

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

Reserved on 21.12.2023

Delivered on 29.02.2024

**Court No.42**

**Case :-** WRIT - C No. - 25554 of 2019

**Petitioner :-** Ashish Gupta

**Respondent :-** State Of U.P. And 5 Others

**Counsel for Petitioner :-** Ashish Kumar Singh, Swetashwa Agarwal

**Counsel for Respondent :-** C.S.C., Abhinav Gaur, Aditya Vardhan Singh, Anshul Kumar Singhal, Kaushalendra Nath Singh, Nikhil Kumar, Pandey Balkrishna, Prashant Kanha, Prateek Sinha, Raghav Dev Garg, Rishu Mishra, Sumit Daga, Varad Nath, Vinayak Mithal

With

**Case :-** WRIT - C No. - 11712 of 2023

**Petitioner :-** Lotus Boulevard Espacia Apartment Owners Association

**Respondent :-** State Of U.P. And 2 Others

**Counsel for Petitioner :-** Varad Nath, Agarwal Archi Piyush

**Counsel for Respondent :-** C.S.C, Anjali Upadhyaya, Kaushalendra Nath Singh

**Hon'ble Mahesh Chandra Tripathi, J.**

**Hon'ble Prashant Kumar, J.**

**(Delivered by Hon'ble Prashant Kumar, J)**

1. Heard Sri Ashish Kumar Singh, learned counsel for the petitioner in Writ-C No.25554 of 2019, Sri Varad Nath, learned counsel for petitioner in Writ-C No.11712 of 2023, Sri Vinayak Mithal, learned counsel for respondent no.27, Sri Prateek Sinha, learned counsel for respondent no.28, Sri Anurag Khanna, learned Senior Advocate assisted by Sri Raghav Dev Garg, learned counsel for respondent no.7 & 29, Sri Amit Saxena, learned Senior Advocate assisted by Sri Shivam Yadav and Sri Kaushalendra Nath Singh, learned counsel for Noida Authority and Sri S.C. Upadhyay, learned standing counsel for the State respondents. None is present on behalf of respondent nos.6, 8 to 26 and 30 to 33.
2. Since both the writ petitions are relating to the same issue, they are being heard and decide by a common order.

**FACTUAL MATRIX**

3. Few of the Private Limited Companies jointly in a consortium decided to participate in a tender for Plot No.GH-002 in Sector-100, Noida to develop a Group Housing Project and it was decided to apply for a plot and if the plot was accorded, the consortium would set up a “special purpose company” for execution of the project. After allotment of the project, a Special Purpose Company known as ‘M/s Cloud 9 Projects Private Limited’ was incorporated on 20.01.2009 ((here-in-after referred to as “Company”) .

4. After the project was allotted to the consortium a special purpose company was incorporated, which entered into a lease-deed with Noida Authority on 17.06.2009. The shareholding in this special purpose company (project company) was as follows:-

| <i>Sl.No.</i> | <i>Shareholder/Subscriber</i>                            | <i>Authorised Representative</i>   | <i>No. of Equity Shares Taken</i> | <i>Shareholding Percentage</i> |
|---------------|--|------------------------------------|-----------------------------------|--------------------------------|
| 1.            | <i>M/s Civic Traders Pvt. Ltd.</i>                       | <i>Mr. Aditya Gupta</i>            | <i>5000</i>                       | <i>50%</i>                     |
| 2.            | <i>M/s Nandini Electricals Works Pvt. Ltd.</i>           | <i>Mr. Aditya Gupta</i>            | <i>1500</i>                       | <i>15%</i>                     |
| 3.            | <i>M/s Civic Properties Pvt. Ltd.</i>                    | <i>Mr. Aditya Gupta</i>            | <i>1500</i>                       | <i>15%</i>                     |
| 4.            | <i>M/s Dashmesh Promoters &amp; Developers Pvt. Ltd.</i> | <i>Mr. Nirmal Singh (Deponent)</i> | <i>1000</i>                       | <i>10%</i>                     |
| 5.            | <i>M/s Vistar Constructions Pvt. Ltd.</i>                | <i>Mr. Supreet Singh Suri</i>      | <i>1000</i>                       | <i>10%</i>                     |

5. As per the lease, the consideration of the premium was Rs.84,18,27,000/- out of which 20% i.e. Rs.16,80,00,000/- was paid at the time of allotment and the balance amount was to be paid as per following schedule:-

| <i>Sl. No.</i> | <i>DUE DATE</i>   | <i>BALANCE PREMIUM (in Rs.)</i> | <i>INSTALMENT (in Rs.)</i> | <i>INTEREST (in Rs.)</i> | <i>TOTAL (in Rs.)</i> |
|----------------|-------------------|---------------------------------|----------------------------|--------------------------|-----------------------|
| <i>1</i>       | <i>08.02.2010</i> | <i>672,000,000</i>              | <i>21,000,000</i>          | <i>75,952,800</i>        | <i>96,952,800</i>     |
| <i>2</i>       | <i>08.08.2010</i> | <i>651,000,000</i>              | <i>21,000,000</i>          | <i>35,805,000</i>        | <i>56,805,000</i>     |

