proceed further. The Court also bears in mind the principle of "directing mind" as accepted by courts in the United Kingdom."*

64. The learned counsel for the home buyers, to buttress his argument further submitted that the resignation of the promoters as directors of HPPL is nothing but a sham and a facade setup to deceive the statutory bodies to evade the process of law. This is evident from the fact that:-

A. There are several e-mails written between the promoters where repeatedly concerns are being expressed by and amongst themselves about rearrangement of the affairs of the company, and other group companies irrespective the purported resignation of the promoters from these companies a long time ago.

B. The fact that the promoters are the real persons controlling the affairs of the HPPL this has been recognised by the order dated 30.04.2019 passed by this Hon'ble Court in Arbitration and Conciliation Application No.39 of

2018, wherein the newly appointed Director of HPPL was summoned who gave a statement that he was a dummy director only on paper, and he was working as a Store Keeper of the company.

C. The very fact that the promoters signed the MOUs executed in the year 2018, and owned up responsibility for completing the project (despite having resigned in between 2014-15) also shows that they are in full control of HPPL and are in a position to take a decision on behalf of the company.

D. The promoters continued to offer guarantees on behalf of sister concerns, towards the loans extended to them, to various group companies and financial institution, as late as till 2018, despite allegedly having no role to play in the company.

E. The charge-sheet filed by the Economic Offences Wing, Delhi clearly points out the manner in which the promoters have indulged in misappropriation and siphoning of funds, and how they were/are the real brain behind the HPPL.

F. The entire web of transaction and the facts and circumstances of the present case clearly indicate that the promoters have used the HPPL and other similarly situated group companies to syphon out funds and to invest or park the same in various other entities. They were doing so as these funds were their personal properties.

65. The learned counsel lastly submitted that the averments made by the home buyers in their writ petition has not been denied by the promoters or the company and they have chosen not to file any counter affidavit to controvert the averments made therein, hence, under the provisions of law they stand admitted.

ANALYSIS

66. We have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, we have perused the pleadings, grounds taken in the petition, affidavits and annexures thereto and the reply filed by concerned parties.

67. This much is reflected from the record that as per the prevailing policy, Noida Authority allotted land to the builders without charging any

upfront amount. A special concession was given to the builders by which the builders were supposed to start the construction work and pay the Noida Authority the price of the land out of the booking amount collected from the home buyers. Noida Authority allotted 67,941 square meters of land to HPPL to develop the residential project, and fixed a time schedule for payment of the land price.

68. The project was named as Lotus 300, the advertisement which was issued by the company stated that only 300 apartments would be built on an area of 67,941.95 square meters. A lot of people got attracted to the alluring presentation given to the company, vast openness in the project, and booked flats in this project. Allotments were made by the HPPL in favour of the respective buyers. The Builder Buyers Agreement was executed which apparently carried unilateral terms and conditions on a printed agreement whereunder the builder was supposed to charge a fine at the rate of 18% per annum on the delay of payment by the home buyer.

69. However, out of this land parcel 27,941 square meters were sold off by HPPL to a third company for a sum of Rs.236 crores and the entire sale consideration was transferred out of HPPL by the promoters/petitioners to some of their own companies. Surprisingly, the Noida Authority did not asked for this money neither modified the payment schedule fixed earlier.

70. The initial sanctioned map had three hundred flats on the entire stretch of 67941 square meters of land. However, the petitioners/promoters sold off 27,941.95 square meters of the land from the project. The effect was that the area on which 300 flats were to be built got substantially reduced without taking concurrence of the flat buyers. Further 30 apartments were added in the project which was against the sanctioned floor-plan of 2011. So the builder applied for a fresh sanction of plan in April, 2013 for these additional 30 flats. All the 330 flats, in six towers of the project were booked/sold and the developer collected a whopping sum of Rs.636 crores from the home-

buyers, which was supposed to be utilised for construction/developments of the project.

71. It transpires from the record and from the balance sheet of the HPPL that the directors had taken out around 190 crores from HPPL and have invested or given interest free loan to their other companies in which the promoters were either directors or had some personal interest. While HPPL could not complete the project because of the cash crunch and also chose not to pay the dues of the Noida Authority.

72. When the home buyers felt cheated they had filed a First Information Report with the Economic Offences Wing, New Delhi New Delhi under Sections 409, 420 and 120B IPC. A thorough investigation was carried out by the Economic Offences Wing and a charge sheet was filed, in which it was found that the builders have duped the home buyers, siphoned away the funds and offences under Sections 409, 420 and 120B IPC is made out.

