

Court No. - 39

Case :- WRIT TAX No. - 638 of 2017

Petitioner :- Mr. Pranay Dhabhai

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

Counsel for Petitioner :- Shubham Agrawal

Counsel for Respondent :- C.S.C.

Hon'ble Saumitra Dayal Singh,J.

Hon'ble Donadi Ramesh,J.

1. Heard Shri Subham Agarwal, learned counsel for the petitioner and Shri Ankur Agarwal, learned Standing Counsel for the revenue.
2. Present petition has been filed by the petitioner to resist the recovery of tax dues of the company M/S Global Brands Enterprise Solutions Private Limited (hereinafter referred to as the Company-under-liquidation) a duly incorporated company, under the Companies Act, 1956.
3. Upon hearing learned counsel for the parties and perusal of record, it transpires that the Delhi High Court appointed the Official Liquidator as the Provisional Liquidator of the Company-under-liquidation on 09.09.2013. In October, 2013 the Provisional Liquidator took over the assests of the Company-under-liquidation. Thereafter, on 17.02.2014, 28.03.2015 and 26.03.2016, the assessing authority of the Company-under-liquidation passed the first ex-parte assessment order against A.Ys. 2010-11, 2011-12, 2012-13. Details of the same as given in the Counter Affidavit filed by the revenue are as below:-

<i>Date of Assessment order</i>	<i>Assessment Year</i>	<i>Demand Created</i>
17.02.2014	2010-11 (UP)	Rs.1,59,18,761/-
17.02.2014	2010-11 (Central)	Rs.13,50,000/-
28.03.2015	2011-12 (UP)	Rs.2,71,54,394/-
28.03.2015	2011-12 (Central)	Rs.12,82,500/-
26.03.2016	2012-13 (UP)	Rs,4,87,28,791/-

26.03.2016	2012-13 (Central)	Rs.2,99,59,988/-
	Total	Rs.12,43,94,434/-

4. Thus, all assessment orders came into existence when the Provisional Liquidator had taken over. In such circumstances, it seems, the tax demand assessed against the Company-under-Liquidation remained outstanding. Since those demands were not satisfied, the assessing authority has issued recovery citation against the present petitioner to recover the tax dues of the Company-under-Liquidation from the personal assets of the petitioner. Such recoveries are being pursued against the petitioner on the strength of the fact allegation that the petitioner was the director of the Company-under-Liquidation, at the relevant time.

5. Upon such recoveries being pressed, the present petition was filed wherein interim protection was granted.

6. Submission of learned counsel for the petitioner is that the petitioner never incurred any vicarious liability to discharge the tax dues of the Company-under-Liquidation. Neither on a general principle in law, nor in the facts of the present case that liability may ever be enforced on the present petitioner under the U.P. VAT Act, 2008 and/ or the Central Sales Tax Act, 1956. The Company-under-Liquidation was duly incorporated and was real. It was not a proprietary enterprise of the present petitioner and the petitioner had not conducted himself in any manner *vis-a-vis* the affairs of the Company-under-Liquidation as may ever have allowed the revenue authorities to reach a conclusion that the petitioner was the real person who had done business in the name of the Company-under-Liquidation. The pleadings made in the writ petition are to the effect that the petitioner had conducted himself in accordance with law *vis-a-vis* the affairs of the Company-under-Liquidation. In paragraph No.15 of the Counter Affidavit it has been stated as below:-

"That the directors who had been managing the company were completely negligent in taking steps by participating in assessment proceedings or by taking legal recourse after obtaining assessment orders, but no care was taken to participate in the assessment proceedings and assessment order had been passed exparte. No steps were taken for recalling the orders or for filing appeal under Section 55 of the U.P. Value Added Tax Act."

7. Besides the above, no other special fact has been pleaded in the Counter Affidavit as may lead to an inference that the revenue authorities had lifted the corporate veil and had found the petitioner to be the real person who benefited from the business transactions of the Company-under-Liquidation. The law on the issue has been dealt with by a coordinate bench of this Court in **M/S Meekin Transmission Ltd. and others Vs. State of Uttar Pradesh and others (2013) 58 VST 2001 (All)**.