|    |            |             |            |            |            |
|----|------------|-------------|------------|------------|------------|
| 3  | 08.02.2011 | 630,000,000 | 21,000,000 | 34,650,000 | 55,650,000 |
| 4  | 08.08.2011 | 609,000,000 | 21,000,000 | 33,495,000 | 54,495,000 |
| 5  | 08.02.2012 | 588,000,000 | 53,454,546 | 32,340,000 | 85,794,546 |
| 6  | 08.08.2012 | 534,545,454 | 53,454,546 | 29,400,000 | 82,854,546 |
| 7  | 08.02.2013 | 481,090,908 | 53,454,546 | 26,460,000 | 79,914,546 |
| 8  | 08.08.2013 | 427,636,362 | 53,454,546 | 23,520,000 | 76,974,546 |
| 9  | 08.02.2014 | 374,181,816 | 53,454,546 | 20,580,000 | 74,034,546 |
| 10 | 08.08.2014 | 320,727,270 | 53,454,546 | 17,640,000 | 71,094,546 |
| 11 | 08.02.2015 | 267,272,724 | 53,454,546 | 14,700,000 | 68,154,546 |
| 12 | 08.08.2015 | 213,818,178 | 53,454,546 | 11,760,000 | 65,214,546 |
| 13 | 08.02.2016 | 160,363,332 | 53,454,546 | 8,820,000  | 62,274,546 |
| 14 | 08.08.2016 | 106,909,086 | 53,454,546 | 5,880,000  | 59,334,546 |
| 15 | 08.02.2017 | 53,454,540  | 53,454,546 | 2,940,000  | 56,394,546 |

6. Clause 6 of the lease deed mentions the construction period where a timeline was framed for completing the construction. The relevant clause was as follows:-

*The lessee is required to submit building for approval within 3 months from the date of possession and shall start construction within 6 months from the date of possession. Date of execution of lease deed shall be treated as the date of possession. The lessee shall be required to complete the construction of group housing pocket on allotted plot as per approved layout plan and get the occupancy certificate issued from Building Cell Development of the Lessor as per schedule given below: (subject to the approval of the State Government) .*

| Sl. No. | Size of the Plot (in sq. mtrs.) | Minimum Constructed Area (percentage of total permissible FAR) | Time limit for obtaining Completion Certificate for Ist Phase of the project to be developed in Phases | Maximum time limit for obtaining completion certificate of the full project |
|---------|---------------------------------|--|--|---|
| 1.      | Upto 4000                       | 50%  | Three years from the date of execution of Lease Deed/Possession  | Five years from the date of execution of Lease Deed/Possession              |
| 2.      | 4000-10000                      | 40%  | Three years from the date of execution of Lease Deed/Possession  | Five years from the date of execution of Lease Deed/Possession              |
| 3.      | 10000-20000                     | 35%  | Three years from the date of execution of Lease Deed/Possession  | Five years from the date of execution of Lease Deed/Possession              |
| 4.      | 20000-40000                     | 30%  | Three years from the date of execution of Lease Deed/Possession  | Six years from the date of execution of Lease Deed/Possession               |

|    |               |     |   |   |
|----|---------------|-----|---|---|
| 5. | 40000-80000   | 30% | Three years from the date of execution of Lease Deed/Possession | Seven years from the date of execution of Lease Deed/Possession |
| 6. | 80000-200000  | 25% | Three years from the date of execution of Lease Deed/Possession | Eight years from the date of execution of Lease Deed/Possession |
| 7. | 200000-400000 | 20% | Three years from the date of execution of Lease Deed/Possession | Nine years from the date of execution of Lease Deed/Possession  |
| 8. | Above 400000  | 15% | Three years from the date of execution of Lease Deed/Possession | Ten years from the date of execution of Lease Deed/Possession   |

7. The lease-deed executed between the project company and Noida Authority also had a clause for cancellation of lease-deed, which was as follows:-

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

1. *Allotment being obtained through misrepresentation/suppression of material facts, misstatement and/or fraud.*
2. *Any violation of directions issued or rules and regulation framed by any authority or by any other statutory body.*
3. ***Default on the part of the lessee for breach/violation of terms and conditions of registration/allotment/lease and/or non-deposit of allotment amount.***
4. *If at the same time of cancellation, the plot is occupied by the Lessee thereon, the amount equivalent to 25% of the total premium of the plot shall be forfeited and possession of the plot will be resumed by the Lessor with structure thereon, if any, and the lessee will have no right to claim compensation thereof. The balance, if any shall be refunded without any interest. The forfeited amount shall not exceed the deposited amount with the Lessor no separate notice shall be given in this regard.*
5. *If the allotment is cancelled on the ground mentioned in sub clause 1 above, then the entire amount deposited by the lessee, till the date of cancellation shall be forfeited by the Lessor and no claim whatsoever shall be entertained in this regard.*

*In case of cancellation a proper notice to the lessee will be sent by the lessor.”*

8. M/s Civic Properties Limited is 50% share holder of the company in which brother of the petitioner and his wife Kalpana Gupta were directors, and this M/s Civic Properties Limited was also a lead member of consortium and was responsible for planning, development, implementation, marketing and management and completion of the project.

