

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 11.05.2016

Pronounced on: 16.03.2017

+ **CO.APP.50/2013 & C.M. NOS. 11516/2013 & 11518/2013**

VIJAY KUMAR SHARMA Appellant

Versus

VIJAY KUMAR KAPOOR AND ORS. Respondents

+ **EFA (OS) 9/2012**

YUSUF ENGINEERING CO. PVT. LTD. Appellants

Versus

MR. VIJAY KUMAR KAPOOR AND ANR. Respondents

+ **EFA (OS) 12/2012**

YUSUF ENGINEERING CO. PVT. LTD. Appellant

Versus

MR. VIJAY KUMAR KAPOOR AND ORS. Respondents

+ **CO. APP.61/2013 & C.M. NOS. 13310-13312/2013**

D.K. WAREHOUSE PVT. LTD. Appellant

Versus

BRAINBRIDGE ADVERTISING AND MARKETING PVT. LTD.
AND ANR. Respondents

Through: Sh. Hitender Kapur and Sh. Sagar Chawla, Advocates, for D.K. Warehouse in Co.App.50/2013, EFA(OS) 9/2012, EFA (OS) 12/2012 & Co.APP.61/2013.

Sh. Aruneshwar Gupta and Ms. Parul Bose, Advocates, for D.K. Warehouse, in EFA (OS) 12/2012.

Sh. Vivek Gupta, Advocate, for D.K. Warehouse, in Co.App.50/2013.

Sh. Manjit Singh Ahluwalia, Advocate, for ARD with Ms. Anita Jain, in Co.App.50/2013.

Sh. Rajiv Bahl, Advocate, for OL, in Co.App.50/2013, EFA(OS) 9/2012, EFA (OS) 12/2012 & Co.APP.61/2013.

Sh. Deepak Khadaria, Sh. C. Mohan Rao and Sh. Lokesh Sharma, Advocates, for Sh. Manish Katyal, auction purchaser.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This common judgment disposes off four appeals (two execution appeals and two company appeals), because of the twining of facts. They relate to one property A-24, Okhla Industrial Estate, Phase I (hereafter “the suit property”). The first set of two appeals are preferred by Yusuf Engineering Co (P) Ltd (hereafter “Yusuf” or “YECPL”) which had filed EA 668-69/2011 claiming an order to set aside the sale of the suit property pursuant to a court order dated 30.09.2011 and a further stay of proceedings in Execution Petition No. 135/2010. The other application, EA 5/12 was by Manish Katyal (hereafter “the auction purchaser”) who sought confirmation of the auction sale. Yusuf’s applications were dismissed and those of the auction purchaser were allowed, by the learned Single Judge, in the order dated 02.03.2012. Yusuf prefers the two execution appeals, i.e. EFA 9 and 12/2012 against the said judgment (the said two appeals are hereafter referred to as the “execution appeals”). The second set of appeals is by Vijay Sharma (Co. A. No. 50/2013) and D.K. Warehouse Pvt. Ltd (Co. A. No. 61/2013- hereafter “D.K. Warehouse”). These appeals, preferred under Section 483 of the Companies Act, 1956 (hereafter called “company appeals”) are directed against an order of the Company Judge dated 07.05.2013 in CP 265/1998. The company appeals also pertain to the suit property.

Facts relevant to the execution appeals

2. Yusuf purchased the suit property by a registered deed dated

22.12.1992. Its predecessor-in-interest had acquired perpetual leasehold rights from the Delhi Development Authority (DDA) through a deed dated 25.09.1980. It is alleged that on 27.11.2003, the suit property was let out to M/s Ambica Research Development (hereafter “ARD”) a proprietorship concern of Ms. Anita Jain. It is stated that such an arrangement had the approval of the concerned authorities and that later, a greater portion of the suit property on the ground and first floors etc. were let out through a lease deed for three years to ARD on 10.02.2006, by a lease deed. Another lease deed was later executed on 01.08.2009. Apparently, in the meanwhile, on 01.09.2005, Ms. Anita Jain married Mr. V.K. Sharma (appellant in one of the company appeals). A dispute had, in the meanwhile arisen between ARD and one Vijay Kapoor (hereafter called the “decree holder” or “DH”), was referred to arbitration. An award was rendered, adverse to ARD, i.e. the proprietorship concern of Ms. Anita Jain, on 6th January, 2010, holding her liable to pay ₹21,01,875.37 with interest @ 9% per annum from 2006. This award became the subject matter of the execution proceedings, EP 135/2010. In that proceeding, on 26th August 2010, the court attached the suit property as well as another property. The JD appeared through counsel before the Joint Registrar (JR) on 2nd December 2010 and stated that a petition was filed under Section 34 of the Arbitration and Conciliation Act (hereafter “the Act”) to challenge the award. The JR noted that since there was no stay of the proceedings, draft sale proclamation schedule should be filed within four weeks. On the next date, i.e. 25th January 2011 since the JD did not appear, the JR directed notice under Order XXI Rule 54, CPC. One Kiran Mittal filed EA No. 95/2011 seeking for the setting aside of the order dated 26th August 2010 of the court- but insofar as it related to some other property, (80-4/3,

Forest Lane, Sainik Farms,) New Delhi and not the suit property. The court directed proclamation of sale on 02.06.2011 and 30.09.2011. On 25th October 2011, the sale proclamation was advertised in English and Hindi dailies. On 15.11.2011 auction of the suit property was conducted and Manish Katyal was the highest bidder at ₹1,24,00,000/-. The reserve price of the disputed property was kept at ₹35,00,000/-.

