

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2015

CORAM:

THE HONOURABLE MR. JUSTICE V. DHANAPALAN
AND
THE HONOURABLE MR. JUSTICE G. CHOCKALINGAM

W.A. No.2082 of 2011
against
W.P.10601 of 2008

1. Union of India,
represented by
The Secretary,
Ministry of Consumer Affairs,
Food & Public Distribution,
Krishi Bhavan, New Delhi - 1.
 2. The Chief Director (Sugar),
Government of India,
Ministry of Consumer Affairs,
Food & Public Distribution,
Krishi Bhavan, New Delhi - 1.
 3. The Director (SDF),
Government of India,
Ministry of Consumer Affairs,
Food & Public Distribution,
Krishi Bhavan,
New Delhi - 1.
- ... Appellants/Respondents

vs.

Ponni Sugars (Erode) Limited,
a Company registered under the Companies
Act, 1956 and having its Registered Office
at ESVIN HOUSE,
No.13, Old Mahabalipuram Road,
Seevaran Village, Perungudi,
Chennai - 96.

... Respondent/Petitioner

Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 09.11.2010 passed by the learned Single Judge in Writ Petition No.10601 of 2008. This writ petition filed under Article 226 of the constitution of India to issue a writ of certiorarified Mandamus to call for the records pertaining to file No.8-396/2004-CC/1027 dt. 31.01.2008 of the second respondent and quash the same and direct the second and third respondents to sanction and disburse subsidies towards Buffer Stock, Transport, Ocean Freight and

interest Subsidy in respect of pending Claims without adjustment towards the SDF Loan dues of Ponni Sugars and Chemicals Ltd to enable the petitioner to clear cane dues and to sanction in normal course future subsidy claims and loan requests of the petitioner under Provisions of the SDF Act/ Rules.

For Appellants : Mr. G.Rajagopalan
Addl. Solicitor General
of India for
Mr.C.V.Ramachandramurthy
For Respondent : Mr.AL. Somayaji
Senior Counsel for
Mr. V.Perumal

J U D G M E N T

V.DHANAPALAN, J.

Heard Mr.G.Rajagopalan, learned Additional Solicitor General appearing for the appellants and Mr.AL.Somayaji, learned Senior Counsel appearing for the respondent.

2. Being aggrieved by the order dated 09.11.2010 passed by the learned Single Judge in W.P.No.10601 of 2008, the respondents therein have come up with the present Writ Appeal.

3. The case of the writ petitioner as put forth by it before the learned single Judge is as follows :

3.1 The petitioner, M/s. Ponni Sugars (Erode) Ltd. is a public limited company. Its Equity Shares are listed at National Stock Exchange Limited at Bombay. It owns and operates a 2500 TCD sugar Mill at Erode in Namakkal District (herein after referred to as the Erode Sugar Mill) and about 400 employees, 7,500 sugarcane cultivators and 10,000 indirect labourers are dependent upon the Erode Sugar Mill for their livelihood. The Erode Sugar Mill was originally established in 1984 by Ponni Sugars and Chemicals Limited, a public limited company incorporated on 25.2.1982 in the State of Tamil Nadu. Later, the said company took over the management and operations of 1250 TCD Bargarh Sugar Mill in the State of Orissa for a fixed tenure of 16 years in terms of Management Agreement dated 30.8.1991 with Bargarh Cooperative Sugar Mills Limited (BCSM), a society registered under the Orissa Cooperative Societies Act, 1962. The said company also set up a new 2500 TCD Sugar Mill in 1994 at Balangir in the State of Orissa.

3.2 Thus, Ponni Sugars and Chemicals Limited (hereinafter referred to as PSCL) was owning two sugar mills viz., Erode Sugar Mill and Balangir Sugar Mill besides operating the third Sugar Mill under a Management contract, viz., Bargarh Sugar Mill. Sugar Development Fund (SDF) was established under the Sugar Development Act, 1982 to provide financial assistance for development of sugar industry and for matters connected therewith and incidental thereto. PSCL reportedly availed SDF loan for all its three sugar mills in

accordance with the eligibility criteria from time to time. The Bargarh and Balangir Sugar Mills in Orissa were incurring huge loss right from inception, as a result, both the sugar mills had to operate at very low capacity. While so, notwithstanding the fixed tenure of management agreement for 16 years, the owners of Bargarh Sugar Mill (BCSM) unilaterally terminated the arrangement by their letter dated 11.4.1998. Consequently, PSCL had to hand over the possession to its owners. In turn, it was advised to the respondents by PSCL with a plea to transfer the SDF loan availed for purpose of Bargarh Sugar Mill to its owners.