9. The petitioner Ashish Gupta, along with his brother Aditya Gupta, together held 80% shares of the company (M/s Cloud 9 Projects Private Limited) directly and indirectly through the other companies. A few years later, M/s Dashmesh Promoters Private Limited, which had 10% shares of the project company got dissolved and as per scheme of arrangement approved by the Delhi High Court the assets debts and liabilities of M/s Dashmesh Promoters and Developers Private Limited were transferred to M/s Vistara Constructions Private Limited and M/s Three C Universal Developers Private Limited.

10. After the allotment, the project company proposed to construct a residential housing project of eight towers and accordingly the maps were approved. These towers were Tower nos.31 to 38. The tower nos.32 to 36 were constructed by the company and got the occupancy certificate from Noida Authority, and handed over 366 flats of those completed towers to the buyers.

11. However, the tower no.31 of the project company was sealed by the Noida Authority as the dues of Noida Authority were not paid by the company.

12. The issue before us is regarding tower nos.37 and 38 in which there are 168 flats and out of these 168 flats, 148 flats had been handed over to the flat owners but the project company did not apply for the occupancy certificate from Noida Authority and no steps were taken for the execution of sale-deeds/Tripartite lease deed.

13. The reason for not getting the occupancy certificate was due to outstanding dues of Rs.62 crores of the company towards Noida Authority. Unless and until the dues were paid, the Noida Authority was not ready to grant occupancy certificate. It is clear that the flat owners had paid the entire

amount, which included various components like construction cost, premium charges, interest, acquisition cost and lease rent.

14. The flat owners, as well as the Noida Authority alleged that the directors of the project company had siphoned off the money though it was taken from the flat owners but it was not deposited to the Noida Authority.

15. After issuing a number of show cause notices when the company failed to pay the dues, ultimately the Noida Authority issued recovery certificate of Rs.62 crores on 28.06.2019 against the company and also against its directors. The petitioner and his brother were also detained in civil imprisonment. It was then the petitioner had filed the instant petition under Article 226 of the Constitution of India on the ground that the petitioner is no longer a director of the company and the liability, if any, is that of the company and not on the ex-director of the company and the recovery certificate issued against them is illegal, and sought the following reliefs:-

*I. Issue an appropriate order or direction in the nature of certiorari to call for the record, quash and set aside the recovery certificate dated 28.06.2019 issued by the Additional Chief Executive Officer, Noida as well as the Recovery Citation dated 08.07.2019 issued by the Tehsildar, Tehsil Dadri, District Gautam Budh Nagar insofar as it relates to the ex-director/petitioner herein.*

*II. Issue an appropriate order or direction in the nature of mandamus commanding and directing the respondent authorities to release the petitioner herein from civil imprisonment/illegal detention forthwith.*

*III. To pass such other and further order, which this Hon'ble Court may deem fit and proper in the circumstances of the present case.*

*IV. Award the cost of this petition to the petitioners.*

16. This Court vide its order dated 07.08.2019 released the petitioner from civil prison. The order passed by this Court on 07.08.2019 is as follows:-

*“Heard Sri Shashi Nandan, Senior Counsel assisted by Sri Ashish Kumar Singh, learned counsel for the petitioner, learned Standing Counsel for the respondent Nos. 1, 2 and 4 and Sri Kaushalendra Nath Singh, learned counsel for respondent Nos. 3 and 4.*

*The petitioner has preferred this writ petition for quashing of the recovery certificate dated 08.06.2019 and recovery citation dated 08.07.2019 whereby a sum of Rs. 65,73,10,206.50/- plus others is sought to be recovered from him. A further prayer has been made by the petitioner to direct the respondent No.6 to release him from civil*

*imprisonment as he has been arrested on 25.07.2019 on default in making the payment as per the recovery citation.*

*M/s Cloud Nine Project Pvt. Ltd. (respondent No.6) is a company which entered into a lease deed with New Okhla Industrial Development Authority (NOIDA) on 17.06.2019 which under a huge piece of land was allotted to it for development and group housing, subject to payment of premium of Rs. 84,18,27,000/- which was payable in installments as notified in the lease itself.*

*The aforesaid amount carried interest at the rate of 14% compounded half yearly in the event of default in the payment of installment.*

*The aforesaid company was given the status of Special Purpose Company (SPC) on the request of consortium members i.e.-:*

*1. M/s Civic Traders Pvt. Ltd., 2. M/s Nandini Electricals Works (P) Ltd., 3. M/s Civic Properties (P) Ltd., 4. M/s Dashmesh Promoters & Developers Pvt. Ltd., and 5. M/s Vistar Constructions Pvt. Ltd.*

*The petitioner at one point of time was the Director of the respondent No.6 and alleges that he had resigned which fact is being disputed by the other side.*

*The petitioner was also a share holder and Director in the companies forming the consortium.*

*On the query of the Court, the petitioner informs that the following had been the Directors of the various companies-:*