73. Accordingly, they were arrested on 30.11.2019. Soon after the arrest all the three promoters, (who are petitioners herein) entered into the MOU, wherein they agreed to infuse Rs.60 crores in the company by opening an escrow account and complete the project in nine months. They further agreed that they will pay the entire dues of the Noida Authority, which was essential for getting the Occupancy Certificate. This MOU was executed between the home buyers, and by all the three promoters personally and also on behalf of the HPPL.

74. On the basis of the MOU and the personal assurance/guarantee given by the three promoters, they were granted bail by the Court of Chief Metropolitan Magistrate, Saket Court, Delhi. The promoters apparently, who had no intention of honouring the MOU, soon after getting the bail, stopped infusing the fund and did not complete the project nor paid Noida Authority their statutory dues. In fact they have once again not only cheated the home buyers and also the Noida Authority but have also cheated the Court by

giving a wrong undertaking (which they never intended to fulfil) and getting a bail. It is evident that the petitioners/promoters have not come to this Court with clean hands and clean mind.

75. As a part of the larger conspiracy to defraud everyone the promoters/directors (petitioners herein) after syphoning off 236 crores (sale proceeds of the part of the land) and 190 crores from the total corpus of Rs.636 crores, which was paid by the flat buyers, by illegally transferring to other entities/companies directly or indirectly owned/controlled by the promoters or where they had personal interest, all the three directors resigned and made their petty employees as puppet directors of the company just to escape their liabilities. This fact is proved by an order of this Court in which the present director, Anand Ram, who happens to be the Store Keeper, appeared in the Court and said that he is simply an employee of the company, which goes to show that the petitioners even after resigning had full control of the company.

76. As far as the argument of the petitioners/directors is concerned that after the resignation they have nothing to do with the company and cannot be prosecuted for the offences of the company and it is the present directors, who are responsible for the affairs of the company in the opinion of the Court, the moot question is to see, whether the resignation is genuine or was made as a part of the conspiracy to avoid any civil and criminal liability while secretly having full control over the company. The only way to ascertain this fact is by piercing the corporate veil and to see as to who are the key persons and in actual charge of the company and whether a fraud has been played by those persons and also to see whether they are trying to hide their fraudulent activities and themselves under the mask of the company being a separate juristic personality. It is trite law that the corporate veil cannot be lifted unless there is some impropriety or fraud been played, which is being masked as a separate juristic entity. And if so found, the veil may be pierced to see who is in actual control of the company and has

created a facade and sham to camouflage the illegal action with a view to avoid payment of liabilities.

77. Due to the occurrence of the above instances of fraud and irregularities, the law has taken change with its earlier exception that the company is a separate juristic personality and the liability of the company cannot be recovered from the property of directors. In due course of time, certain exceptions have been carved out in the doctrine of separate juristic personality of the company, which are being referred in the forthcoming paragraphs.

78. The doctrine of 'piercing of corporate veil' was initially crystallized in ***In Salomon v. Salomon & Co. Ltd. [Salomon v. Salomon and Co. Ltd.***[5]***,*** *, the House of Lords had observed, the company is at law, a different person altogether from the subscriber. 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'.*

79. The doctrine of lifting corporate veil was carved out to be used whenever and wherever the situation so warranted. Lord Denning in ***Littlewoods Stores v. I.R.C., 1969 (1) WLR 1241*** held:-

> "*The doctrine laid down in Salomon's case has to be watched very carefully. It has been supposed to cast a veil over the personality of a limited company through which the Courts cannot see. But that is not true. The Courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. The way with group accounts and the rest. And the Courts should follow suit……."*

80. On the doctrine of 'piercing of corporate veil' the Hon'ble Supreme Court in the matter of **State of U.P. v. Renusagar Power Co.**[6] has held that, in the expanding horizon of modern jurisprudence, the lifting of the corporate veil is not only permissible, its frontiers are unlimited and ever

5 1897 AC 22 : (1895-99) All ER Rep 33 (HL)

6 (1988) 4 SCC 59

expanding. It further significantly observed that the lifting of the corporate veil was a changing concept and of expanding horizons.

81. The Hon'ble Supreme Court in the matter of **Balwant Rai Saluja v. Air India Ltd.**[7] has held that courts would be empowered to disregard the separate legal personality of a company and impose liabilities upon the person actually in control, the essential intent of the piercing of veil of a corporate structure must be guided by the necessity to remedy a wrong done by persons controlling the company and that the said principle would have to be tested based upon the facts and circumstances of each case.