3.3 Repetitive infusion of funds in large measure for over Rs.25 crores by PSCL and its promoters to fund losses and develop cane sources could not eventually help achieve viable operations in Orissa. It could not repay huge term loans and other bank borrowings as well as SDF loans by reason of erosion of its net worth in full and negative cash flow suffered, resulting in BIFR declaring PSCL as a sick industrial company. Under such circumstances, PSCL formulated a scheme of arrangement in terms of sections 391 to 394 of the Companies Act, 1956 known as 'Demerger Scheme'. This scheme, inter alia, envisaged the transfer of Erode Sugar Mill to Ponni Sugars (Erode) limited, the writ petitioner. Considering the huge losses suffered and the need to secure viable functioning atleast one sugar mill viz., Erode Sugar Mill, all major stake holders in PSCL were subject to financial sacrifice. This Court, by order dated 24.1.2001, directed the convening of the meetings of secured and unsecured creditors for the purpose of considering sanction to the Demerger Scheme. The scheme contained specific provision for the transfer of SDF loan sanctioned to Erode Unit to the petitioner while retaining the SDF loan sanctioned to Balangir Unit only with PSCL. The Demerger Scheme was approved. In terms of Demerger Scheme sanctioned by this Court, the writ petitioner has transferred the Erode Sugar Mill for a valid consideration of Rs.75 Crores effective 1st April 1999. Immediately upon the Demerger Scheme coming into force, the petitioner obtained the relevant information and details on the business carried on, term debts contracted and transferred to Erode Undertaking along with transfer of agreed part of share capital and term debts from PSCL to the petitioner.

3.4 PSCL had borrowed SDF loan for all its sugar mills. Out of this, SDF loan borrowed for the purpose of Erode Sugar Mill was transferred to the petitioner while SDF loan availed for purpose of Bargarh and Balangir Sugar Mills in Orissa remained with the parent entity viz., PSCL. The petitioner informed the respondents of the Demerger Scheme sanctioned by this Court and consequent transfer of Erode Sugar Mill from PSCL to the petitioner. SDF loan of Bargarh and Balangir Mills are shown as liabilities in the balance sheet of PSCL in accordance with the division of loans between the two companies under the Demerger Scheme. The petitioner used to receive Monthly Release Orders in respect of levy and free sugar from the second respondent in terms of Sugar (Control) Order, 1966. The petitioner continues to depend upon the Release Mechanism for sale of levy sugar or export of sugar. The respondents, all of a sudden,

withheld free sale quota from June 2005 and levy sugar quota from July 2005 in the case of petitioner. The petitioner was neither given any reason in advance for such withholding of quota nor given an opportunity to clarify the position before such act of withholding. The petitioner was also not given the Export Release Order and did not receive any communication from the Chief Director (Sugar) Govt. of India, Ministry of Consumer Affairs, Food and Public Distribution, New Delhi, on this issue. The petitioner has in fact been put to a formidable financial loss of Rs.8.5 Crores by reason of denial of export opportunity, thereby forcing the petitioner to sell the same sugar at depressed market conditions much later. The petitioner made number of representations to the respondents highlighting the fact that the SDF loan had neither been borrowed by the petitioner nor used for its Erode Sugar Mill Undertaking. But the respondents are attempting to recover SDF dues of sugar mills not under the ownership or management of the petitioner company at present or any time in the past. The petitioner had neither contracted the SDF loan sanctioned to Bargarh and Balangir Mills nor is the owner / manager of these sugar mills. There is no power, express or implied under the SDF Act or Rules for adjusting the dues of one group company against subsidy claims of another. Therefore, petitioner has approached this court by filing the writ petition.

4. The case of the respondents/Ministry of Consumer Affairs, appellants in this writ appeal, is that the respondent/writ petitioner viz. M/s.Ponni Sugars and Chemicals Ltd. (PSCL), at the time of submitting application to the Central Government for sanction of loan amount of Rs.259.65 lakhs, was registered under the Companies Act, 1956 and having its registered office at Esvin House, Perungudi, Madras. The respondent/writ petitioner was incorporated on 25.02.1982 with the State Erode Sugar Mill and therefore, continues to be the successor Company of PSCL and therefore, responsible for meeting the liabilities incurred by PSCL. According to the appellants, the respondent/writ petitioner has not enclosed copy of the relevant documents. As per clause 1.2 of the Management Agreement, the agreement could not be terminated earlier than sixteen years by either party to the said agreement. Since loans were availed by PSCL, the writ petitioner Company being the successor Company of PSCL and is liable to pay the SDF loans availed by PSCL from the Central Government. In terms of Clause 4.4. of the Management Agreement dated 30.08.1991, M/s.Bargarh Co-operative Sugar Mills Limited (BCSM) had transferred its industrial license in favour of PSCL enabling the latter to utilise the movable and immovable properties of the Sugar Mill and further executed an irrevocable power of attorney in favour of PSCL for the same purpose in terms of Clause 4.5 of the Management Agreement. PSCL did not challenge the illegal termination of the Management Agreement by M/s.Bargarh Co-operative Sugar Mills Limited (BCSM). Knowing full well that termination of the Management Agreement by BCSM was illegal, PSCL did not challenge the same and instead wrote to the Central Government to transfer the SDF loans to BCSM. The appellants would contend that the writ petitioner Company, PSCL and BCSM are jointly and equally responsible for their act defrauding the SDF loan dues.