- (a) Ashish Gupta*
- (b) Aditya Gupta*
- (c) Nirmal Singh*
- (d) Surina Uppal*
- (e) Surpreet Singh Suri*
- (f) Vidur Bhardwaj*
- (g) Kalpana Gupta*
- (h) Jitendra Kumar Gupta*
- (i) Minakshi Gupta*
- (j) Girish Chandar Joshi*

*As on date, Sri Anand Ram and Sri Rajendra Kumar are said to be the Directors of the respondent No.6.*

*The submission of Sri Shashi Nandan, Senior Counsel is that the dues sought to be recovered under the impugned citation are the dues of the respondent No.6 which is a separate legal entity and the said dues cannot be recovered from the assets of the petitioner or by his detention in civil imprisonment.*

*In view of the above argument, the precise question which arises is whether the dues of the respondent No.6 company can be recovered from the personal assets and its Directors or the Ex-Directors or by the arrest of the Directors/Ex-Directors.*

*In view of the aforesaid facts and circumstances, we direct the petitioner to implead companies of the consortium and their Directors and all the persons who have remained Directors of the respondent No.6 from time to time as respondents to this petition.*

*Sri Shashi Nandan on our query and on receiving instructions informs that the petitioner is possessed of two residential houses in Meerut and a piece of land in Panipat apart from having 10% shares in respondent No.6 company.*

*All the respondents may file reply/counter affidavit within 3 weeks. One week thereafter is allowed to the petitioner to file rejoinder affidavit.*

*Issue notice to respondent No.6 and the proposed respondents who may also file their reply and submit explanation in relation to the above dispute giving full and complete details of their persons, assets and liabilities and that of the respective companies.*

*List for admission/final disposal for adjudication of the above question of law raised immediately after one month.*

*In the meantime, the petitioner who is under civil imprisonment shall be released forthwith with the following conditions:-*

*(i) that on release from civil imprisonment, he shall not move out of the country without the leave of the Court;*

*(ii) that he will not deal with his shares which he is having in the company M/s Cloud Nine Project Pvt. Ltd. And any company that is a member of the consortium;*

*(iii) his two residential houses situate in Meerut and the land which he possesses in Panipat (particulars of which shall be supplied by the counsel for the petitioner) shall be under attachment and;*

*(iv) he is restrained with dealing with those properties in any manner and would not transfer them.*

*The Sub-Registrar, Meerut and Panipat are directed not to register any deed of transfer of any property in respect of the above referred properties of the petitioner.*

*The Sub-Registrar, Gautam Buddh Nagar/Ghaziabad is directed not to register any deed of transfer of any flat constructed by the respondent No.6 company on the property leased out by the NOIDA in connection with which the present dues are being claimed.*

*A copy of this order may be sent to all the above Sub-Registrars with the request to ensure strict compliance of the same.”*

17. After the interim was passed by this Court there was a stalemate, the petitioner was enjoying the interim order and the Noida Authority was not issuing the occupancy certificate. The flat owners formed an association and filed an impleadment application in the pending petition but since no substantial relief could have been sought as an intervener and since the Noida Authority was not issuing “occupancy certificate” in spite of the fact that the flat owners had paid the entire amounts, it was then the flat owners association decided to file separate and substantive writ petition. This writ petition being Writ-C No.11712 of 2023 has been filed by the association of flat owners seeking the following reliefs:-



*(I) issue a writ, order or direction in the nature of mandamus directing the respondent no.2, Noida Authority to issue Occupancy Certificate for Tower Nos.37 and 38 of Lotus Boulevard Espacia, Sector 100, Noida for 168 flats.*

*(II) issue a writ, order or direction in the nature of mandamus directing the respondent no.2, Nodia Authority to register sub-lease in favour of the flat owners of Tower Nos.37 and 38 in relation to the flats purchased by them;*

*(III) issue any other or further order or direction which the Court may deem fit and proper in favour of petitioner, and*

*(IV) Award costs of this petition to the petitioner.*

This writ petition got tagged along with the earlier Writ-C No.25554 of 2019.

**ARGUMENTS ON BEHALF OF THE  
PETITIONER/DIRECTOR/PROMOTER**

18. Learned counsel for the petitioner submitted that the petitioner and his brother Mr. Aditya Gupta had resigned from the position of directors of the company on 31.05.2017 and Mr. Anand Kumar and Rajendra Kumar had been appointed as directors of this company, who were managing the affairs of the company since then. The petitioner claims that after resignation as director he has nothing to do with the company as any liability of a company has to be recovered from the company and no recovery certificate could be issued against the erstwhile directors of the company.

19. He further argued that the audit report of the company of 2018 (which was for the financial year 2016-2017) shows a positive net-worth and further submitted that while the petitioner and his brother were the directors, the net-worth of the company was positive.

20. The Noida Authority had issued a recovery certificate against the ex-directors i.e. Ashish Gupta and Aditya Gupta (petitioner herein) and on the basis of recovery certificate dated 28.06.2019 a recovery citation was issued on 08.07.2019 against Ashish Gupta and Aditya Gupta. The petitioner claims that he along with his brother, who were ex-directors, have been illegally

detained by the respondent authority on 25.07.2019 and were sent to civil prison.