82. The Hon'ble Supreme Court in **State of Rajasthan and others vs. Gotan Lime Stone Khanij Udyog Private Limited and another**[8] has held as under:-

> *The principle of lifting the corporate veil as an exception to the distinct corporate personality of a company or its members is well recognized not only to unravel tax evasion[7] but also where protection of public interest is of paramount importance and the corporate entity is an attempt to evade legal obligations and lifting of veil is necessary to prevent a device to avoid welfare legislation[8]. 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.*

83. The Honble Supreme Court in **State of Karnataka vs. J. Jayalalita and others**[9] has held as under:-

> *It was finally held that the concept of corporate entity was evolved to encourage and promote trade and commerce and not to commit illegalities or to defraud people and thus when the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court ought to ignore the corporate character and scan the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties.*

84. The Hon'ble Supreme Court in the matter of **Arcelormittal India Private Limited vs. Satish Kumar Gupta and others**[10] has observed as under:

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7 (2014) 9 SCC 407

8 2016) 4 SCC 469

9 (2017) 6 SCC 263

> *"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.*

85. The Division Bench of this Hon'ble Court in the matter of **Jagvir Singh vs. State of U.P.**[11] has held that:-

> *"…...by lifting the corporate veil it can be found that the corporate personalitywas used as a mask for evasion of tax and that the corporate personality was sued to recover sham and collusive transactions and that when such tactics are used to circumvent the statutory liability, the taxes could be covered from the Directors by lifting the corporate veil inspite of absence of statutory provisions.*
>
> *In due course of time, certain exceptions were carved out in the doctrine of separate juristic personality of the company. The doctrine of lifting the corporate veil was carved out to be used whenever and wherever the situation so warranted. Lord Denning in Littlewoods Stores Vs. I.R.C., 1969 (1) WLR 1241 held:-*
>
> > *" The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the Courts cannot see. But that is not true. The Courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the Courts should follow suit.....…"*

86. The principle of lifting the veil of corporate personality has been upheld in **Subhra Mukharjee & another v. Bharat Cooking Coal Ltd. & another** (2003) 3 SCC 312; **Calcutta Chromotype Ltd. vs. Collector of Central Excise Kolkata** AIR 1998 SC 1631, **New Horizon Ltd. & another vs. Union of India and others,** 1995 (1) SCC 478, **C.I.T. vs. Meenakshi Mills Ltd. Madura** AIR 1967 SC 819; **Telco & ors vs. State of Bihar** AIR 1965 SC 40; **Juggilal Kamlapal vs., AIR** 1969 SC 932.

87. This Court in the matter of **Rakesh Mahajan vs. State of U.P. and others**[12]**,** this Court has held:-

> *"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:*

10 (2019) 2 SCC 1

11 2012 (50) NTN 236

12 (2020) 2 All LJ 501

> *"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."*

88. The most comprehensive exposition of the approach to the subject has been elucidated by the Delhi High Court in the matter of **Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd (supra),** wherein it has been held that the doctrine of lifting of the corporate veil is no longer recognized to be applicable only in the context of the facade and sham tests that have held the field for centuries. The web of complex corporate structures, which many a time spread across jurisdictions commands the courts to develop and adapt. The power of the Court to peep behind the veil thus must be recognised and held to be justifiably invoked where questions of public policy, public interest or enforcement of settled legal obligations arise. These three factors must be recognised as being the cornerstones of our judicial system itself. The precedents noticed above had

resorted to the lifting of the veil doctrine to overcome injustice and inequitable circumstances or results. It is the absolute control exercised by the key personnel over that corporate body which would convince and justify a court to proceed further.

89. In this backdrop, the ration of case law cited by petitioner in the case of **R.K. Chaddha Vs. State of U.P. (supra)** is not applicable in the present case. As in the instant matter the promoters/directors had got land allotted from Noida Authority launched project and lured people to invest/book and then sold off a major portion of the land to the third party for Rs.236 crores and then skimmed off this amount to its other companies and thereafter, out of Rs.636 crores collected from home buyers again diverted Rs.191 crores to their other group companies. To divest this amount, corporate structure was set up for masking the sham transactions and a fraud is apparently played with the bank or the public at large as well as the State. Therefore, it has become imperative on this Court to lift the corporate veil and to see who are the key persons involved behind this syphoning, layering of funds of HPPL company.