5. According to the appellants, M/s.Ponni Sugars (Erode) Limited (PSEL) is the representative Company of erstwhile PSCL and therefore, it is responsible for the liabilities incurred by PSCL. Having obtained considerable loans from the Central Government under SDF Rules, it was the responsibility of the writ petitioner Company to fulfill their liability towards repayment of the outstanding dues and keep the appellants informed at each and every stage of the development regarding Demerger Scheme or Scheme of Arrangement. The term debts transferred to the writ petitioner Company should also include the outstanding dues of SDF loans. The very fact that both PSCL and writ petitioner Company jointly drew up the balance sheet as of 31st March, 2001 to give effect to the Demerger Scheme, adequately proves that the writ petitioner Company is the successor Company of erstwhile PSCL and therefore, it is responsible for all the liabilities incurred by PSCL including the loans taken from SDF and hence, according to the respondents/appellants their action is justifiable one.

6. The learned single Judge, after considering the issue in detail, held that the contention of the Government that M/s. Ponni Sugars (Erode) Ltd. is the successor company of M/s. Ponni Sugars and Chemicals Ltd. (PSCL) and is therefore liable to meet the liabilities incurred by PSCL cannot be accepted; the scheme of demerger was duly approved by this Court vide its order dated 10.09.2001 / 26.09.2001 with effect from 01.04.1999, which was binding on all the creditors as per Sec. 391 (2) of the Companies Act. The writ petitioner, M/s. Ponni Sugars (Erode) Ltd. who has not borrowed the SDF in no manner could be held liable for its re-payment. So holding, the learned single Judge quashed the proceedings of The Chief Director (Sugar), Government of India, Ministry of Consumer Affairs, Food and Public Distribution, New Delhi, and directed them to sanction and disburse subsidies towards Buffer Stock, Transport, Ocean Freight and Interest Subsidy in respect of pending claims without adjusting towards the SDF loan dues towards PSCL. Challenging the aforesaid order, the appellants have filed this writ appeal.

7. According to the appellants, the merger of the writ petitioner viz. Ponni Sugars (Erode) Ltd. with Ponni Sugars and Chemicals Ltd. and the unilateral termination of the management agreement between Ponni Sugars and Chemicals Ltd. and Bargarh Sugar Mills were effected only for the purpose of avoiding repayment of the loans borrowed from SDF and as long as the appellants were not parties to the merger proceedings and no notice had been served on them, the merger would not bind them in any way. The appellants also contended that the bank guarantee executed by PSCL is still subsisting and the writ petitioner is duty bound to honour it. It is also the contention of the appellants that the shareholders and directors of both the entities are one and the same and hence, the writ petitioner can be held liable for the dues of PSCL.

8. On behalf of the respondent/writ petitioner, counter affidavit has been filed, wherein, it is stated as follows:

8.1. Ponni Sugars and Chemicals Limited (PSCL), a Company registered under the Companies Act, 1956, had set up Erode Sugar Mill in 1984. In 1991, under Management Contract, it took a Co-operative Sugar Mill in Bargarh and in 1994 also set up a new Sugar Mill at Balangir, both in the State of Orissa. Sugar Development Fund (SDF) is constituted under the Sugar Development Fund Act, 1982. It collects a cess at stipulated rate from sugar Mills for every quintal of sugar produced. The funds so collected are to be used, inter alia, to extend loan at concessional rate to Sugar Mills for various purposes in accordance with the Sugar Development Fund Act, 1982 and the Sugar Development Fund Rules, 1983. SDF extended loan for cane development in the State of Orissa to PSCL for each of its three Sugar Mills :

Unit	Date of Loan	Amount of Loan (Rs. Lakhs)
Bargarh	13.12.1993	259.65
Balangir	06.05.1996	251.47
Erode	20.02.1998	50.00

8.2. PSCL face acute raw material shortage in Orissa units. Despite promoters repetitively pumping in huge resources, PSCL was on the verge of sickness threatening its survival and jeopardizing debt servicing. Under the advice of All India Financial Institutions and Commercial Banks, PSCL conceived a Demerger Scheme in 1999, as per which, Erode Sugar Mill would be transferred to the writ petitioner, viz. Ponni Sugars (Erode) Limited (PEL) together with appropriate share of capital and debt that are considered within the serviceable capacity of PEL. Bargarh Sugar Mill had already been restored to its owner from 30.06.1998, while in terms of the Demerger Scheme, Balangir Sugar Mill along with residual capital and debt remained with PSCL.