21. He also submitted that the Collector could not issue a recovery certificate against the ex-directors as they could not be held vicariously liable for the acts of the company. The petitioner held 10% share of the company and it is only the present director of the company who should be held responsible for any act of the company. He further submitted that the project company has enough assets and the recovery should be made from the company as the company itself is in a position to pay off the debt and liabilities.

22. Learned counsel for the petitioner submitted that tower no.31 had 74 flats, out of which 56 flats were unsold, this tower was sealed by Noida Authority. Even if unsold inventory is sold it will fetch more than Rs.500 crores, which would be sufficient to meet current liability of the Noida Authority.

23. The counsel for the petitioner further argued that it is settled proposition of law that a company is a juristic person, capable to sue or being sued in its independent capacity, therefore, the petitioner herein who is an Ex Director of the company cannot be held vicariously liable for the acts of the company.

24. The counsel for the petitioners relied on the judgement passed by this Court in the case of **R.K.Chaddha vs. State of U.P.**<sup>1</sup> in which the Division Bench of this Court has held that the legal position in a case where the corporate personality has been obtained by certain individuals as a mask to prevent tax liability or to divert the funds of the Company for some illegal purpose, the corporate veil can be lifted so that the persons can be identified and made responsible for such fraud, he therefore, submitted that since in

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<sup>1</sup> 2014 SCC OnLine All 6248

this case there was no diversion of funds or tax liability, hence there is no necessity of piercing the corporate veil.

25. 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.**<sup>2</sup> 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 crystallised by Munby J. in **Ben Hashem v Ali Shayif**, and approved by the Apex Court in **Balwant Rai Saluja and Arcelormittal India***

*(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.”*

26. The petitioner further relied on a Division Bench judgement of this Court in **M/s Meekan Transmission Ltd. vs. State of U.P. and others**<sup>4</sup> in which the Court has held :-

*“In the nutshell, the doctrine of lifting of veil or piercing the veil is now a well established principle which has been applied from time to time by the Courts in India*

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2 (2020) 2 All LJ 501

3 [2008] EWHC 2380

4 2008 SCC OnLine All 161

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

27. 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 (supra)** hence the Court should not exercise its right in piercing of corporate veil.

28. This Court on 25.05.2023 in Writ-C No.25554 of 2019 passed the following order:-

*1. Learned counsel for the petitioner seeks time to file affidavit and state on oath as to when first default was committed by the company-respondent no. 6 in payment of dues of Noida Authority; the present holding of the petitioner in the said company and its value; the company in which the petitioner is presently posted as Director or holding any other managerial post and also his shareholding in the consortium.*

*2. Shri Kaushalendra Nath Singh, learned counsel appearing on behalf of Noida Authority will also obtain instructions and disclose when the first default was committed by the company in paying its dues; **what measures have been taken by Noida Authority in recovering its dues from the company and its Directors and disclose the name of their family members and relations who are still Director or in any manner connected with the defaulter company or group of companies.***

*3. As jointly prayed, list on Monday, i.e. 29.05.2023 along with connected cases.*

### **RESPONSE OF NOIDA AUTHORITY**

29. In response to the direction of this Court, Noida Authority had filed an affidavit on 10.07.2011 stating that when the company started defaulting in paying the premium and other dues, a show cause notice was issued for the first time on 03.03.2011 calling upon the present company to pay Rs.6,16,20,650/- by 15.03.2011 failing which the allotment would be

cancelled. This was followed by other show cause notices dated 13.04.2011, 08.12.2014 and 15.12.2014.

30. After three years the Noida Authority sent another notice on 10.11.2017 asking the company to pay the outstanding dues, which had swelled up to Rs.34 crores by 31.10.2017 (this was towards premium instalment and interest), failing which the Noida Authority would take action under Section 40 (a) and (b) of U.P. Industrial Disputes Act, 1976.

31. It was on 28.06.2019, when finally a recovery certificate was issued by the Noida Authority and a recovery citation dated 08.07.2019 was also issued in terms of this recovery certificate, which has been impugned herein by the promoters/directors.

32. Mr. Amit Saxena, learned Senior Counsel for Noida Authority submitted that Noida Authority will issue "Occupancy Certificate" only when the premium, lease rent and other dues are paid by the project company.

33. Referring to the affidavit filed by Noida Authority, Mr. Saxena submitted that the petitioner and his brother, who were directors of the company prior to resignation has siphoned away huge amount of money from the project company. The report relied by the petitioner of the year 2018, for the financial year 2016-17, where the petitioner claims that the company has a positive net-worth when the petitioner and his brother were directors is misleading, if that was the situation why they were not paying the Noida Authority's dues, which was outstanding. If the company was in a position to pay, what held them back from paying. It seems that the company/its directors had no intention to pay.