3. In the two applications filed in execution proceedings, Yusuf claimed that the property in question had been leased by it to ARD for three years commencing from 10th February 2006. It was stated that Yusuf had orally worked out an arrangement of ARD and persuaded it to vacate the property in question at the earliest. Yusuf argued that ARD had written to it on 16th March 2011 stating that it would vacate the premises on 15th April 2011 and on that day it (ARD) handed over the premises to Yusuf, which was thereafter retained by it. On 15th November 2011 when Yusuf personnel visited the suit property to collect old files, the Local Commissioner appointed by this Court reached, with some others with local police and informed them about the court auction. Yusuf also urged that thereafter the lawyer inspected the court file and the applications to set aside the auction and stay execution proceedings were filed. In the circumstances, Yusuf says it could not be fastened with liability of a third party, i.e. ARD, which was merely a tenant. The property in question admittedly was in the name of Yusuf and cannot be sold to realize the debts of any one shareholder. In any event, the property of the JD's husband could not be sold to satisfy the debt of the wife. It is stated that it is not pleaded anywhere in the execution petition that the JD has used YECPL as a front for availing of the benefits

which form the subject matter of the arbitral award and, therefore, there is no question of lifting the corporate veil of YECPL. Likewise, since the JD was only an individual, there is no question of enforcing the liability of the JD against a company, which is not even a party either to the Award or the execution proceedings.

4. In the reply the auction purchaser stated that he had paid the entire amount of ₹1.24 crores for the property in question as the successful bidder in the auction sale. It was alleged that the JD, Ms. Anita Jain, and her husband Mr. Vijay Kumar Sharma, in connivance with one Mr. Ravinder Kumar Mishra misled this Court and also committed perjury by filing false affidavits. It is alleged that Mr. Vijay Kumar Sharma is the husband of Ms. Anita Jain and that they were the owners of Yusuf and were conducting business from the property in question. The annual returns filed by Yusuf in Form-20B under the Companies Act, showed that in 2005, Mr. Vijay Kumar Sharma held 25.30% of the total shareholding with 40,010 equity shares as on 29th September 2005. From the Form-20B filed by Yusuf in 2008, it was revealed that Mr. Vijay Kumar Sharma and his relatives held 49.4% shares. In 2009, Mr. Vijay Kumar Sharma held 99.3% of the total shareholding, whereas Ravinder Kumar Mishra held 0.70% of the total shareholding. This continued in 2010 as well. It was, accordingly, prayed that Yusuf's corporate veil should be lifted to determine the real character of persons conducting its affairs. The auction purchaser also alleged that Ravinder Kumar Mishra perjured by affirming an affidavit on behalf of Yusuf in support of the application in which false statements were made concerning its purported request to ARDPL to vacate the premises. It was also argued by the auction purchaser that Yusuf was incorporated in 1984 with 40% equity shares and

four directors. Later, it appears that Mr. Vijay Kumar Sharma acquired Yusuf's majority shares. It was urged that the lease agreement filed by Yusuf was unregistered and was signed by one Ms. Indu K. Wattal on behalf of ARD and not by Ms. Anita Jain. It was urged that the lease deed was a fabricated document to show tenancy in favour of ARD because Mr. Vijay Kumar Sharma was Anita Jain's husband and was acting in connivance to defeat the decree and also to get the duly conducted auction sale set aside through fraudulent means.

5. The suit property was, according to the auction purchaser, always under the control of Vijay Kumar Sharma, the JD's husband, and this was known to him, the JD and Mr. Ravinder Kumar Mishra, who filed the affidavit in support of EA No.668 of 2011. Further, the auction purchaser stated in EA 5/2012, in addition to these facts, that the suit property was rented by Yusuf to ARD at ₹9,000 per month, whereas the extent of the premises was 7,000 sq. ft. and market rent was at least ₹1,40,000 per month. Even if a smaller area were to be taken i.e., less than 65% to 70% of the total area, the market rent would still not be less than ₹1 lakh per month. It was contended that the said lease deed produced by Yusuf was a manufactured document.