8.3. The notice for Demerger Scheme was served on all shareholders and creditors for the respective meetings convened under the directions of this Court. The approval of shareholders and creditors with requisite special majority both in number and value was obtained. Finally, this Court sanctioned the Scheme by its order dated 10.09.2001 in C.P.Nos.118 and 119 of 2000. SDF loan referable to Erode Sugar Mill was transferred to the respondent and serviced. SDF loans for Bargarh and Balangir Mills were retained by PSCL in terms of the Demerger Scheme which were backed by Bank Guarantee as security. These Bank Guarantees were valid till 13.03.2003 and 15.03.2003 for the loan to Bargarh Mill and 30.11.2004 for Balangir Mill. SDF, after a long wait and much after letting the Bank Guarantees to expire, endeavoured to enforce recovery of loans disbursed to PSCL from the respondent. It was clarified to them that the respondent is a new and different Company and hence, not legally liable for the loan borrowed by PSCL.

8.4. SDF authorities unleashed a host of coercive measures to penalize the respondent and enforce recovery of PSCL dues. Without

notice, they withheld sugar releases that were voluntarily restored in phases much later. They declined fresh loan for eligible schemes of respondent and also withheld the subsidy sums due to the respondent. The respondent received letter No.8-396/2004-CC/1027 dated 31.01.2008 from the appellants advising sanction of Rs.15,24,642/- of buffer stock subsidy and its adjustment against dues of other sugar mill of the group Company. Challenging the said letter, the respondent filed W.P.No.10601 of 2008.

8.5. The respondent/writ petitioner was incorporated only on 26.12.1996, while the disputed SDF loans were disbursed to PSCL anterior in date. The respondent was non-existent on the date of loan and neither contracted nor benefited by the captioned loans. The respondent was transferred the Erode Sugar Mill with effect from 01.04.1999 with definitive term debts in terms of the Demerger Scheme sanctioned by this Court in C.P.Nos.118 and 119 of 2000, dated 10.09.2001. The rights and obligations of the respondent as regards business transfer from PSCL are solely governed by the Scheme as approved by this Court. The appellants cannot overwrite the terms of Demerger so sanctioned by this Court. In particular, the respondent has not taken over the liability of SDF loans sanctioned to Bargarh and Balangir Sugar Mills in terms of the Demerger Scheme sanctioned by this Court. In fact, this Court while sanctioning the Demerger Scheme has in clear and express terms observed that only SDF loan sanctioned to the Erode Undertaking is transferred to the respondent. Hence, the respondent has no legal liability for the other SDF loans disbursed to PSCL. There is no provision under the SDF Act or Rules to enforce recovery of loan from the transferee of business or part of the business. Further, the Bargarh and Balangir Mills for which the captioned SDF loans were disbursed were never under the ownership or management of the respondent, who was never benefited by these loans.

8.6. The respondent is an independent legal entity under the Companies Act, which is distinct and different from that of PSCL. There is no legal provision under which the dues of one Company, even if they are under the same Management or have common Directors, can be recovered from another Company. Corporate veil can be lifted only in the event of fraud or misfeasance, whereas, the respondent has fully complied with the legal requirements for the transfer of Erode Sugar Mill and obtained the sanction of this Court as well as for the Demerger Scheme and hence, doctrine of 'lifting of corporate veil' cannot be invoked. The appellants had acted without authority of law by withholding sugar releases. While this had put the respondent to severe hardship and financial loss, no remedy is pressed at this stage, since the appellants have voluntarily chosen to restore sugar releases. However, the withholding of eligible subsidies due to the respondent has put the respondent under grave hardship.

8.7. The appellants had valid and readily enforceable security by way of Bank Guarantee to recover the SDF loans. For their failure to exercise their right by invoking Bank Guarantee in time, the

appellants cannot now turn to the respondent to cover up their fault and enforce recovery of loan dues of another Company from the respondent. The respondent has derived no monetary benefit due to the negligence of appellants in not invoking Bank Guarantee in time. Hence, the respondent has no obligation to appellants even under equity. Further, the appellants have no right to impose the burden of another Company on the respondent and jeopardize the interest of public investors.