34. It was further submitted that the petitioner and his brother still controls 70% shareholding of the company but are taking a stand that they have no idea as to what is happening in the company as they are no longer

directors of the company. However, after siphoning of the money they have resigned from the company just to escape from civil and criminal liabilities of the company.

35. Mr. Amit Saxena, learned Senior Advocate appearing for Noida Authority further submitted that this is a perfect case for piercing the corporate veil and to see the conduct of the petitioner and his family members, who after receiving the money from the home buyers, instead of paying the statutory dues of the Noida Authority has siphoned away the money, thereafter, resigned from the project company and now they have turned around and saying that they are just ex-directors of the company so no vicarious liability of the company can be fixed on them.

36. He further submitted that, an investigation may also be directed which may find out the link between the promoters/directors and their family members and their other related subsidiary companies in which funds from this project company has been siphoned and parked in other companies so that this illegally syphoned amount could be traced down and recovered from these companies.

### **ARGUMENT ON BEHALF OF RESPONDENT NO.23**

37. The respondent no.23 is one of the directors of this company, who had filed an affidavit, which actually disclosed the correct picture and the affairs of the company. In that affidavit he fairly stated that the petitioner and his brother were the founding director/promoter of M/s Cloud 9 Projects Private Limited, which is a project company.

38. Learned counsel for the respondent no.23 submitted that the petitioner is also a director in M/s Nandini Electricals Works Private Limited, which is a member of the consortium and held 15% of the shareholding of the company, and M/s Civic Properties Private Limited, which is another company held by the family of the petitioner and owns 50% shares of the

company and is also a “Lead Member” of the consortium and responsible for implementation, construction, management, marketing etc. of the entire project.

39. He further submitted that the petitioner’s family held 80% of the shareholding of the project company, which is currently reduced to 70% and they have a full control over the decision and day to day affairs of the project company.

40. He further submitted that the recovery certificate has rightly been issued as the company had failed to follow the schedule of payment as per the lease deed. The project company had started defaulting even when the petitioner was director. Even on the date of his resignation the outstanding amount towards Noida Authority was Rs.34 crores. He also submitted that the petitioner and his brothers though resigned are still in charge and actually control the project company.

41. The learned counsel further submits that the claim of the petitioner that he has resigned in 2017 is not correct, actually the resignation of the petitioner took effect on 09.03.2018 when the compounding charges were paid by him to the authority. Even then almost Rs.31 crores were outstanding towards the Noida Authority. He further submitted that the entire facade of resignation from the company was nothing but a sham to escape from the liability of the Noida Authority and civil and criminal liability towards the home buyers.

42. He further submitted that no audited balance sheet has been filed, after 2017, though the company is under statutory compulsion to file the same.

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43. The learned counsel for the petitioner vehemently argued that the promoters directors of the project company, and the lead member of the consortium after syphoning off all the money to their other companies and defrauding both the flat owners and the Noida Authority, 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.

44. He further argues that since the company though being a legal entity, cannot be prosecuted, it is the directors and key managerial persons, 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 petitioner and his brother 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.

45. He invited attention of the Court to the fact that the Noida Authority had been very lenient on the company and inspite of fact that they did not pay the dues in time, no action was taken by the Noida Authority.

46. 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 and where the money was ultimately parked/invested.



47. In this backdrop, the learned counsel submitted that a suitable investigation should be carried out by an independent agency, which is competent enough to investigate in the siphoning off funds and also to see, who is responsible and is in actual control of M/s Cloud 9 Projects Private Limited and suitable endeavours should be made to get the syphoned money back into the company and action should be taken against all these who had conned and illegally transferred funds from project company.

48. The learned counsel for 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.**<sup>5</sup>, 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 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.”*

49. He submits that the entire scheme/design of the resignation of the promoters/directors from the project company (M/s Cloud 9 Projects Private Ltd.) is nothing but a sham and also a facade set up to deceive Noida Authority, to evade payment of their dues and to defraud the home buyers.

50. He lastly submitted that it has become a trend in most of the real-estate companies, the owners/promoters, who were the directors of the company after diverting/siphoning the funds from the company to resign

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<sup>5</sup> 2019 (19) SCC 161

and make their peons or some lower staffs as directors of the company and by doing so they try to get out of civil and criminal liabilities, while keeping the control of the company in their hands. This practice is rampant in most of the real-estate companies.

### ANALYSIS

51. The entire proceedings in the instant matter as it get unfurled, manifest the intention of the promoters for defrauding and cheating both Noida Authority and the home buyers.

52. The promoters/directors/petitioner held 70% shares of the project company through various other companies in which the petitioner or his family members are directors or have control over the company. It is apparent that they have launched a project, booked/sold the flats to the gullible home buyers, collected considerable chunk of money and then diverted the money off from the project company, to their other companies, or invest in other companies where they have business interest. Thereafter, resign from the position of director of the company and now the petitioner is trying to shield himself under the mask of different juristic personality by stating that the liability of the company can only be recovered from the company.

53. Counsel for the petitioner throughout has been giving a picture that the petitioner only held 10% share in the present company. On being confronted with the affidavit filed by the respondents, a question was put, as to whether the family still held 70% shares of the company or not, at that point of time the counsel for the petitioner gave a very evasive answer and said that he was not aware of the same.