8. The same was considered in **A.S. Solanki Vs. State of U.P. and others [Neutral Citation-2023:AHC:130306-DB]**. Therein it was observed as below:-

"24. The law in that regard stood in doubt upon pronouncement of the judgment in Naresh Chander Gupta (supra). However, all doubts were dealt with and cleared by the subsequent division bench decision in M/s Meekin Transmission Ltd. (supra), wherein it was observed as under:-

"55. In Naresh Chander Gupta (Supra) the dues of trade tax were sought to be recovered from M/s Shiv Sewa Samiti, a society registered under the Societies Registration Act of which the petitioner, Naresh Chander Gupta was the secretary. Though recovery certificate was issued against the society but it was alleged by the petitioner that the revenue recovering authorities were proceeding against the assets of the petitioner himself. On the pleadings, the Court found that the petitioner has neither shown as to whether there are other office bearers of the society or not and as to who actually is running and controlling the society. Further the Court recorded a finding that the petitioner was really managing the entire society and had control over its operations and has created society for evading tax or for other extraneous reasons as is evident from the following:

18. On the facts of the present case we are of the opinion that the petitioner was really managing the entire society and had control over its operations. He has only created the society for the evading tax or for other extraneous reasons.

56. In these circumstances, the Court declined to exercise its discretionary remedy under Article 226 of the Constitution of India. The said judgement also is not an authority to hold that whenever the dues are to be recovered from a corporate body, the Directors etc. would be personally liable.

57. However, learned Standing Counsel sought to draw our attention to para 20 of the judgement which reads as under:

20. The Supreme Court has held in some of the above decisions that in tax matters the veil of corporate personality can be lifted so that the tax dues can be realized. The doctrine of piercing the veil of corporate personality has an expanding horizon. We are therefore expanding this doctrine and declare that ordinarily if there are tax dues against the corporate personality (or societies) they can be realized from the Directors, Secretary of the Society, or others who control the company or the society. This is necessary because in our country what is happening is that tax dues are often evaded by business under the cover of the doctrine of corporate personality. The petitioner society is not a charitable society doing social work but is doing business. Thus the petitioner is not entitled to the protection of the principle laid by the decision in *Salomon Vs. Salomon and Co. Ltd.* (supra).

We find that in para 19 of the judgement on the basis of the factual finding recorded in the said case the Court declined to exercise its discretionary remedy under Article 226 of the Constitution in favour of the petitioner. The observations made in para 20 of the judgement were thus not on an issue involved as such. The provisions of the Companies Act, the position of Directors qua company was neither in issue nor any argument was raised nor it can be said that such an issue was decided and the provisions of Companies Act having also not been referred to and considered, in our view, the said observations cannot be said to be a binding precedent and are per incurium. With great respect to the Bench we also notice that even the provisions of the Trade Tax Act which provides to what extent recovery can be made from persons, other than dealers who is registered under the Trade Tax Act, have not been noticed and considered. At this stage it would be appropriate to refer Section 8 sub-section 3 of the U.P. Trade Tax Act, 1948 which reads as under:

8(3) Notwithstanding anything contained in any law or contract to the contrary, the assessing authority may, at any time or from time to time, by notice in writing a copy of which shall be forwarded to the dealer at his last address known to the assessing authority, require-

(a) any person from whom any amount is due or may become due to the dealer, or

(b) any person who holds or may subsequently hold money for or on account of the dealer, to pay to the assessing authority-

(i) forthwith upon the money becoming due or being held, or

(ii) at or within the time specified in the notice not being before the money becomes due or is held.

So much of the money as is sufficient to pay the amount due by the dealer in respect of arrears of tax or other dues under this Act, or the whole of the money when it is equal to or less than that amount.

Explanation-

For the purpose of this sub-section, the amount due to a dealer or money held or on account of a dealer by any person shall be computed after taking into

account such claim, if any, as may have fallen due for payment by such dealer to such person and as may be legally subsisting."