9. Mr.G.Rajagopalan, the learned Additional Solicitor General of India appearing for the appellants would contend that notice of De-merger Scheme was not received by them and that the De-merger Scheme without their approval is not binding on the respondent/writ petitioner. It is his further contention that since there are common Directors between the PSCL and the respondent/writ petitioner, the respondent shall be viewed as successor to PSCL and liable for all the loans of the predecessor. He would also contend that the learned Single Judge failed to note that Ponni Sugars and Chemicals Ltd. was declared a sick unit by BIFR on 16.04.2001 and the scheme of merger was approved by a special Resolution of the two Companies on 07.04.2000 and 03.03.2001 and later sanctioned by this Court in C.P.Nos.118 and 119 of 2000 on 10.09.2001 and that the amounts due by Ponni Sugars and Chemicals Ltd. were reflected in its Balance Sheet up to 2004 which included the loans borrowed for the Balangir Sugar Mill and the Bargarh Sugar Mill. The learned counsel appearing for the appellants also emphasised the need for lifting the corporate veil.

10. Per contra, Mr.A.L. Somayaji, learned Senior counsel appearing for the respondent/writ petitioner would submit that the appellants are patently wrong in claiming that the learned Single Judge failed to note the merger of the writ petitioner with PSCL and that the Scheme of Arrangement sanctioned in C.P.Nos.118 & 119 of 2000 on 10.09.2001 was for the purpose of salvaging and safeguarding the well-functioning Erode Sugar Unit from the ill-effects of Orissa operations and thereby secure the interest of diverse stakeholders as expressly stated in the Scheme itself. The Scheme was not envisaged for the purpose of avoiding repayment of the loans borrowed from the third appellant. According to the learned senior counsel, the respondent, in any event, has ab initio no liability for these loans or for the Bank Guarantees furnished by PSCL therefor.

11. In support of his case, learned counsel for the appellants has relied on the following decisions :

- (i) Union of India v. Tata Chemicals Ltd. [2014] 363 ITR 658 (SC)
- (ii) Balwant Rai Saluja and another v. Air India Limited and Others [2014] 9 SCC 407.

12. We have heard the learned counsel appearing on either side and perused the materials made available on record.

13. The facts that PSCL was incorporated on 25.02.1982; established a sugar mill at Erode in 1984; it later took a co-operative sugar mill in Bargarh Orissa under Management Contract in terms of Management Agreement dt. 30.08.1991 and later PSCL also established a new sugar mill at Bolangir in Orissa in 1994 are all not disputed by either side. For each of its sugar mill, PSCL borrowed loans from Sugar Development Fund (SDF) in terms of Sugar Development Fund Act, 1982 and Rules thereunder. PSCL had furnished Bank Guarantees securing these loans valid till 13.03.2003 for loan to Bargarh mill and valid till 30.11.2004 for loan to Bolangir Mill. While the Erode sugar mill was functioning profitably, the Bargarh and Bolangir Sugar Mills in Orissa were incurring huge losses right from inception and though PSCL infused funds to the tune of Rs.25 crores, sugar mill operations in Orissa could not be turned viable. While things stood thus, BCSM unilaterally terminated the Management Agreement by its letter dt. 11.04.1998. Immediately, PSCL had advised this fact to the appellants herein with a request to transfer the SDF loan for Bargarh Sugar Mill to its owners. However, the accumulated losses of PSCL lead to erosion of its net worth and inflicted negative cash flow resulting in the BIFR declaring PSCL as a sick industrial company. Therefore, in order to facilitate repayment of debts in a fair and equitable manner, PSCL formulated a Scheme of Arrangement and filed C.P. No: 118 of 2000 before this Court. The Scheme of Arrangement essentially provided for the transfer of Erode Sugar Mill to Ponni Sugars (Erode) Ltd. with appropriate share of share capital and debts. By an order dated 10.09.2001 in C.P. No: 118 of 2000, the Scheme of Arrangement was sanctioned by this Court. Thereby, the Erode Sugar Mill stood transferred to Ponni Sugars (Erode) Ltd. for a consideration of Rs.75 crores effective from 01.04.1999 along with relevant share of share capital and term debts as provided in the Scheme. By the said Scheme of Arrangement, the SDF loan borrowed for the Erode Sugar Mill was transferred to the Erode Sugar Mill while the SDF loan availed for the purpose of Bargarh and Bolangir Sugar Mills at Orissa, remained with PSCL.