90. After piercing the corporate veil, it is evident that the three promoters/ directors/petitioners have transferred/diverted funds from HPPL to different companies in which these three were either promoters/ directions/shareholders or had some business interest in it. As per their own balance sheet Rs.191 crores was given as interest free loans, and surprisingly, HPPL was facing cash crunch, they did not had the money to complete the project or pay the Noida Authority dues or the dues of the bank, but even then it did not take any steps to recover the interest free loan which they had given to other companies. Apart from this, the sale proceeds of Rs.236 crores which the company got from selling a portion of the project land, was also diverted away. The syphoning away of funds is evident and this was done while these three petitioners were directors. They had tendered their resignation after the money was moved out of HPPL and they were

responsible for doing that. Now the question is as to who has the full control of the company.

COMPLETE CONTROL OF HPPL WITH THE PROMOTERS EVEN AFTER RESIGNING

91. The promoters of the company even after resigning have a complete control over the company. This fact has been ascertained with the several emails, which have been brought on record, which goes to prove that the promoters even much after resigning have been managing the affairs of the company and had been sending emails where they have shown concerns among themselves about rearrangement of the affairs of the company and other group companies irrespective of the purported resignation given by them from these companies long time back.

92. The fact that the promoters are still in the driving seat and have a complete control on the affairs of HPPL and other group companies has also been recognized by the order dated 30.04.2019 passed by Hon'ble High Court in Arbitration and Conciliation Application No.39 of 2018, wherein, Anand Ram, the present director, in a Court proceeding has given a statement that he is just a store keeper with HPPL and has no knowledge about the working of the company and he had appeared on the direction of (Personal Secretary of one of the promoters, Vidur Bharadwaj), it was then the Court had issued summons to one of the directors/petitioners (who had resigned) to appear before the Court. This goes to show that the petitioner and the other directors are in complete control of the company throughout, and the present directors are their petty employees placed by them as puppets.

93. The very fact that the promoters signed the MOUs executed in the year 2018, and owned up responsibility for completing the project (despite having resigned in between 2014-15) also shows that they are in full control of HPPL and are in a position to take a decision on behalf of the company.

CONDUCT AND ROLE OF NOIDA AUTHORITY

94. The lease deed executed between the HPPL and the Noida Authority had a clause of cancellation of lease in case there is any default on part of the lessee or violation of any terms and condition of the lease for non-deposit of the allotment amount. The terms of the lease deed was clear that in case any amount due is not paid, the sub-lease would be cancelled but surprisingly, the allotment amount, which fell due w.e.f. 25.03.2014 to 28.03.2020 and onwards no action was taken by the Noida Authority.

95. In this backdrop, it would not be wrong to say that the officers of the Noida Authority had been allowing the petitioners to commit the fraud. Though after paying seven instalments (out of which four were of moratorium period where nothing towards the principal amount was to be paid and only interest was to be paid) they have stopped paying instalments w.e.f. 25.03.2014 onwards but the Noida Authority did not take any steps to recover the same and virtually allowed the promoters to collect money from the home buyers and syphon away the same to some other companies. It was only in 2019, the Noida Authority got out of the slumber and issued a recovery certificate against the company and against the promoters. The impugned recovery notice issued was only against the additional compensation which the company had to pay to the Noida Authority, which in turn had to be paid to the farmers. The Noida Authority had given enough long rope for the promoters to siphon away all the funds of the company and leave the company absolutely in an insolvent condition.

96. The Noida Authority had in the year 2017 issued a list of defaulters, who had defaulting in making payments to the Noida Authority. The name of the HPPL was there but surprisingly they took no steps to recover the overdue instalments from the company.

97. There is also an indemnity clause in the lease deed executed between Noida Authority and HPPL wherein it was stated that the lessee shall be wholly and solely responsible for implementation of the project and also for

ensuring quality, development and subsequent maintenance. The lessee has not completed the project as per the timeline given by the Noida Authority and for the reasons best known to the Noida Authority, they have not taken any action against the promoters. The Noida Authority did not make any effort to even ascertain the reasons for the delay of more than a decade in completion of the project.

98. When the Noida Authority permitted HPPL to sell 27,941.09 square meters of land (hey ought to have recovered the said money but they allowed the HPPL to sell the part of the allotted land) for Rs.236 crores and pocket all the sale proceeds and most surprisingly the Noida Authority did not even ask for the same. Astonishingly, when the The payment schedule was of total land area of 67,941.95 square meters, though the HPPL had sold off 27,941.09 square meters but the Noida Authority did not change the payment schedule but allowed to continue the earlier payment schedule, which was for 67,941 square meter. With this, the Noida Authority had ensured an illegal windfall gains to the promoters at the cost of the interest of Noida Authority. Had the Noida Authority recovered the premium from the sale proceeds or changed the payment schedule when a major portion of land has been sold off, this outstanding dues would have been far less . Even if they had insisted the HPPL to pay the instalments in time, there would not have been a default and the dues would not have mounted so much.