58. The Court in para 21 of the judgement in Naresh Chander Gupta (Supra) has rightly observed that the U.P. Trade Tax Act being Special Act so far as recovery of trade tax dues are concerned, and, therefore, would prevail over the general law like Societies Registration Act but thereafter the Court, with respect, has omitted to notice Section 8 sub-section 3 which permits assessing authority to realise the dues of a dealer from some other persons which does not include a person merely for the reasons that he is Director or shareholder or otherwise office bearer of the corporate body. Besides Section 8 sub-section 3, there is no other provision under the U.P. Trade Tax Act which empowers respondents to recover the dues of a dealer from the assets of any other person. In the present case it is not disputed that petitioner no. 1 who was registered under the provisions of U.P. Trade Tax Act, 1948 was a dealer for the purpose of liability of tax and not the petitioner no. 2. Wherever the legislature has intended, has provided statutory provision empowering tax authorities to recover the dues of a corporate body from its Directors, shareholders or others. For illustration, we may refer to Section 179 of the Income Tax Act, 1961 which reads as under:

179. (1) Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where by tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

(2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.

59. A perusal of Section 179 shows that it has been given an overriding effect over the various provisions of the Act and makes Director of a Private Company responsible for payment of tax dues outstanding, of the period, he was Director; provided he proves that non recovery is not attributed to any gross neglect, misfeasance or breach of duty on his part. The said provision, therefore, while making Director of the private company responsible for payment of tax dues jointly and severally, makes an exception that in case he proves that the assets of the company are not sufficient to meet tax dues and have reduced for reasons not attributable to him on account of any gross neglect, misfeasance or breach of duty, then such person would not be responsible. The legislature thus has also recognised even in the said statute the principle that the doctrine of lifting of veil in the matter of tax dues is to be applied to prevent fraud etc. and not where the company has suffered despite its normal bona fide function. The persons responsible for its management are not

to be made responsible for normal depreciation of capital or assets merely because the dues are of Tax. Further even the said provision is applicable only to private companies and not to public companies other than those which are converted from private to public.

60. In fact some of the provisions have been made in the Act where the corporate veil has to be ignored. Section 45 provides where the number of members of a company reduce below seven, in the case of a public company, and the company continues to carry on business for more than six months with such reduced member, every person who knows this fact and is a member of the company is severally liable for the debts of the company contracted during that time. Section 147(4) of the Act provides that if an officer of a company signing bill of exchange, hundi, promissory note, cheque, if not mention the name of the company in the prescribe manner, such officer can be held personally liable to the holder of the bill of exchange, hundi etc. unless it is duly paid by the company. Section 542 of the Act provides that if during the course of winding up of a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, the persons who were knowingly party to such carrying on business, shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company, as the court may direct.

61. We have not been shown that any similar provision exist in U.P. Trade Tax Act empowering recovery of dues of the company from the Directors or shareholders personally. At this stage it would be appropriate to notice another Division Bench decision of this Court in Adesh Kumar Jain and others Vs. U.P. S.E.B. and others, 1998 All.C.J. 266 the Court while rejecting a similar contention that the Director of the company would be personally liable for dues of the company held that though it is true that the Director of a company may be an agent of the company but that would not result in making the assets of the company to be the assets of the Director and vice versa. It further held that in the absence of any statutory provisions, recovery from the personal assets of the Director cannot be made. In para 7 of the judgement, the Court held:

7. Director's liabilities in some of the enactments have already been dealt with in provisions contained in the relevant laws such as Employees State Insurance Scheme, Provisions of Food Prevention Act, Factories Act, Provident Fund Act, Industrial Disputes Act etc. etc. There is no provision in the U.P. Government Electricity Undertaking (Dues Recovery) Act, 1958 or Electric Supply (Consumers) Regulations, 1984 or even in the Indian Electricity Act, 1910 which may make it possible to read that a Director can be taken to be the successor of the Company which had entered into the agreement with the Board as a Consumer taking note of the definition of the word 'Consumer' in any of the three laws referred to above.