14. The first and foremost contention of the appellants is that the Scheme of Arrangement as projected by the writ petitioner is only for the purpose of avoiding repayment of SDF Loans and since the appellants were not put on notice about the proposed merger of the two companies, it would not bind them in any manner. In other words, the appellants contend that the scheme of arrangement is only a sham and nominal created especially to avoid repayment of SDF Loans availed by Bargarh Sugar Mills, Orissa. When the appellants take such a stand, it is necessary on their part to prove it before this Court that in reality such an arrangement does not exist. They have not done so. On the other hand, the company, respondent herein, has presented the Scheme of Arrangement before this Court and sought its permission in C.P. No: 118 of 2000. The appellants contend that they have not been served with notice of the scheme of merger. But it is seen that by an order dt. 24.01.2001 made in C.P. No: 118 of 2000, this Court appointed Mr. Suresh Krishnamurthy, Advocate, as Chairman of the Meeting and ordered that the Scheme of Arrangement shall be

communicated to Secured Creditors along with the Notice of the meeting. The Chairman had filed a report before the Company Court and stated that due notices, together with copy of the Scheme of Arrangement, were sent to all secured creditors. In fact, it is evident from the order passed by the Company Court in C.P. No:118 of 2000 that the meeting of the Secured Creditors was held on 03.03.2001 and votes were cast in favour of and against the scheme. The relevant portion of the order passed in C.P. Nos: 118 and 119 of 2000 is as under :

" 35. A question arose that since the transferor company is before the BIFR in Case No: 148 of 2001, whether it is permissible to grant sanction of the scheme. Though the transferor company is before the BIFR, no final order has been passed by the BIFR. Secondly, by the grant of approval to the scheme, the Erode Undertaking of the transferor company would come out of the BIFR and the relevant provisions of the Sick Industrial Companies (Special Provisions) Act, 1989 do not preclude this Court from granting approval to the scheme under Section 391 of the Companies Act.

36. I have considered the scheme and also the objections raised by the State Bank of India carefully. I am of the view, even if both the Undertakings are allowed to remain and function together, the transferor company will have to be wound up ultimately with the result, there will be no benefit to any of the parties. I am of the view, the decision relied upon by the learned counsel for the petitioner in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* (87 Comp. Cases 792) would squarely apply to the facts of the cases. I find that the shareholders of the transferor company with more than the requisite majority have approved the scheme. The interest of the employees of the Erode Undertaking of the transferor company is also protected under the scheme. The scheme also intends to protect the interest of cane-growers. As seen from the affidavits filed by the various cane-grower associations, they have supported the scheme of arrangement. The financial institutions have made significant sacrifice by way of reduction in the rate of interest and conversion of the interest accruals into zero coupon debentures so that the transferee company would be in a better position to carry on its business operations on the merger of the Erode Undertaking. Except the State Bank of India, all other major creditors have agreed for the scheme of arrangement. The State Bank of India has also not opposed principally the scheme of arrangement as the affidavit shows that the Bank has imposed certain conditions for accepting the scheme of arrangement. I find that the transferor company has accepted the conditions (a), (d) and (e) imposed by the State Bank of India. In so far as the conditions (b) and (c) are concerned, the undertakings given by the transferor

company are recorded and they shall form part of the scheme. In my view, it is not necessary to discuss the various case-laws relied on by the learned senior counsel for the petitioner.

37. Though the vote cast by the State Bank of India was not taken into account by the Chairman, I am of the view that since the objections raised by the State Bank of India have been considered, it is not necessary to direct to convene another meeting of the creditors as more than the requisite majority of creditors in terms of number and in terms of value have voted in favour of the scheme. I do not find any objectionable feature which stand in the way of the Court from granting the necessary approval to the scheme. Accordingly, the petitions are ordered subject to the conditions (a), (d) and (e) contained in the affidavit filed by the State Bank of India praying for modification of the scheme and subject to the conditions (b) and (c) as modified. It is open to the parties to approach this Court seeking any modification of the order or any direction in the case of any difficulty that may arise in the implementation of the scheme. The Directors of the transferor company are directed to hand over the books of accounts to the Official Liquidator so that the books of accounts can be audited by the Chartered Accountants appointed by the Court at the instance of the Official Liquidator. There will be no order as to costs. "

The State of Bank of India, Commercial Branch, Bargarh, Orissa, has filed an affidavit before the Company Court objecting the terms of arrangement. The relevant paragraph mentioning the objections raised by the State Bank of India before the Company Court is as under :