6. The learned Single Judge, by the impugned order in the execution appeals, dismissed Yusuf's applications and allowed those of the auction purchaser, stating as follows:

“Mr. Vijay Kumar Sharma, also known as Mr. V.K. Sharma, has been involved in several instances of fraud and cheating, as is clear from an application filed in this Court in CP No.265 of 1998 by the OL based on reports of the Serious Fraud Investigation Office ('SFIO'), an investigating agency of the

central government conducting inquiry into the affairs of JVG Group of Companies (in liquidation). In the said application, it is stated that M/s. JVG Finance Limited (in liquidation) had issued cheques from its banks for issuance of drafts, pay orders in 1995 and 1996 in the name of Yusuf Engineering Private Limited, Mr. Yusuf Hafeez, Mr. Abdul Hafeez and Mrs. Noorsabha. The investigation by the SFIO further revealed that Ms. Veena Sharma, the (first) wife of Mr. V.K. Sharma (the ex-Chairman and Managing Director of the JVG Group of Companies) entered into an agreement to sell on behalf of JVG Publication with Yusuf Engineering Private Limited through Mr. Abdul Hafeez, to purchase all shares of Directors of the said company "owning building (constructed on a plot of land measuring 392.5 sq. yds.) bearing No. A-24, Okhla Industrial Area Phase-I, New Delhi-20." It is mentioned in the report of SFIO that the agreement was executed on 5th January 1996 and the total sale consideration settled was Rs.34 lacs. When this is seen along with the documents enclosed by YECPL with its application a clear picture emerges. A sale deed was executed on 27th December 1992 in favour of YECPL by M/s. Azad Engineering Works through Mr. Abdul Hafeez, son of Mr. Abdul Latif, and property measuring 392.5 sq. yds. at A-24, Okhla Industrial Area Phase-I, New Delhi was transferred to YECPL. Then progressively shares in YECPL were purchased by Mr. Vinod Kumar Sharma and his wife Ms. Anita Jain and ultimately Mr. Vinod Kumar Sharma held 99.3% shares of YECPL. Thereafter the so-called lease deed (unregistered) was entered into between YECPL and ARDPL through its authorized signatory on 10th February 2006 in respect of the property in question.

22. The SFIO report, in fact, states that Mr. Abdul Hafeez and other Directors had appeared before the Inspectors on 21st May 2008 stated on oath that they have sold their company, YECPL to JVG Group of Companies through their Directors. Para 12.3 to 12.7 of the application filed by the OL, which are relevant for the purpose of present application, read as under: "12.3) That the payments were received from M/s JVG Finance

Limited (In Liquidation) and the shares were transferred along with the property as mentioned above. The shares were transferred in the name of Sh. S.P. Sharma, Smt. Veena Sharma, Sh. Vinay Kumar Sharma and these persons became directors in this company.

12.4) That the investigation of SFIO further reveals that the agreement between M/s Yusuf Engineering Co. Pvt. Ltd. and M/s JVG Publication was only for name sake and actually the relatives of Sh. V.K. Sharma, Ex-CMD of JVG Finance Limited (In Liquidation) purchased the said property, which is in the name of M/s Yusuf Engg. Co. Pvt. Ltd. with the funds of JVG Finance Limited (in liquidation).

12.5) That the report of SFIO reveals that after transfer of shares the persons who were the directors of M/s. Yusuf Engineering Co. Pvt. Limited were close associates/ex-employees of Sh V.K. Sharma, Ex-CMD of JVG Group of Companies and one Sh. Ravinder Kumar Mishra, Director of M/s. Yusuf Engineering Pvt. Ltd stated on oath from the SFIO on 1st May 2008 is working as caretaker in guest house of Sh V.K. Sharma situated at 74/5, Chhattarpur, New Delhi and he has been signing various papers, including bank account opening forms, blank cheque books and other company related documents. He has no knowledge about the company and its business.

12.6) Smt. Veena Sharma w/o Sh. Vijay Kumar Sharma appeared before the Inspector on 18th June 2008. She stated on oath that she has no knowledge about the transactions. She signed papers, cheque books and other documents as per advice of her husband, Sh V.K. Sharma. The above said transactions have not been disclosed by the Ex-Management of the aforesaid companies of JVG Group either to Official Liquidator or to this Court.

12.7) That on 5th June 1998 the banker of JVG Group company, M/s. JVG Finance Limited was put under liquidation

on a petition moved by RBI. A number of cases of misappropriation, siphoning of funds have been registered against Sh V.K. Sharma and relatives/associates. To hide this property/transaction and to mislead the investigation agencies and the official liquidator attached with Delhi High Court Sh V.K. Sharma deliberately kept the management of Yusuf Engineering Pvt. Ltd. in the hands of his close relatives. Subsequently, he transferred management/control of this company from his relatives to his close/faithful associates/employees, such as D.K. Agarwal, Ravinder Kumar Mishra etc. During the year 2004-05, he again transferred the management/control of Yusuf Engg. Pvt. Ltd in his own name and his new wife's name i.e., Smt. Anita Sharma as is evident from the annual return of M/s. Yusuf Engg. Pvt. Ltd. made upto 30th September 2005 filed with ROC, Delhi. Therefore, he is illegally occupying/enjoying the benefits of property No. A-24, Okhla Industrial Area, Phase-I, New Delhi, which was solely acquired from out of funds of JVG Finance Limited (in liquidation)."

23. The matter has assumed serious proportions with Mr. Vijay Kumar Sharma being involved in a large number of cases of fraud and cheating and being on the run. He has been proclaimed an absconder since 2007. A plea by him in a separate petition for quashing of an FIR against him was dismissed by this Court with costs of Rs.5 lakh.