54. It was brought to our notice that the project company in all had 606 flats out of which 550 were sold up to 2018 and the entire money collected

from the flat owners, which included lease rental, premium etc. but the same was not paid to the authority.

55. It has been submitted by counsel for the petitioner that unsold inventory of tower no.31 if sold would fetch Rs.500 crores on which Mr. Amit Saxena, learned Senior Counsel for Noida Authority replied that it cannot be sold as it is a bare shell of RCC structure and there is no way that the said amount can be recovered from the unsold inventory.

56. We cannot keep our eye shut and be a mere mute spectator of the fraud, which the builders have played on the home buyers and Noida Authority. We are forced to lift the corporate veil to see how the promoters though after resigning as directors continued to be in full control over the company. They had made their petty employees/stooges as the director of the company. Even while they were directors a lot of money has been siphoned away to their other companies.

57. So far as the argument of counsel for the petitioner that the company is a separate juristic personality and any liability of the company has to be recovered from the company and not from the personal properties of the director unless the statute so provides is concerned, he has cited various judgements to buttress his argument wherein it was held that the liability of the company can only be recovered from the company and cannot be fastened and recovered from the directors of the company.

58. *Prima facie*, the above argument raised by the counsel for the petitioner seems attractive and the judgement cited would no doubt be a correct law in normal circumstances and no liabilities of the company can be recovered personally from the directors. But in the facts and circumstances of the present case, it is apparent that a fraud has been played and the directors have siphoned off the funds of the company to their other companies, which is duly substantiated by the records and accounts of the company, the above argument fails and stands rejected.

59. The doctrine of a separate legal personality of a corporation and the situations where that veil could be pierced or lifted is well embedded. The shield of a separate legal personality is neither inviolable nor impenetrable. The Court can very well pierce a corporate veil when the public interest is involved, or where there are sham transactions to cover up fraud or has been done with the intention to evade tax or statutory dues or dues of the statutory authorities.

60. The petitioners/directors have averred that after the resignation they have nothing to do with the company and cannot be prosecuted for the offences of the company. They further averred that it is the present directors, who are responsible for the affairs of the company. Now the moot question is to see if the resignation is genuine or was made as a part of the conspiracy to avoid any civil and criminal liability, while having full control over the company. The only way to ascertain this fact is by piercing the corporate veil and see as to who are the persons in charge of the company and who is keeping full control of the company, and whether a fraud has been played by those personnel, and who are trying to hide their fraudulent activities and themselves, under the mask of the company being a separate juristic personality.

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

62. 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 were carved out in the doctrine of separate juristic personality of the company. 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.*<sup>6</sup>, 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.....”*

63. The division Bench of this Court in the matter of **Jagvir Singh v. State of U.P.**,<sup>7</sup> has held that by lifting corporate veil if it can be found that the corporate personality was used as a mask for evasion of tax and that the corporate personality was sued to recover sham and collusive transactions and such tactics are used to circumvent the statutory liability, then the dues could be recovered from the Directors by lifting the corporate veil in spite of absence of statutory provisions.

64. The Hon’ble Supreme Court in **State of Rajasthan and others vs. Gotan Lime Stone Khanij Udyog Private Limited and another**<sup>8</sup> 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.*

65. The Honble Supreme Court in **State of Karnataka vs. J. Jayalalita and others**<sup>9</sup> 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*

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6 1969 (1) WLR 1241

7 2012 (5) NTN 236

8 (2016) 4 SCC 469

9 (2017) 6 SCC 263

*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.*

66. The Hon'ble Supreme Court in **Juggilal Kamlapat v. Commissioner of Income-Tax**<sup>10</sup>, has held as under:-.

*"From a juristic point of view the Corporation may be a legal personality distinct from its members. But the Court is entitled to lift the mask of corporate entity if the conception is used for tax evasion, or to circumvent tax obligation, or to perpetrate the fraud."*

67. The Delhi High Court in the case of **Ram Kishan and sons vs. Freeway Marketing (India) (P) Ltd. and another**<sup>11</sup> has referred to a judgement in **Russel J. Advarting to Gilford Motor v. Horne**<sup>12</sup>, which holds as under:-

*"Those comments on the relationship between the individual and the company apply even more forcibly to the present case. The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. The Gilfords' case illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances."*

68. The Division Bench referred to **Palmer's company Law**<sup>13</sup> on the question of lifting the veil behind the company as legal persona where it was stated that generally speaking the courts are more inclined in appropriate circumstances to "lift the veil" of corporates where questions of control are in issue or a question of ownership arises. But certain instances have been stated in which the veil of corporates was lifted. Some of them were as follows:-

*1. In certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue.*

*2. The courts have further shown themselves willing to "lift the veil" where the device of incorporation is used for some illegal or improper purpose.*

It was observed by the Division Bench that the doctrine of the piercing the corporate veil is not confined to cases of tax assessment only;

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10 U.P., AIR 1969 SC 932

11 2003 SCC Online Del 1193

12 (1933) All ER 109 (CA)

13 Vol.1, 22nd Edition, at pages 160 to 162

and the court may invoke this doctrine wherever necessary in the interest of justice to prevent the corporate entity from being used as an instrument of fraud. It was held 'in other words, the fundamental principle of corporate personality itself may be disregarded having regard to the exigencies of the situation and for the ends of justice.'