" 12. The State Bank of India, Commercial Branch, Bargarh, Orissa, has filed an affidavit objecting the terms of arrangement. In the affidavit it is stated that the proposed scheme of arrangement is to the effect that the security of II charge over the Erode Undertaking available for the Agricultural Cash Credit is being annulled. The next objection raised by the SBI is that since the transferor company is liable as guarantor, its assets, viz. The Erode Undertaking is also available subject to prior charges towards the satisfaction of the guarantee liability. According to the SBI, the property of the guarantor company is taken away free from the liabilities of the guarantor company. In so far as the transferor company is concerned, it is stated that after demerger it will not be a viable unit. The affidavit also refers to the cash credits granted. In so far as the working capital limit of Rs.10 crores and bank guarantee of Rs. 1.96 crores are concerned, the affidavit sets out the nature of the charge. As far as the cash credit of Rs. 5.60 crores is concerned, it is stated that the said cash credit

represents agricultural cash credit limit the details of which are set out in the affidavit. In the affidavit the SBI has set out the following conditions for granting its approval to the scheme :-

a) The existing working capital limit of Rs.10.00 crores, Bank Guarantee limit of Rs. 1.63 lakhs to be taken over by the transferor company and it should continue to be secured by the 1st Pari passu charge on the current assets of the transferee company and II pari passu charge on the fixed assets of the transferee company.

b) The existing Agricultural Cash Credit outstandings of 5.24 crores with future interest thereon to be secured by (1) Corporate Guarantee of the transferee company, (2) II Pari passu charge on the fixed assets of the Erode undertaking, (3) III Charge on the fixed assets of the transferor company.

c) The existing guarantee liability of Rs.14.10 crores with future interest of the transferor company arising out of the 5 Agricultural term loans granted to 3 lift irrigation Co-operative Societies should be guaranteed by both the transferor and transferee company.

d) The receivables, subsidies to be credited to the respective loan account.

e) For any further restructuring / charge of management, prior consent of State Bank of India to be taken. "

Moreover, to substantiate their claim that notice for the secured creditors meeting was in fact sent to the 3rd appellant herein viz. The Director, Sugar Development Fund, Government of India, Ministry of Consumer Affairs, Food & Public Distribution, Krishna Bhawan, New Delhi - 110 001, through Certificate of Posting, the respondent had produced a copy of communication dated 06.02.2001, addressed to the Mass Mailing Centre, Chennai - 2, enclosing therein a Pay Order for Rs.82,500/-. In the list furnished along with that communication, the name and address of the 3rd appellant herein, finds a place at Sl. No. 7. The list also bears the seal of the Business Post Centre, Anna Road, Chennai - 2, with 07.02.2001 as the date. Therefore, the contention of the appellants that there was no notice served on them falls to ground.

15. It was next argued by the learned counsel appearing for the appellants that the Directors of both PSCL and Erode Sugar Mills are one and the same and hence, the Erode Sugar Mills is liable to repay the loans sanctioned to PSCL. To substantiate this contention, the appellants must prove that at least one of the Company is not an existing one. But, it is seen from the records that the Certificate of Incorporation for PSCL was issued on 25.02.1982 in Cert. Of Incorp. No: 9249 of 1982 while the Erode Sugar Mill bears Certificate

of Incorporation No: 18-37200 dt. 26.12.1996. It is trite law that a Company, formed and registered under the Companies Act 1956, in the eye of law, is distinct and has a separate legal entity of its own. May be it is true that the erstwhile Directors of PSCL are among the Board of Directors of Erode Sugar Mills. Obviously, when they were Directors of PSCL they would have been men of reputation with rich experience in running the sugar industry and this would have induced the person incharge of the affairs of the Erode Sugar Mills to take on Board those persons also as Board of Directors. Therefore, we are unable to accept the said contention that PSCL and Erode Sugar Mills are one and the same company.

16. As regards the next contention viz. Lifting of corporate veil, the Courts have time and again held that corporate veil cannot be lifted in the absence of fraud and mere common directorship or holding - subsidiary relationship cannot be the ground for foisting the liability of one company on the other company. We also have an endorsement of our view from a recent pronouncement of the Supreme Court, in the case of Balwant Raj Saluja and another vs. Air India Ltd. and others - reported in 2014 (9) S.C.C. Cases 407. In that decision, the Supreme Court, at para 74, held that,

"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."

17. The claim of the appellants as regards the order passed by the Company Court, as alleged in the ground, is that the merger of PSCL and Bargarh Sugar Mills was only for the purpose of avoiding repayment of loan borrowed by Bargarh Sugar Mills from Sugar Development Fund. This cannot be a ground to interfere with the order of the learned single Judge in the light of the fact that the Scheme of Arrangement had been sanctioned by this Court in C.P. Nos: 118 and 119 of 2000 on 10.09.2001. The relevant portion of the order passed by the Company Court, which has been extracted, would clearly reveal the scheme of arrangement. In the absence of any challenge to that scheme sanctioned by the competent Company Court, the appellants cannot take a stand in this appeal that the scheme of arrangement arrived at between the companies is only to avoid repayment of loans. As to the contention that there are common Directors between the two companies, no acceptable evidence has been adduced before the Court