24. It is in the above background that the plea raised by YECPL in the present application has to be appreciated. YECPL is one of the many devices adopted by Mr. Vinod Kumar Sharma to defraud the public. He has also involved his family members as is evident from the SFIO report. The person in actual control of YECPL is Mr. Vijay Kumar Sharma, who is none other than the husband of the JD, Ms. Anita Jain. Clearly the story about YECPL having given the premises in question on rent to ARDPL is only a smoke screen to conceal the real picture. YECPL's attempt through the present application to defeat the decree arising out of the Award in question should

fail. It is only to help the JD avoid meeting the liability thereunder.

25. There can be no manner of doubt that YECPL has suppressed several material facts in its application, the most significant of which is that Mr. Vijay Kumar Sharma, who holds 99.3% of YECPL is, in fact, husband of the JD. YECPL's application is supported by the affidavit of Mr. Ravinder Kumar Mishra who holds only 0.70% of the shares of YECPL while being fully in the know of who owns the remaining shares and yet not revealing that fact. This brazen conduct of YECPL deserves the severest condemnation. It has resulted in the abuse of the process of the Court and delayed the confirmation of the auction sale in favour of the auction purchaser. It is an attempt to overreach the Court and frustrate the execution of the Award in question."

The company appeals

7. After auction of the suit property took place, possession was taken by the Court Commissioner appointed by the executing court, in the execution proceedings, (on 15.03.2012) and delivered it to the auction purchaser. However, the official liquidator - appointed as the provisional official liquidator of ARD on 08.05.2012 in Co. Pet. No. 123/2010, took over possession of the suit property on 15.05.2012 and sealed it. This resulted in the auction purchaser filing C.A. No. 1067/2012 (in CP No. 123/2010), for de-sealing of the premises (i.e. suit property). While that application was pending, D.K. Warehouse approached the company court, by filing applications, CA 1219 and 1820 of 2012 stating that it was the *bona fide* purchaser of the suit property, from Yusuf, without notice. D.K. Warehouse also sought leave to file an application, before the learned Single Judge, in terms of Section 446 of the Companies Act.

8. On 5th April, 2013, the Company court rejected the application seeking leave, and observed as follows:

“14. Having heard learned counsels, I am of the view that there is no merit in these applications. If the property in question, namely, property No.A-24, Okhla Industrial Area Phase I, New Delhi eventually is found to be that of JVG Finance Ltd. on account of the fact that the said company had provided the entire consideration for purchase thereof, though in the name of YECPL, neither the applicant nor the auction purchaser would have any interest in the said property. For the purpose of deciding the present applications, I am assuming that the property belonged to YECPL in its own name and in its own right. If so, it is clear that the property was put to public auction after due publication of the notice of the sale proclamation and the auction was held on 15.11.2011. The auction purchaser paid a substantial amount of Rs.31 lacs on 15.11.2011 itself, and the balance amount of Rs.93 lacs was paid on 03.12.2012, i.e. before the applicant claimed to have entered into agreement to sell with YECPL through Sh. Vijay Kumar Sharma.

15. The submission of the applicant that it was a bonafide purchaser without notice for valuable consideration cannot be accepted for the reason that the auction sale was duly published and the applicant ought to have had notice of the same. The rights of an auction purchaser who has purchased the property through public auction under the gaze of the court would take precedence over a subsequent agreement purchaser who claims to have entered into an agreement with the registered owner, particularly when the registered owner was aware of the earlier auction sale through the process of the court. If the submission of the applicant were to be accepted, in every such case, the party not interested in the auction sale going through, would easily scuttle the same on the premise of a subsequent agreement to sell, wherein the disclosed consideration is higher than the price at which the auction sale has been concluded. This would completely undermine the

sanctity of the process of the conduct of auction sale by the court.

16. The auction purchaser having deposited the entire consideration on 02.12.2011, certain rights accrued in its favour. The court confirmed the sale subsequently on 02.03.2012 and the auction purchaser was even put in possession of the property on 07.03.2012. Only thereafter, the applicant approached the executing court by filing E.A. No.334/2012, thereby seeking to scuttle the auction sale in favour of the auction purchaser.

17. I do not find merit in the submission of the applicant founded upon the order dated 30.04.2012 passed in C.P. No.265/1998 for the reason that the order dated 02.03.2012 could not have been assailed, and has not been assailed, before the Company Court. The challenge to the said order is pending consideration before the appellate court. The auction purchaser has, in any event, filed an application to seek sanction of the company court under section 536(2) of the Companies Act. The said aspect may be relevant to consider the applications preferred by the auction purchaser under section 536(2) of the Companies Act. I also find this argument of the applicant self-destructive. If this submission were to be accepted, it would follow that not only the auction purchaser but even the applicant would have no right to claim any right in the said property. I, therefore, reject this submission of the applicant.

18. For the aforesaid reasons, in my view, the applicant has no right to claim any relief against the auction purchaser, who stands at a higher pedestal than the applicant, insofar as the right to the property is concerned.

19. I may observe that after the conclusion of the argument, learned counsel for the applicant has sought to confine his relief to grant of permission under section 446 of the Companies Act to pursue its application under Order 21 Rule 89 before the executing court. However, I am not inclined to do

so, precisely for the reason indicated herein above. Accordingly, these applications are dismissed.”

