

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR No. 3991 of 2013 (O&M)

Date of decision: January 27,2016

M/S Sai Sounds Private Limited

.....Petitioner

VS.

M/S Kiran Contractors Private Limited

.....Respondent

CORAM: HON'BLE MR.JUSTICE K.KANNAN

Present: Mr. Anand Chhibbar, Sr. Advocate with
Ms. Harpriya Khaneka, Advocate
for the petitioner.

Mr. Animesh Sharma, Advocate
for the respondent.

1. **Whether Reporters of local papers may be allowed to see the judgment?**
2. **To be referred to the Reporters or not?**
3. **Whether the judgment should be reported in the Digest?**

K.KANNAN,J (Oral)

1. The revision petition is brought at the instance of the company against the order in execution of a money decree obtained under Order 37 CPC. The decree was passed for money on a contract of supply to the company on 30.08.1990. The defendant-company had appealed on 16.05.1991 with an application to condone the delay. Even before the appeal was filed before the Appellate Court, it would appear the decree holder had sought for winding up of the company making reference to the unsatisfied decree claim for more than the statutory period by moving High Court of judicature at Calcutta. The court had admitted the petition on

17.07.1991. Against the order of admission, the judgment debtor company had preferred Letters Patent Appeal where Appellate Court had directed the amount to be deposited. Admittedly, the amount was not deposited, as directed. Simultaneously in the appeal filed with an application to condone the delay, the judgment debtor company had sought for stay of execution and the court directed the amount to be paid as the condition for grant of stay. Again the amount had not been deposited. The appeal came to be dismissed on 27.01.1997 declining to condone the delay in preferring the appeal.

2. The decree holder filed an execution petition on 29.05.2004 which on the face of it was more than 12 years from the date of the decree that was granted on 30.08.1990. There had been an objection regarding the issue of limitation but executing court dismissed the execution petition on the ground that there had been winding up proceedings before the High Court of judicature at Calcutta and, therefore, execution petition could not be prosecuted without permission of the High Court. The decree holder withdrew the winding up petition filed before the Calcutta High Court on 28.08.2006 and filed a fresh execution petition on 23.10.2006 which was just over 16 years after the institution of the suit. The petitioner had stated, while seeking for attachment of the property of the Managing Director of the company that the company was a closely-held company with two directors, namely, the Managing Director Mr. Neeraj Bhardwaj and his wife being Director and holding 50% share each. The petitioner had founded the justification for proceeding against the assets of the director on a plea that the director had committed fraud by running away from execution process by filing an appeal and not complying with the condition for stay and

similarly filing an appeal against the company court judgment and not complying with directions for making the payment, as directed to be done when the company court had admitted the winding up petition.

3. Since the execution process was sought against the personal assets of the director of the company, the objection was taken predictably on the ground that there was no decree personally against the director and hence he would not be personally liable. His own personal property could not be, therefore, proceeded against. It was the further objection that the execution petition itself was barred by limitation, for, after decree was passed on 30.08.1990, there never was any fetter for the decree holder to levy execution on account of the fact that the Appellate Court's direction for conditional stay had not been complied with and there was no stay operating against the company for proceeding for recoveries. Similarly, the process in winding up did not proceed further when first an order for payment had not been complied with and the execution petition itself need not have been withdrawn. There was also an objection pointed out by the judgment debtor that mere filing of winding up itself did not constitute any bar and the assets had not been vested with the official liquidator and even the order passed by the executing court at the first stage that permission had not been granted by the company court was erroneous. There was no permission necessary and if the decree holder had not sought for execution within a period of 12 years, the petition could not be sustained.

4. The executing court rejected the objection and allowed further process in execution to be done by what was contended to be sweeping observation that if the decree could not be satisfied from assets of the company, then the Managing Director of the company would be personally

liable to satisfy the same.

5. The learned Senior Counsel appearing on behalf of the company reiterates the objections brought before the executing court and lays emphasis on the issue of limitation and the non liability of the Director for a decree obtained the company except in cases of tax liability of the company. The learned Senior counsel would also find fault with the observations of the executing court to hold that if the company assets were not sufficient, the asset of the director could always be proceeded to be a wrong statement of law.

