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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 2401 OF 2016

DB (BKC) Realtors Pvt. Ltd. And Anr. ….Petitioners
Vs.
Punjab National Bank …..Respondent

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Mr. S.U. Kamdar, Senior Counsel a/w. Mr. Yashesh Kamdar i/b. Manisha Gawde for the Petitioners

Mr. Prashant P. Chavan a/w. Ravindra R. Chile i/b. P.S. Legal for the Respondent
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CORAM : V.M. KANADE &

C.V. BHADANG, JJ

DATE : APRIL 10, 2017

P.C. :

1. Rule. Rule is made returnable forthwith. Respondent waives service. By consent of parties, the writ petition is taken up for final hearing.

2. By this petition, which is filed under Article 226 of the Constitution of India, Petitioners are seeking the following reliefs.

“(a) That this Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order or direction in the nature of certiorari under Article 226 of the Constitution of India thereby calling for the record and proceedings pertaining to the Common Loan Agreement and the creation of securities including by way of Equitable Mortgage by deposit of original Title Documents by the Petitioner No.1 in favour of the Respondent and after examining the validity, legality and propriety thereof be pleased to declare that the action of the Respondent in withholding the original Title Documents in relation to all the piece and parcel of land admeasuring 4313.91 sq.mtrs. bearing Survey Nos. 378 (pt) CTS No.7643 (pt) situate at Tata Colony, Bharat Nagar, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051 and the shares of the Petitioners owned by its shareholders lying with the Respondent is illegal.

(b) Pending the hearing and final disposal of the above Petition;

(i) that this Hon'ble Court be pleased to order or direct the Respondent to hand over the loan and security documents along with original Title Documents to the Petitioner No.1 including the shares of the Petitioners owned by its shareholders lying with the Respondent forthwith.

(ii) that this Hon'ble Court be pleased to permit the Petitioner No.1 to raise finance from any Bank and/or Financial Institution and/or create security in respect of all that piece and parcel of land admeasuring 4313.91sq. mtrs. bearing Survey Nos. 378 (pt) CTS No. 7643 (pt) situate at Tata colony, Bharat Nagar, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051 including the tit bits lands for the purpose of commencing re-development of the said land in accordance with law.

(iii) In the alternative to prayer clause (b) (i) above, this Hon'ble Court be pleased to restrain the Respondent from in any manner acting on the said Title Documents and/or representing that a valid and subsisting equitable mortgage exists over the property in question and/or initiating any proceedings in respect of the equitable mortgage over the said property.

(c) for ad-interim reliefs in terms of prayer (b) above.

(d) for costs; and

(e) for such further and other reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

2. The brief facts, which are relevant for the purpose of deciding this petition are as under:

(i) Petitioner No.1 is a company incorporated under the Companies Act, 1956 on 14.2.2006. Petitioner No.2 is an Authorized Signatory of Petitioner

No.1 and is concerned with the affairs of Petitioner No.1. The Petitioner No.1 is engaged in the business of construction and development.

(ii) Petitioner No.1 was in the process of developing a piece and parcel of land admeasuring 4313.91 sq. mtrs. along with some other small pieces of lands. Petitioner No.1 applied to the consortium of banks including the Respondent Bank for term loan facilities. Accordingly, the term loan facility to the tune of Rs.244.80 crores was secured by creating an equitable mortgage by way of deposit of title deeds in respect of Petitioner No.1's property situated at Bandra Kurla Comples, Bandra (East), Mumbai – 400 051. It is an admitted position that though the said facility was allowed, Petitioner No.1 never availed the said amount or the facility.

(iii) Petitioner No.1 requested the Respondent Bank for issuance of 'No Dues Certificate' for its partly sanctioned loan of Rs.75 crores and for release of the security documents since other two lenders had already given their 'No Dues Certificate'. However, despite repeated requests being made by the Petitioners, the Respondent Bank did not hand over the said title documents. The Petitioners, therefore, have moved this Court by filing a present Writ Petition, seeking a direction, directing the Respondent Bank to hand over / release the said title documents.

3. A preliminary objection has been raised by Shri Chavan, learned counsel appearing on behalf of the Respondent Bank that the writ petition is not maintainable; firstly, because it related to the contractual agreement between the parties and no writ could be filed, seeking enforcement of terms of the contract; and secondly, it is submitted that the writ can not be issued against the Respondent Bank.

4. Shri Kamdar, learned Senior Counsel appearing on behalf of the Petitioners has relied on a judgment of the Apex Court in the case of **Zonal Manager, Central Bank of India Vs. Devi Ispat Limited and Others [(2010) 4 SCC (Civ) 401].** He invited our attention to paragraphs 28 and 29 of the said judgment and also relied on the judgment of the Division Bench of this Court in the case of **Surendra Laxman Nikose Vs. Chief Manager & Authorized Officer, State Bank of India [2014(3) Bom.C.R. 223]** and, more particularly, paragraph 13 thereof.