Appellate proceedings

9. Since the appellants felt aggrieved by the order of the learned Single Judge in execution proceedings, EFA 9/2012 and EFA 12/2012 were preferred. On 10.07.2012, the following orders were made:

“2. While we are seized of these appeals, certain other developments have taken place. There is a company named JVG Finance Limited which is in liquidation and the proceedings are pending before the Company Judge in respect of the said company. Mr. V.K. Sharma, husband of Aneeta Sharma was holding 99.3% shares in the said company and remaining 0.7% shares was held by his employee. During the winding up proceedings, the Company Judge noticed certain alleged frauds allegedly committed by Sh. V.K. Sharma as the Managing Director of the said company in liquidation which included diversion of funds. The matter was referred to Serious Fraud Investigation Office which, gave the report and as per that report, the aforesaid property was purchased from the funds of JVG Finance Limited. On that basis, the Official Liquidator has taken the possession as the property in question in fact belongs to JVG Finance Limited and, therefore could not even be sold in auction by the executing Court in civil proceedings and that to, without obtaining the permission of the Company Court under Section 446 of the Companies Act.

3 In these circumstances, before we proceed to adjudicate the issue which arises in these appeals, it is imperative that the question as to whether the property in question belongs to JVG Finance or not is to be determined first.

4. These appeals are accordingly adjourned to sine die and parties are given liberty to revive the same after the aforesaid issue is settled by the Company Judge.”

As a consequence, two applications were moved before the Company Judge (CA No.1067/12 in CP No.123/2010 and CA No.1065/12 in CP No.265/1998). The Company Judge on 07.5.2013, upholding the sale by auction in the execution proceedings, disposed off these applications. The execution appeals were disposed off on 08.07.2013, in the following terms:

“In view of the order dated 07.05.2013 passed in Company Petition No.123/2010 and CP No.265/1998 whereunder the learned Company Judge has held that the property in question belongs to YECPL and has confirmed the sale in favour of the auction purchaser on his depositing additional consideration of Rs.1.26 crores within eight weeks with the Official Liquidator, the present Appeal has become infructuous.

Dismissed as infructuous.”

10. In the light of the filing of the company appeals, CM No.13122/2013 and CM Nos.11516 &11518/2013 were preferred seeking revival of the execution appeals. At one stage, the execution appeals and applications for revival were sent for mediation; the attempt however, failed because of the intractable nature of the disputes. The applications (for revival of the execution appeals) and the company appeals were therefore, clubbed together and heard finally by this court.

Arguments of the appellants

11. In the execution appeals, it is argued (by Yusuf, in the application seeking revival of its disposed off appeals) and – in the company appeals, (by DK Warehousing, as well as VK Sharma) that the auction of Yusuf’s property was unwarranted. It is highlighted that the debt arising from the arbitration award was on account of the omission by ARD, which was a tenant of a part of the suit property. As lessee, it had no right or interest in

the suit property. On the other hand, Yusuf was owner of the property. In the circumstances, the property belonging to the lessor (Yusuf) could never have been subjected to attachment or valid order of disposition in the execution proceedings. This position remained unaltered whether Yusuf objected to it or did not, in the execution proceedings.

12. It is argued on behalf of the appellants, Yusuf, DK Warehousing and Vijay Sharma, that the decree holder had an enforceable decree against Anita Jain in her personal capacity under the award dated 06.01.2010 passed by the Sole Arbitrator. A perusal of order passed by the Company Court dated 30.04.2012 establishes beyond doubt that the real owner of the property was Yusuf and not Anita Jain (JD). Therefore, auction of the suit property on 15.11.2011 belonging to Yusuf in a decree against Anita Jain is under mistake of fact, hit by Section 20 of the Contract Act and, improper, without jurisdiction, null and void *ab-initio*. Reliance is placed on the decision reported as *Thakur Barmha v. Jibanram Marwari* (1914) ILR 41 Cal 590 PC. In that judgment, the Privy Council held that sale of a wrong property in an auction to satisfy a decree could not be valid:

“Their Lordships are of opinion that all such matters irrelevant. If by a mistake the wrong property was attached and an Order made to sell it, the only course open to the decree-holders on the discovery of the mistake was to commence the proceedings over again. They could not turn an authority to sell one property into an authority to sell another and a different one.”

13. It is further argued that a decree or order, which is *ipso facto* a nullity, can be challenged at any stage, even in collateral proceedings. In support, reliance was placed upon *Kiran Singh v. Chaman Paswan* AIR 1954 SC 340:

"... It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings . ."

It is argued that the decree holder (Vijay Kapoor) intentionally and deliberately misled the court to secure attachment of property (in satisfaction of the award which became a decree) which never belonged to the judgment debtor, i.e., Anita Jain (ARD). It is also argued that the learned Single Judge, in the impugned judgment in the execution appeals, ignored that the true market value of the suit property was ₹6,08,61,150/- and the realizable value was ₹5,47,75,000/- whereas it was sold for less than one fourth that value, i.e., ₹1.24 crores.