6. On the issue of a limitation, the learned Senior counsel would point out to two decisions, namely, **Ratan Singh versus Vijay Singh and others JT 2000 (Suppl.3) SC 499** and the judgment in **Chandi Prasad and others versus Jagdish Prasad and others (2004) 8 Supreme Court Cases 724** as laying down the law that when an appeal is filed against a decree, which is dismissed summarily without examination of the case on merits, for the purpose of limitation under Article 136 of the Limitation Act it shall be the date of the decree of the court that passed the judgment on merits which would be the starting point. A summary dismissal at the High court or the Supreme Court by dismissal in limine at the stage on moving an SLP cannot be treated as creating merger of the lower court judgment to the Appellate Court judgments. Consequently, if the decree dated 30.08.1990 had been appealed against to the District court and the latter dismissed it otherwise than on merits on the issue of delay in filing the appeal, the Appellate Court judgment cannot constitute a merger of the trial Court judgment and the petition filed beyond a period of 12 years is barred. The learned Senior counsel is fair to point out to me of yet another judgment

which took a different view in Shyam Sundar Sarma versus Pannalal Jaiswal and others JT 2004 (9) SC 436 a judgment of a three member Bench that dealt with the same issue of whether an appeal disposed of otherwise done on merit on a preliminary point would constitute a merger, when it held that Rattan Singh's case (supra) was not correctly decided. Chandi Prasad's case (supra) which was again a three-member Bench decision was not brought before the judgment in Shyam Sundar's case (supra) although delivered a month later but the three-member Bench made reference to a four-member Bench decision of the Supreme Court in Sheodan Singh versus Daryao Kunwar (1966) 3 SCR 300: AIR 1966 SC 1332

7. The point raised in the said judgment in Sheodan Singh was only whether the appeal which was disposed of on a preliminary ground could be taken as the date when the case was finally decided. The Court held that it was not possible to accept the contention that though the trial court may have decided the case on merit, there could be no resjudicata, if the appellate court dismissed the case on a preliminary ground. The Court held that where a decision is given on merit by the trial court and the matter was taken on appeal was dismissed on some preliminary ground, like limitation or default, it must be held that such dismissal, when it confirmed the decision of the trial court, amounted to the appeal being held and finally disposed of on merit.

8. It must be pointed out that in Sheodan Singh's case (supra), the Supreme Court was not deciding the point of limitation under Article 136 of the Limitation Act. It was actually deciding on the period when the decision became final. It was another way of saying that the trial court judgment

must be taken as having merged with the decision of the Appellate Court when even a dismissal otherwise than on merit must be taken as having such effect. It is this judgment in Sheodan Singh that the Supreme Court was citing Shyam Sunder Sarma's case (supra) to make for an interpretation that for the purpose of Article 136, it shall be the decision of the Appellate Court which shall be the starting point.

9. No doubt, the decision in Shyam Sunder Sarma's case (supra) was cited before yet another Bench of the Supreme Court in Raja Mechanical Company (P) Ltd. Versus Commissioner Central Exercise ILR (2002) 1 Delhi 33. The Court, however, took the same view that had been taken in Ratan Singh and Chandi Prasad cases (supra) and did not follow Shyam Sunder Sarma's case. The Supreme Court did not make any attempt to reconcile the conflict in view to hold that if the appeal was dismissed on the ground of limitation and not on the merits, the order would not merge with the order passed by the first Appellate Court. If the two decisions of equal strength of higher forum take diametrically conflicting views, a subordinate court shall attempt to harmonize to the extent possible a view that will not conflict with the propositions of either case. Shyam Sunder Sarma's case makes reference to Sheodan Singh's case (a 4 member Bench), although rendered in a different context to use that for deciding on the nature of a decree passed by a Appellate Court, even if it was otherwise than on merits. I will hold that the subordinate court will be bound by a three members bench of Shyam Sunder Sarma's case that has taken note of a 4 member Bench in Sheodan Singh's case to make for an interpretation in an identical situation for invoking Article 136 of the Limitation Act to hold that if an appeal had been preferred in a higher court against the 1st decree,

the 2nd decree, even if disposed of otherwise than on merits will be considered as the starting point of limitation. Under the circumstances, the execution petition filed within 12 years period, when the appeal was disposed of, although otherwise than on merit, on 27.1.1997 must be taken to be within time.