5. We have perused the observations made by the Apex Court and the Division Bench of this Court in the respective cases and we are of the view that

the ratio of the judgment in case of Zonal Manager, Central Bank of India (supra.) would squarely apply to the facts of the present case. The Apex Court in paragraphs 28 and 29 of the said judgment has observed as under:

> "28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs.
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> 29. In the case on hand, it is not in dispute that the appellant Bank, being a public sector bank, discharging public functions is "State" under Article 12. In view of the settlement of the dues on the date of filing of the writ petition by arrangement made through another nationalized bank, namely, State Bank of India and the statement of accounts furnished by the appellate Bank subsequent to the same i.e. on 14-5-2009 is 0.00 (ni) outstanding, we hold that the

> High Court was fully justified in issuing a writ of mandamus for return of its title deeds."

Similarly the Division Bench of this Court in paragraph 13 of the judgment in the case of Surendra Laxman Nikose (supra.), after relying on the judgment of the Apex Court in the case of Zonal Manager, Central Bank of India (supra) has held that writ of *mandamus* could be issued against the Nationalized Bank for seeking return of title deeds especially when the entire loan amount was cleared. Paragraph 13 of the said judgment reads as under:

> "13. In the judgment in the case of Zonal Manager, Central Bank of India (supra) that was relied upon by the learned Counsel for the petitioner, the Hon'ble Apex Court has held that the Central Bank of India being a Nationalized Bank was amenable to writ jurisdiction. In the said case, M/s. Devi Ispat Limited has borrowed certain amounts from the Central Bank of India. According to the borrower though it had cleared all dues, its security documents were not being returned. According to the bank, there was a fraud committed by another firm and the liability of the Bank under a revolving letter of credit was still alive and it was in the process of recovering the said amounts. On that basis, the Bank sought to exercise its right under section 171 of the said Act and refused to return the documents of title to M/s. Devi Ispat Limited. The learned Single Judge of the Calcutta High Court held that the amounts borrowed by M/s Devi Ispat having been duly

paid, the Bank was not justified in exercising lien on the documents of title. The Division Bench of said High Court dismissed the appeal preferred by the Bank therein which led to the Bank approaching the Hon'ble Apex Court. To an objection raised that the High Court should not have interfered in a matter arising out of contract, the Hon'ble Apex Court held that there being no dispute relating to terms and conditions of a contract, the writ petition was tenable before the High Court. Upholding the judgment of the learned Single Judge as affirmed by the Division Bench, the appeal preferred by the Bank was dismissed holding that a writ of *mandamus* for return of title deeds had been rightly issued by the High Court. This judgment of the Hon'ble Apex Court is, therefore, rightly relied upon by the learned Counsel for the petitioner for contending that there being no disputed questions, a writ of *mandamus* could be issued against the Nationalized Bank for seeking return of title deeds especially when the entire loan amount was cleared."

6. In our view, the facts of the present case are identical to the facts of the case of Surendra Laxman Nikose (supra.). We have no hesitation in holding that writ petition filed under Article 226 of the Constitution of India is maintainable against the Respondent Bank, which is a Nationalized Bank.

7. Shri Kamdar, learned Senior Counsel appearing on behalf of the Petitioners submitted that it has also been held by this Court that where the

dispute between the parties is not in respect of the terms and conditions of a contract, then writ petition would be maintainable. He again relied on paragraphs 29 and 30 of the judgment of the Apex Court in the case of Zonal Manager, Central Bank of India (supra.) and also paragraph 13 of the judgment of the Division Bench of this Court in the case of Surendra Laxman Nikose (supra)

7. We find that in both these cases, the Apex Court as well as the Division Bench of this Court have taken a view that where there is no dispute relating to the terms and conditions of the contract, a writ petition is maintainable before the High Court.

8. Shri Kamdar, learned Senior Counsel appearing on behalf of the Petitioners submits that it is not in dispute that though an equitable mortgage was created for credit facilities, which were given to the Petitioners, these facilities were not availed and the loan was not disbursed to the Petitioners at any point of time. He submitted that, therefore, there was no relationship of banker and customer between the Respondent Bank and the Petitioners and, therefore, the Respondent Bank was not entitled to have a general lien under section 171 of the Contract Act. He submitted that the Respondent Bank purportedly withheld the documents on the ground that one of the shareholders

of the Petitioners was a Director of some other company, and since the said company had availed a loan from the Respondent Bank, the Respondent Bank is entitled to withhold the title deeds of Petitioner No.1. It is submitted that this objection is not tenable. He also relied on paragraph 30 of the judgment of the Apex Court in the case of Zonal Manager, Central Bank of India (supra.)**.** He submitted that the Calcutta High Court in the case of **M/s. Devi Ispat Limited and Others vs. Central Bank of India in Writ Petition No.485 of 2009 decided on 24.8.2009** has considered in detail the said issue and has taken a view that title deeds could not be retained on this ground.