14. It is also argued that besides ignoring that ARD's tenancy did not mean that it had any ownership rights over the suit property and it remained always that of Yusuf, the learned Single Judge further erred in placing reliance on the report of the SFIO¹ because it implicated the wrongdoings not of Yusuf, but of one of its shareholders. Its probative value could not be of such character as to lead to the conclusion that Yusuf's corporate veil had to be lifted, to infer that it was a front for VK Sharma and his wife, Anita Sharma (formerly Jain). Yusuf held the property since 1992; that its shareholding was substantially taken over or purchased by someone connected by marriage to the sole proprietor of a concern which was the

¹ Serious Fraud Investigation Office: A multi-disciplinary organization set up by the Ministry of Corporate Affairs, Central Government. It was set up in 2003 and consists of several experts in the field of accountancy, forensics, information technology, investigation, company law, insurance, capital market and taxation, who investigate and look into corporate and white collar crime.

judgment debtor in the arbitration proceedings, was too tenuous a link to enable the court to proceed against its assets. In other words, the identity and corporate character of the owner of the suit property could not be shaken by the wrongdoings, real or alleged, of one of its prominent shareholders. Reference was made to *Bacha F. Guzdar v. Commissioner Of Income Tax, Bombay* AIR 1955 SC 74, which stated that upon acquisition of a stake in a company, the shareholder does not own any interest in its assets or properties.

15. It is argued that DK Warehousing was a *bona fide* purchaser of the suit property for value before the auction, and part payment towards the consideration was made on 13.11.2011, which was credited to Yusuf's account on 15.11.2011 before the auction sale and the entire balance amount was also paid. Therefore, its rights as such purchaser, *bona fide* and without notice, were superior to that of the auction purchaser, who could claim rights, if any based on the assumed ownership of the judgment debtor (ARD) since the property did not belong to the latter, but to Yusuf, who rightfully sold it, to such *bona fide* purchaser.

16. It is stated that the learned single, in execution, exceeded the remit of a Division Bench order, in EFA (OS) No.12/2012, which had directed examination of the issue, whether having regard to the allegations of serious fraud in respect of the “*JVG Finance Limited which is in liquidation and the proceedings are pending before the Company Judge in respect of the said company*”, the question for decision for the learned Single Judge was:

“3. *In these circumstances, before we proceed to adjudicate the issue which arises in these appeals, it is imperative that the question as to whether the property in question belongs to JVG*

Finance or not is to be determined first.”

Counsel submitted that in not deciding these, but instead proceeding to hold that the suit property was sold to a *bona fide* purchaser, who had no notice of any wrongdoing and had therefore perfected his title, the learned Single Judge committed an error.

Arguments of the auction purchaser

17. The auction purchaser argues that there is no legal infirmity in the judgments impugned. It is highlighted that in addition to ₹1.24 Crores, a further sum of ₹1.26 Crores was directed to be deposited with the Official Liquidator for the suit property, as against the alleged private sale conducted by the appellant, Yusuf, within 20 days of the auction. The said amount was deposited by the auction purchaser and was duly accepted by the Liquidator on 27.05.2013. Further, under the orders passed by the learned Single Judge, the Liquidator also withdrew approximately a sum of ₹1.45 Crores (including interest) lying deposited in this Hon'ble Court for the said property. Thus, as on date a total sum of ₹2.71 Crores has been received by the Official Liquidator from the auction purchaser.

18. The auction purchaser relies on *Chinnammal & Ors. v. P. Arumugham & Anr.* (1990) 1 SCC 513 to say that an innocent, *bona fide* purchaser in a court auction is insulated from the vicissitudes of litigation relating to title. It was held in that judgment that:

“An auction purchaser who is not a party to the decree is protected against the vicissitudes of fortunes of the litigation and remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The property bonafide purchased ignorant of the litigation should

be protected. The judicial sales in particular would not be robbed of all their sanctity. It is a sound rule based on legal and equitable considerations.”

19. The arguments of the appellants that the Company Judge could not have decided the validity or otherwise the auction sale and in doing so he overstepped the jurisdiction vested in the Company Court are refuted by the auction purchaser. It is pointed out that the application filed by the auction purchaser under Section 536(2) of the Companies Act, on 22.05.2012 much before the Division Bench order of 10.07.2012, and was pending adjudication for grant of sanction. The Company Judge therefore, rightly adjudicated that application for sanction strictly in accordance with law keeping in mind the interest of the creditors of the company. While deciding it, the Company court even directed that the sanction was subject to the condition of depositing of ₹1.26 crores more than the auctioned amount. The auction purchaser deposited the amount on 27.05.2013. Also, possession was also handed over to the auction purchaser on 10.06.2013. Thus, the appellants' submission that the Company Judge overstepped the jurisdiction in deciding validity of auction sale is without merit. The Company Judge relied on the decision of this Court in *Reserve Bank of India v. Crystal Credit Corporation Ltd.* 2005(121) DLT 375 and granted the sanction under Section 536(2).