69. Therefore, this Court is of the considered view that the concept of separate corporate entity was evolved to encourage and promote trade and commerce, but not to commit illegalities or to defraud people. Therefore, where the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil.

### **CONDUCT AND ROLE OF NOIDA AUTHORITY**

70 The lease deed executed between the project company 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, no action was taken by the Noida Authority to cancel the sub-lease even after so many defaults done by the project company.

71. Hence, 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. The first instalment due was on 15.03.2011, apart from sending few notices, which was nothing but an eyewash, the Noida Authority did not take any steps to recover the same, and kept their eyes closed, while the promoters collected money from the home buyers and syphoned off the same to their 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.

72. The affidavit filed by the Noida Authority did not explain the reason why the Noida Authority did not make any efforts to recover the dues. Apparently, the inaction of the Noida Authority speaks volumes of their conduct. It is because of their inaction and not taking timely action, against the defaulting company, home buyers have come to such a situation where they, after paying the entire money are not getting the occupancy certificate and the Noida Authority is now not in a position to recover any amount from the company.

73. It is a clear case of syphoning/diverting of funds from the Project Company to other companies by these directors, and after illegally transferring all the funds and defrauding the home buyers by not delivering the flats in spite of receiving the full amount, and also defrauding the Noida Authority by not paying the dues, it is a clear case of cheating. Further, as per the lease deed, the Noida Authority was also responsible to see that the project is completed in time. The project was delayed by the promoters but, Noida Authority did not object to it. Further, no action was taken against the lead member of the consortium, who was responsible for implementation and completion of the project.

74. Apparently there was an abject failure of Noida Authority and a complete abdication of their duties to protect the rights of hapless home buyers.

75. We will be failing in our duty if we keep our eye shut and allow the promoters to go scot free after defrauding both the Noida Authority and the flat buyers.



### **CONCLUSION**

76. On lifting the corporate veil, it is evident that the petitioner/promoter/director still have a full control of the project company, he along with his family members through various other corporate entities still hold 70% shares of the project company. Even while they were directors they had diverted money from the project company and that was the reason, the company could not complete the project, nor pay the Noida Authority their dues. These directors were completely responsible for the affairs and present condition of the company. The resignation tendered was just a sham in order to escape civil and criminal liabilities.

77. It is apparent that the petitioner and his brother, who were the Directors of the Company, had diverted huge amount of money from the Company and also did not pay the dues of Noida Authority. To overcome the liability, they resigned and made someone else the Director. The petitioner and his family members had drawn a nefarious scheme of defrauding home buyers and Noida Authority, by getting the plots allotted, launching the project, collecting money from the flat buyers, diverting the funds to their other companies. Its a clear case of cheating which falls under the ambit of Section 120 and 420 IPC, which as per amended Section 2 (y) of PMLA Act, would be a scheduled offence.

### **DIRECTIONS OF THE COURT**

78. Looking into the nature of crime, this Court refers the matter to the Enforcement Directorate, who is the appropriate agency and competent to investigate into such kind of financial frauds and transactions. The Enforcement Directorate is directed to proceed against all the directors/persons/designated partners/officers, who is in default or companies or other entities in which the money from M/s Cloud 9 Projects Private Limited is diverted or parked. The Enforcement Directorate will make all the efforts to recover the said amount from persons/companies and

key personnel involved in offence and also against all entities where this amount is transferred.

79. Needless to say that the Directors/Promoters/Key Persons of this Company and also the companies in which the funds have been diverted from this Company, should cooperate with the investigation and, in case, they do not cooperate, the Enforcement Directorate will be free to take appropriate action as available under law.

80. The amount if recovered will be used for the payment of Noida Authority and if any amount is left then the same may be used for completion of the project, even after that if any amount is left the same should be left with the project company.

81. While the conditions imposed by this Court on the promoter/director of the project company vide order dated 07.08.2019 will continue till the dues of Noida Authority is paid.

82. The Noida Authority cannot take advantage of their own wrong. It is hereby directed that the Noida Authority will provide the occupancy certificate for tower nos.37 and 38 and also conclude the sale-deeds of the flat owners within six weeks.

83. The Noida Authority is further directed to proceed to recover the said amount from the company through the recovery proceedings and whatever amount is not recoverable they can proceed to recover from unsold inventory of tower no.31 and can take any action against the promoter as prescribed under the law.

84. The condition laid down vide order dated 07.08.2019 wherein the Sub-Registrar, Gautambudh Nagar/Ghaziabad was directed not to register any deed of transfer for any flat constructed by the project company stands modified and the flat owners can now register any deed of transfer of any flat in the project company.

85. Accordingly, the writ petitions stands *disposed off*.

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

**Order date:-29.02.2024**

S.P.