62. Where under the agreement or the statutory provisions, only the company is liable to pay the dues, in such cases the Directors would not be personally responsible and the doctrine of lifting the veil cannot be invoked in such case as is evident from following in the judgement of Adesh Kumar Jain (Supra):

.....In the instant case, there is an agreement between the parties and also the statutory provisions under which the only consumer company is liable for

payment of the arrears of electricity dues and the Director of the company cannot be made personally liable. Hence the doctrine of lifting the veil can not be invoked in the instant case.....

(Para 23)

63. Therefore, in our view, the judgment of this Court in Naresh Chander Gupta (Supra) cannot be said to be a precedent for holding that whenever the tax dues are to be recovered from a company, its Director would be personally responsible even though there is no such provision in the relevant statute.”

25. Then it was observed:-

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

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

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

(1) where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies; (2) where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; (3) in certain matters pertaining to the law of taxes; death duty and stamps, particularly where the question of the "controlling interest" is in issue; (4) in the law relating to exchange control; (5) in the law relating to trading with the enemy where the test of control is adopted; (6) where a holding company or a subsidiary company were not working in an autonomous manner and thus were treated as forming an economic unit; (7) where the new company was formed by the members of an existing company holding 9/10 shares in the existing company and only with an object of expropriating the shares of minority share holders of the existing company; (8) where the device of incorporation is used for some illegal or improper purpose; (9) where several companies promoted by the same controlling share holders for defeating or misusing the loss pertaining to labour welfare; (10) where the facts or equitable considerations justify an exemption from the strict rule in *Salomon Vs. Salomon and Co. Ltd.*

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

26. As to procedure to be adopted, it was also observed:-

"78. In the nutshell, the doctrine of lifting of veil or piercing the veil is now a well established principle which has been applied from time to time by the Courts in India also. There is no doubt about the proposition that whenever the circumstances so warrant, the corporate veil of the company can be lifted to look into the fact as to whose face is behind the corporate veil who is trying to play fraud or taking advantage of the corporate personality for immoral, illegal

or other purpose which are against public policy. Such lifting of veil is also has to implemented whenever a statute so provided. However, it is not a matter of routine affair. It needs a detailed investigation into the facts and affairs of the company to find out as to whether the veil of the corporate personality needs to be lifted in a particular case. After lifting the veil, in a case where it is so required, it is not always that the Directors would automatically be responsible but again it is a matter of investigation as to who is/are the person/s responsible and liable who had occasioned for application of said doctrine.

27. Specifically as to the burden to prove it was also made plain:-

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

80. In the case in hand we do not find that any such attempt has been made by the respondents before issuing the impugned notice dated 23.05.2003 to the petitioner no. 2 requiring him to pay dues of petitioner no. 1 from his personal assets. We are informed by learned Standing Counsel that pursuant to the judgment of this Court in Naresh Chander Gupta (Supra) the Commissioner, Trade Tax has issued a circular directing various authorities to initiate recovery proceedings against the Directors of the companies where the dues have not been recovered from the companies and it is pursuant to such circular the authorities are proceeded accordingly. However, no such circular has been placed before the Court and it is not part of the record. We are not making any observation with respect to the validity of said circular but it is suffice to us to make it clear that even when the tax dues are to be recovered from a corporate body, the Directors of such corporate body would not automatically be

responsible unless the doctrine of lifting of veil is found to be applicable in the facts and circumstances of the affairs of that company and thereafter it is further found as to who are the persons who were operating behind the veil. Otherwise, a Director or shareholder cannot be made personally responsible for the dues of a company except of those cases where such a provision is made in the statute or otherwise warranted in law.”

9. In the case of present petitioner, similar recovery initiated by the Maharashtra VAT authority for the Assessment Years 2009-2010, 2010-11, 2011-12 were withdrawn.

10. In view of the above, the present writ petition succeeds and is allowed. Direction is issued to the revenue authorities to restrain them from recovering the disputes tax dues of the Company-under-Liquidation from the personal assests of the petitioner. However, the revenue authorities shall be at liberty to proceed against the assests of the Company-under-Liquidation, without any objection of the petitioner.

11. Accordingly, the present writ petition is **allowed**. No order as to costs.

Order Date :- 23.4.2024

A Gautam

(Donadi Ramesh,J.) (S.D. Singh,J.)