99. The affidavit filed by the Noida Authority does not explain the reason why there was a stoic silence on behalf of the Noida Authority, for making any efforts to recover the instalments which fell due from 25.03.2014 onwards. On account of gross negligence of Noida Authority in taking any steps or even ascertaining status of payment towards its dues for over a decade has led to ballooning of its dues, which is approximately Rs.166 crores as of today.

100. Apparently, the inaction of the Noida Authority speaks volumes of their conduct. It is because of their inaction against the defaulting company, the gullible home buyers have come to such a situation where they, after paying the entire money, are not getting the occupancy certificate and presently the Noida Authority is also not in a position to recover any amount from the company, as the company is now under insolvency.

101. The Noida Authority merely acted as a private trader (rather than a trustee and regulator) selling rights of these lands to developers, who prospered by making a huge profit. The promoters/developers in cahoots with the officers of the Noida Authority kept defrauding innocent buyers. Astonishingly, while buyers were struggling to get possession of their apartments in such incomplete projects of this developer, Noida continued further to allot large tracts of land to new companies floated by one of the promoters.

102. Apparently, there is an abject failure of Noida Authority and a complete abdication of their duties to protect the rights of hapless home buyers. The Noida Authority have been singularly responsible for a series of untenable, arbitrary and irrational actions which have directly and irreversibly impacted hundreds of home buyers, their families, their life savings and their living situation.

BANK LOAN

103. The company has taken a loan from the IndusInd bank. Apparently, the loan was granted and it seems that the bank did not verify and did not carry out proper due diligence before granting the loan. If the bank had taken due care and diligence, it would have come to surface that there was no need for the loan to HPPL as the home buyers had paid the amount, which included cost of the land, (that is land premium) lease rent, cost of construction, and of-course a profit, which the builder was supposed to make. When there was enough money with HPPL for completion of the

project then what was the need of taking/giving loan to the company. Even after disbursing the loan, the Bank did not bother to see or check whether the amount for which the loan was given has been utilized for the same or not.

IMPLEMENTATION OF PREVENTION OF MONEY LAUNDERING ACT

104. The Prevention of Money Laundering Act[13] (in short 'PMLA Act") was enacted in 2002. For ready reference Sub-Clause (p), (u), (v), (y) and (za) of Clause 2 of Chapter I of the PMLA Act are quoted hereunder :-

> *(p) "money-laundering" has the meaning assigned to it in section 3;*
>
> *u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;*
>
> *Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.*
>
> *(v) "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located;*
> *Explanation.—For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences;*
>
> *(y) "scheduled offence" means—*
>
> *(i) the offences specified under Part A of the Schedule; or*
> *(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or*
> *(iii) the offences specified under Part C of the Schedule;*
> *(za) "transfer" includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;*

The following provisions of IPC were included in Part A, Paragraph 1 of the Schedule. The Schedule :-

OFFENCES UNDER THE INDIA PENAL CODE (45 OF 1860)

Section	*Description of offence*
120B	*Criminal conspiracy*
……..	
420	*Cheating and dishonestly including delivery of property.*

13 PMLA Act, 2002

> *3. Offence of money-laundering.-Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.*
>
> *Explanation.—For the removal of doubts, it is hereby clarified that,—*
>
> *(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—*
>
> *(a) concealment; or*
>
> *(b) possession; or*
> *(c) acquisition; or*
> *(d) use; or*
> *(e) projecting as untainted property; or*
> *(f) claiming as untainted property,in any manner whatsoever;*
>
> *(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.*

105. After the amendment in PMLA Act the offence under Section120B and Section 420 of IPC were included under the ambit of PMLA Act, 2002 and these offences would be a scheduled offence as per Section 2 (y) of PMLA Act. Since, the promoters after syphoning away huge amounts from HPPL has placed it into different companies, by layering through the corporate web and ultimately integrating to some other entity where they all had personal interest. These transactions fall within the ambit of PMLA Act and in the opinion of the Court, the appropriate agency, which is competent to look into and investigate the transactions, will be Enforcement Directorate.