20. The auction purchaser contests the argument that Anita Jain got married to Mr. V.K. Sharma on 01.09.2005 and two did not know each other before 2003. It is submitted that these two were associated since 1996 and had committed various acts of fraud in connivance with each other as noticed by the Division Bench of this Court in *Smt. Benu Berry v. JVG Finance. Ltd.*

(*Under Lqdn.*) [2013] 113 CLA 515 (Delhi), a judgment pronounced on 10th April 2012. Reliance is placed on the following extract of the said judgment:

"(i) that while Smt. Anita Jain claimed to have paid Rs.1, 77, 71,888/- to various publications in December, 1996, January and February, 1997 and April to August, 1997 on behalf of the company in liquidation, the Statement of Account of the company in liquidation showed that a sum of Rs.1,86,65,603/- had been paid to M/s Flying Colours between 05.11.1996 to 25.03.1997;"

Furthermore some transactions were referred by the Serious Fraud Investigation Office (SFIO) in its report as follows:-

"25.12) Details of Flats in Panchmukhi Apartment: That as per report of SFIO the company (In Liquidation) purchased five flats in Panchmukhi Apartment, Yari Road, Versova, Andheri (W), Mumbai viz., Flat No. B-201, B-202, B-302, B-402 and B-101. The SFIO investigation was carried out with respect to the five flats situated in Panchmukhi Apartment.

a) That the Flat No. B-201, Panchmukhi Apartment, Yari Road, Versova, Andheri (W), Mumbai is in the possession of Official Liquidator, Delhi. The said flat was taken in possession on 19.01.2010 vide Hon'ble High Court of Delhi order dated 01.12.2009.

b) That in the case of Flat No. B-202, Panchmukhi Apartment, Yari Road, Versova, Andheri (W), Mumbai, the SFIO report reveals that the said flat was transferred by M/s JVG Finance Limited (In liquidation) through its CMD, Shri V.K.Sharma in the name of Mrs. Anita Jain, (the second wife of Shri V.K. Sharma), Proprietor: M/s Flying Colours Advertising Agency in the year 2001). The said flat was given as an adjustment of the dues of her firm, M/s Flying Colours Advertising Agency against M/s JVG Finance Limited (in Liquidation). SFIO report further states that the said flat was sold to Ms. Benu Berry vide sale agreement dated 13.12.2001

for an amount of Rs. 22,00,000/- and Mrs. Anita Jain/ Sharma received the payments vide cheque No. 042170 dated 13.12.2001 of Rs. 9,00,000/- and Ch. No. 042171 dated 14.11.2001 of Rs. 10,71,975."

21. Therefore, contends the auction purchaser, it is evident that the JD had committed various frauds in connivance with Mr. V.K. Sharma right from 1996 and not from 2005 onwards. Various courts from across the country had already declared her a proclaimed offender. The judgment in *Smt. Benu Berry v. JVG Finance Ltd. (Under Lqdn.)* (supra), also held that:-

"4. The appellant claims, that the company in liquidation had engaged one Smt. Anita Jain, carrying on the business of an advertising agency in the name and style of Flying Colours, for its promotional work and the company in liquidation owed a sum of Rs.1.25 Crores to the said Smt. Anita Jain for the work done for the company in liquidation and in part payment of which cheques for Rs.30,00,000/- issued had also been dishonored; that the company in liquidation, to clear the part of the debt owed by it to the said Smt. Anita Jain vide deed dated 23.03.2001 agreed to sell the said flat to the said Smt. Anita Jain."

22. Counsel also points out that V.K. Sharma, ex-Director of JVG Finance Ltd. (Under Lqdn.) and Anita Jain had created different companies by partnering with each other to give birth to new frauds and played different roles to cheat creditors of the companies. This was so held in the said judgment:-

"(ii) that the payments from the company in liquidation to M/s Flying Colours/Smt. Anita Jain were amounted more than claimed by Smt. Anita Jain to be due from the company in liquidation;

(iii) that the records of company in liquidation further

showed that Smt. Anita Jain have been receiving regular payments of her dues from the company in liquidation;

(iv) that thus the dues from the company in liquidation to Smt. Anita Jain were not clearly established and the transaction in favour of Smt. Anita Jain could not be said to be a bonafide one;

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(v) that Smt. Anita Jain had closed the business of advertising agency in or about January, 1999 due to non payment of outstanding bills by the company in liquidation;

(x) the aforesaid also showed collusion between the appellant, Smt. Anita Jain and the company in liquidation;"

14. We therefore do not find any merit in this appeal and dismiss the same. Though we have found the appellant to be in collusion with the company in liquidation and Smt. Anita Jain but we refrain from imposing any cost on the appellant."

23. Ms. Anita Jain was an associate of Mr. V.K. Sharma from 1996 onwards and was used as a conduit for clandestine money transfers, as her advertising company M/s Flying Colours was created only for diverting money and for receiving excess money. Land barter was used as the device for transfer of land in her name in the first instance and then the same was sold off for cash. The entire purpose was to create multiple title disputes. This is evident from the Division Bench judgment in *Smt. Benu Berry's* case (supra). Further reference also made to the decision of this Court in *Col. M.R. Bhakshi v. Fintra Systems Ltd. & Anr.* 2008 (151) DLT 1, where, it was held that:

"10. Having considered the respective submissions, I am, as at present advised, inclined to agree with the submissions of Mr. Rajiv Shakhder, Sr. Advocate the learned Amicus Curiae.