9. On the other hand, Shri Chavan, learned counsel appearing on behalf of the Respondent Bank has submitted that this Court could lift the corporate veil of the company in which one of the shareholders of Petitioner No.1 was a Director in the other company. He submitted that the Bank could exercise its own general lien under section 171 of the Contract Act.

10. On the other hand, Shri Kamdar, learned Senior Counsel appearing on behalf of the Petitioners submits that such a general lien could not be exercised.

11. The law on the point of corporate lien is quite well settled and the Apex

Court in the recent judgment in the case of **Balwant Rai Saluja and Another Vs. Air India Limited and Ors. [(2014) 9 Supreme Court Cases 407]** in paragraphs 71 to 74 has considered the cases cited before it and observed the circumstances under which corporate veil could be lifted. Shri Chavan, learned counsel for the Respondent Bank has relied on paragraph 73 of the said judgment.

12. Shri Kamdar, learned Senior Counsel appearing on behalf of the Petitioners submitted that the Apex Court had observed that wherever there was a fraud committed by the party or wherever the company was established for the purpose of evading its liability, lifting of corporate veil was justified by the Apex Court. He submitted that in the present case, it was not Respondent Bank's case that Petitioner No.1 Company was established to siphon of monies or was established for committing fraud on the Respondent Bank.

13. We are of the view that there is considerable substance in the submissions made by the learned Senior Counsel for the Petitioners. The Apex Court in paragraphs 71 to 74 of its judgment in Balwant Rai Saluja (supra.) has observed as under:

> "71. In recent times, the law has been crystalized around the six

principles formulated by Munby, J. in *Ben Hashem v. Ali Shayif*[45]. The six principles, as found at paras 159-64 of the case are as follows:

(i) Ownership and control of a company were not enough to justify piercing the corporate veil;

(ii) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;

(iii) The corporate veil can be pierced only if there is some impropriety;

(iv) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;

(v) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

(vi) The company may be a "facade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so fr as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

45 *Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)*

72. The principles laid down by *Ben Hashem case*[45] have been reiterated by the UK Supreme Court by Lord Neuberger in *Prest v. Petrodel Resources Ltd.*[46], UKSC at para 64. Lord Sumption , in *Prest case*[46], finally observed as follows : (AC p 488, para 35).

"35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, of depriving the company or 9its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in *LIC v. Escorts Ltd.*[47] while discussing the doctrine of corporate veil, held that: (SCC pp. 335-36, para 90)

> "90. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statue itself

45*Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)*
46 (2013) 2 AC 4:5:(2013) 3 WLR 1:2103 UKSC 34
46 (2013) 2 AC 4:5:(2013) 3 WLR 1 : 2013 UKSC 34
47 (1986) 1 SCC 264

> contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."
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> 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.

14. Taking into consideration the facts of the present case, we are of the

view that the ratio of the judgment in the case of Balwant Rai Saluja (supra.) or the case of **LIC v. Escorts Ltd. [(1986) 1 SCC 264]** is applicable to the facts of the present case.

15. Shri Chavan, learned counsel appearing on behalf of the Respondent Bank has relied on section 171 of the Contract Act. It is submitted that the Bank always had a general lien in respect of the loan taken by the Petitioners' other concerns and that the said title deeds could be retained to ensure that the loan which was disbursed to other concerns in which one of the shareholders of Petitioner No.1 was also a Director, is repaid. In our view, it is not possible to accept this submission. The Division Bench in the case of Surendra Laxman Nikose (supra.), has in terms considered the provisions of section 171 of the Contract Act and has held that only if the relations between the banker and the customer have not come to an end, in such cases it could exercise its general lien.

16. We have perused the equitable mortgage executed between the parties which in terms state that the said mortgage is given to secure the loan which was given to Petitioner No.1 and, in fact, it is also an admitted position that the said facility was not availed by Petitioner No.1 at any point of time and other two

consortium banks have given their 'No Dues Certificate'. We are, therefore, of the view that the Petitioners have clearly made out a case for issuing writ of mandamus. The writ petition, therefore, is allowed in terms of prayer clauses (a) and (b) (i). It is clarified that prayer clause (b) (i) is treated as final relief and not interim relief as prayed in the prayer clause. Writ petition is disposed of and rule is made absolute in the aforesaid terms.

[C.V. BHADANG, J.] **[V.M. KANADE, J.]**

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