EFFECT OF INSOLVENCY PROCEEDINGS

106. The effect of insolvency proceedings on the petitioners/directors is that they will not get any benefit of moratorium as the same is only applicable to the corporate debtor. The intention of the legislature was very clear that the criminal liability and prosecution of the directors for the fraud committed by them would continue and no benefit of the protection provided in the IB Code would be extended to them.

107. Section 32A of the IB Code is as follows:-

*"**32A. Liability for prior offences, etc.**—(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—*

(a) a promoter or in the management or control of the corporate debtor ora related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who** was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or **was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section."

108. The Hon'ble Supreme Court in the matter of Manish Kumar v. Union of India and Another reported in (2021) 5 SCC 1 has held :-

"Section 32A of the IBC has been upheld by this Court in Manish Kumar v. Union of India reported in (2021) 5 SCC 1. This Court has held that the said section does not permit the wrong-doer to get away. Thus, if the argument of allowing the signatory/director to go scot-free after the approval of the resolution plan is accepted the same would run contrary to the legislative intent of Section 32A which has been upheld by this Court as under:

"326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned

there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision."

109. The Hon'ble Supreme Court in the matter of **Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation of India Ltd. (supra)** (Criminal Appeal No.170 of 2023) (paragraph 67b) has held that, a section has been introduced by an amendment into the IB Code which focuses on the liability of offences committed by the directors of the corporate debtor prior to commencement of the corporate insolvency resolution process. The Court further held that every person who was in any manner in charge of, or responsible of the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence shall be proceeded with, in accordance with law. It is only the corporate debtor company (with the new management) will be safeguarded.

CONCLUSION

110 . It is apparent that the promoters have played a fraud on the home buyers, Noida Authority, Bank as well as on the Court. The claim of the promoters /petitioner that they are not the directors of the company any more and had nothing to do with the company and the liability of the company can only be recovered from the company can not be sustained. If this amount which is illegally stashed / invested in other companies is brought back then all the creditors would be paid off, but unfortunately, the Noida Authority through its recovery proceedings cannot go to the extent of getting the money back which has already been parked in other companies and the company has been pushed into insolvency. As a matter of fact, IRP also does not have the power to recover this amount, which has been illegally siphoned off by the promoters and parked/invested in other entities.

111. The entire transaction through the web of different companies goes to show that the promoters/directors/petitioners have used the HPPL and other similarly situated companies to syphon and layer the funds which they have diverted or invested in various other entities/companies owned or controlled

by them. After piercing the corporate veil, it is clear that even after resigning they had the full control of the company. The resignation was just a facade and it was done to avoid any civil or criminal liabilities, and with the sole intention to cheat the home buyers and to avoid payment of dues of Noida Authority.

112. We will fail in our duty if we keep the eyes shut and allow the promoters to go scot free after having defrauded everyone and syphoning off funds from HPPL and investing in other companies.

113. After piercing the corporate veil, it is evident that, after cheating the home buyers, to avoid civil and criminal liabilities the promoters resigned as directors of the company and made their petty employees as the director of the company while still keeping the full control, and day to day running of the company. The resignation was nothing but just a sham, with the sole intention of defrauding the home buyers and Noida Authority.

DIRECTIONS OF THE COURT

114. Since the offence committed by the petitioners/promoters is a scheduled offence under the PMLA Act. The Enforcement Directorate is directed to proceed against all the directors/promoters/designated promoter/officer who is in default, companies/other entities in which money from HPPL is syphoned or parked. These entities/people are directed to cooperate in the investigation and if they do not cooperate in the investigation then Enforcement Directorate would be free to take any appropriate action against them as available under the law. The Enforcement Directorate will make all sincere efforts to recover the said amount and pay off all dues of all the creditors.

115. Since the company (HPPL) is into Insolvency, there is a moratorium as per Section 14 of the Code so no proceeding can continue against the company by any creditors to recover their dues. Hence, the Noida Authority shall put up all their claims before the Insolvency Resolution Professional.

116. The effect of moratorium under the IB code is confined only to the debtor company HPPL therefore, the director promoters/petitioners will not get any benefit and shall continue to be liable and be prosecuted for such offence.

117. The Noida Authority is directed to issue Occupancy Certificate/part Completion Certificate, as the case may be, and to execute tripartite agreement and registered deed in favour of flat buyer within a month.

118. Accordingly, the writ petitions are disposed of.

119. Registrar (Compliance) of this Court may forward this judgement to the Enforcement Directorate for compliance.

Order Date:-29.02.2024

S.P.