below to show that the respondent company is the successor company of PSCL. The writ Court has also taken note of the fact that the writ petitioner is an independent legal entity distinct and different from PSCL and it cannot be heard on the side of the appellants herein to say that the writ petitioner is the successor company and therefore liable and responsible for meeting the liabilities incurred by the PSCL. It was further observed by the learned single Judge that the writ petitioner company was incorporated on 26.12.1996 while the SDF loans were sanctioned to Bargarh and Balangir Sugar Mills on 13.12.1993 and 06.05.1996 respectively which is anterior to incorporation of the petitioner company and held that the contention raised by the appellant before the writ Court that the petitioner company is the successor company of PSCL and hence is liable to meet the liabilities incurred by PSCL cannot be accepted. The finding rendered by the writ Court in paragraph 11 of its order, by noticing the order passed in the Company petition is as under :

" 11. Company Petition No: 118 of 2000 was filed by M/s. Ponni Sugars and Chemicals Limited and the Company Petition No: 119 of 2000 was filed by M/s. Ponni Sugars (Erode) Limited before this Court for approval of the Scheme of Arrangement namely, transfer of Erode undertaking in Ponni Sugars and Chemicals Limited to Ponni Sugars (Erode) Limited (petitioner herein) and the scheme sanctioned by this Court on 10.09.2001/26th September, 2001 with effect from 01.04.1999. As per Section 391 (2) of the Companies Act, the Scheme so sanctioned by this Court is binding on all creditors including the respondents. "

18. The further contention raised by the appellants was that the notice of De-merger was not received by them and that the scheme was approved without their approval and hence, it is not binding on them. It is seen from the order passed by the Company Petitions referred to above that the meeting of creditors was convened as per the orders of this Court dt. 24.01.2001. Notices have been sent to all the creditors including the appellants herein and advertisements were also published in the newspapers in compliance with Rules 73 and 74 of the Company (Court) Rules, 1959 and it was only thereafter, the scheme had been sanctioned by this Court. Therefore, the contention raised by the appellant was not accepted by the learned Single Judge, who took a view that if at all the appellants have got any right they have to challenge the De-merger scheme sanctioned by this Court in a manner known to law. In the absence of any such challenge, it is not open to the appellants to raise all these pleas in this writ appeal.

19. Now the issue that remains to be considered by us is whether the SDF dues had been paid by the respondent and if not, what are the consequences of that ? As per the Scheme of Arrangement entered into between PSCL and Erode Sugar Mills at the time of merger, the SDF loan availed by PSCL for Erode Sugar Mill was to be paid by Erode Sugar Mills - respondent. It is seen that the respondent had paid the SDF loan for Erode Sugar Mill amount to Rs.50 lakhs during March 2001 itself. At this point, we cannot lose

sight of the point raised by the respondent that the appellants had the benefit of Bank Guarantees towards securing the SDF loans. It is seen that the Bank Guarantee executed in respect of the dues of bargarh Sugar Mill was valid upto 13.03.2003 and that of the Bolangir Sugar Mill was valid upto 30.11.2004. It is on record that the Scheme of Arrangement was sanctioned by this Court on 10.09.2001 and the appellants were informed about the same on 30.10.2001. Even then, the appellants have not shown any interest to encash the bank guarantees towards the dues of the SDF Loan. Having kept quiet without encashing the bank guarantees, the appellants now cannot plead before this Court that they shall recover the dues from the respondent. More over, as rightly contended by the learned Senior counsel appearing for the respondent, the appellants have not challenged the Demerger Scheme by filing an appeal. Once the Demerger order passed by this Court in C.P. No: 118 of 2000 has become final, naturally the consequences thereof must flow in favour of the respondent.

20. For all the aforesaid reasons, we find no error or illegality warranting our intereference in the impugned order passed by the learned Single Judge. Accordingly, this writ appeal stands dismissed. However, this order shall not preclude the appellants from recovering the dues from the responsible company on which the liability has already accrued and proceed further in the manner known to law. Connected miscellaneous petition is also closed. There shall be no orders as to the costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

gp

1. The Secretary, Union of India,
Ministry of Consumer Affairs,
Food & Public Distribution,
Krishi Bhavan, New Delhi - 1.
2. The Chief Director (Sugar),
Government of India,
Ministry of Consumer Affairs,
Food & Public Distribution,
Krishi Bhavan, New Delhi - 1.
3. The Director (SDF),
Government of India,
Ministry of Consumer Affairs,
Food & Public Distribution,
Krishi Bhavan, New Delhi - 1.

1 cc to Mr.V. Perumal, Advocate Sr.24772

W.A. No:2082 of 2011

RJ(CO)

Eu 19.05.15

<https://hcservices.ecourts.gov.in/hcservices/>