10. The issue of competency of the decree-holder to proceed against the assets of the Managing Director could be taken only if it is a circumstance when it is possible to tear the corporate veil. There is no difficulty in understanding the fundamental proposition that a company registered under the Companies Act is an independent entity and the liability of the company cannot be understood as constituting a personal liability for the Managing Director, except to the extent provided under the Income Tax Act. The known exceptions are exceptions which courts have accepted through judicial interpretation when the corporate veil could be lifted. The decisions are abundant, which I do not feel constrained to cite that if in the suit a Managing Director is sought to be made as a party along with the company when the liability is contracted by the Company, the Court will examine whether there has been any fraud committed by a Managing Director to use the corporate cloak only as a facade to secure personal immunity. In this case, admittedly, the decree is only against the company and there is no reference to the Managing Director's personal liability. However, it must be noticed that when the execution petition was filed, the petitioner had made a specific reference to the fact of the admission made by the Managing Director of the Company offering to make the payment before the Company Court, while preferring the appeal, but failed to comply with the direction of the Company Court's order. A plea of

undertaking and default persisted even before the Appellate Court against the decree when the Company was preferring an appeal through the Managing Director and seeking for stay. There was a direction for payment but he failed to comply with the direction. The decree-holder was, therefore, saying that the Managing Director of the Company had approached the Division Bench of the Calcutta High Court only with a motive to buy time and after the dismissal of appeals, the Managing Director was operating from House No. 703, Sector 3, Chandigarh, but evading all types of liabilities.

11. Learned counsel for the respondent points out to me that in Jawahar Lal Nehru Hockey Tournament Versus Radiant Sports Management (2008) 149 DLT 749, the Delhi High Court was holding that there could be a case where the Court could lift the corporate veil even in execution proceedings of a closely held company, particularly of a private limited company in order to satisfy the decree and proceed against the personal assets of the Director. I am in respectful agreement with the proposition and hold that the scope for lifting the veil will be available even at the execution stage, if a fraud was being committed to defeat the process of court and for realization of the decree, in case of a closely held company. We have already observed that the judgment debtor company in which the Managing Director and his wife are the only share holders, who hold 50% shares each and there was no other share holder. It is obvious that the Managing Director was trying to literally use the cloak of corporate entity for securing only immunity against enforcement of any liability contracted by the company. I, therefore, discard the argument placed by the learned Senior Counsel appearing on behalf of the petitioner that the decree cannot

be enforced against the Managing Director.

12. There is yet another strong reason why the petitioner ought not to be permitted to bring the argument of non-enforcement against the Director of the Company. If the decree-holder was seeking for enforcement of the decree against the assets of the Managing Director, the person that could be aggrieved can be the Managing Director and not the company. Significantly, the Managing Director himself had not preferred the revision petition. The company cannot be said to be aggrieved against the decision rendered against the Managing Director. The revision is by a person who cannot even be treated as a aggrieved person. If the counsel were to contend that the liability of the company and of the Managing Director are not to be mixed up, the petitioner's logic must be extended to apply to a situation that a direction against the Director ought not to be taken as a direction against the company also. The petitioner shall hang by his own petard on the arguments propounded before me. The token of logic if the company must be treated as aggrieved, it can be only in a situation when the line drawn between the the Company and the Director itself is an effaced. If the petitioner is literally pleading the brief for the Managing Director, it vindicates the contention of the decree-holder that there exists no difference between the two and the petitioner company was not different from the Managing Director of the company itself. The enforcement of the decree must, therefore, proceed forth without any further obstruction and the revision itself must be taken as incompetent.

13. The executing court has found if the assets of the Company are not satisfied, the assets of the Managing Director could also be proceeded with. The reasoning is erroneous but I have allowed for further process on a

different line of reasoning, referred to above.

14. The revision is dismissed with costs assessed at ₹ 3500/- against the respondent.

January 27, 2016
prem

(K.KANNAN)
JUDGE