Keeping in view the purpose for which Section 542 has been enacted, and the fact that timely action is of the essence, not only to prevent the presentation of a fiat accomplished by the fraudulent Directors of the company, but also to provide relief to the victims of the fraud, it seems that the establishment of the fraudulent conduct for attracting the provision of Section 542 of the Companies Act does not require the same standard of proof as in a criminal trial and the rigours of the law of evidence as apply to a criminal trial would not apply to establish the commission of fraudulent acts and omissions by the Directors and Managers of a company. It has also to be kept in mind that by its very nature, fraud is not easy to establish. This is even more so, when the fraudulent conduct is undertaken by the Directors of a company, sitting in their own office, with a view to defraud the creditors/investors who, though the victim of the fraud, are not involved in the transactions which constitute such conduct and may have no personal knowledge of the same. In K. T. Dharanendrah v. R. T. Authority, AIR 1987 SC 1321, the Supreme Court, while dealing with a case under the Customs Act, 1962, observed that "an economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest."

Analysis and Conclusions

24. It can be seen from the above analysis that the main contention on behalf of the appellants in both the proceedings i.e., the execution appeals' revival applications and the company appeals is that, Yusuf was always the owner of and had title to the suit property, which could not be held responsible for the debts and liabilities of a third party viz. ARD. In other

words, that Anita Jain was the proprietor of ARD did not make any difference; Yusuf properties could not be attached and sold to satisfy the award, which implicated ARD. The corollary to this argument is that the fluctuating shareholding pattern in Yusuf and the extent of shares held by VK Sharma or by Anita Sharma could not in any manner have affected Yusuf's legal ownership of the suit property which could not have been legitimately auctioned. DK's additional argument is that it is a *bona fide* purchaser of property from the valid and true owner, Yusuf, and that its claim has to prevail over that of the auction purchaser.

25. The record of execution proceedings would reveal that after institution notice was issued; the court order noted (on 26th August, 2010) that the JD (Anita Sharma nee Jain) refused to accept notice. It, therefore, directed attachment of the suit property. She entered appearance and stated on 22nd December 2010 that steps would be taken to challenge the award. The orders in execution proceedings also note that the JD's challenge to the award was unsuccessful; ultimately the decree arising from the award became final. The proclamation of sale of the suit property which had been attached on 26th August, 2010, was issued; it was directed to be published in, *inter alia*, the daily newspaper "The Hindu" as well as a local, vernacular newspaper. The sale was conducted and finalized after this event. There is, and cannot be any dispute that the auction purchaser is a *bona fide* purchaser, without notice of dispute regarding the title to the suit property.

26. The rule approved in *Chinnammal* (supra) i.e. that an innocent, third party *bona fide* auction purchaser's rights cannot be affected because of irregularity in the manner the decree was obtained, or as to the subsequent fate of the litigation, was first approved in a Full Bench ruling of the Nagpur

High Court, in *Shankar and Anr v. Jawaharlal* AIR 1928 Nag 265 where it was held that:

" a private satisfaction of a decree certified in court after the sale of immovable property has been held and before the confirmation of the sale is ordered, does extinguish the decree and prevent the Court from confirming the sale in favour of the auction purchaser, if he be the decree-holder himself, but it does not extinguish the decree and prevent the court from confirming the sale where a third person has purchased the property bonafide at the auction sale."

In a later judgment in *Janak Raj v. Gurdial Singh* AIR 1967 SC 608, it was held as follows:

"it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified."

Gurjoginder Singh v. Jaswant Kaur & Anr (1994) 2 SCC 368, relied on the judgment rendered by the Privy Council held that the status of a *bona fide* purchaser in an auction sale in execution of a decree to which he was not a party stood on a distinct and different footing from that of a person who was inducted as a tenant by a decree-holder-landlord. It was held as follows:

"A stranger auction purchaser does not derive his title from either the decree-holder or the judgment-debtor and therefore restitution may not be granted against him but a tenant who obtains possession from the decree-holder landlord cannot

avail of the same right as his possession as a tenant is derived from the landlord."

Padnathil Rugmini Amma v. P. K. Abdulla (1996) 7 SCC 668, reiterated the principle as follows:

"11. In the present case, as the ex parte decree was set aside, the judgment-debtor was entitled to seek restitution of the property which had been sold in court auction in execution of the ex parte decree. There is no doubt that when the decree-holder himself is the auction-purchaser in a court auction sale held in execution of a decree which is subsequently set aside, restitution of the property can be ordered in favour of the judgment-debtor. The decree-holder auction-purchaser is bound to return the property. It is equally well settled that if at a court auction sale in execution of a decree, the properties are purchased by a bona fide purchaser who is a stranger to the court proceedings, the sale in his favour is protected and he cannot be asked to restitute the property to the judgment-debtor if the decree is set aside. The ratio behind this distinction between a sale to a decree-holder and a sale to a stranger is that the court, as a matter of policy, will protect honest outsider purchasers at sales held in the execution of its decrees, although the sales may be subsequently set aside, when such purchasers are not parties to the suit. But for such protection, the properties, which are sold in court auctions, would not fetch a proper price and the decree-holder himself would suffer. The same consideration does not apply when the decree-holder is himself the purchaser and the decree in his favour is set aside. He is a party to the litigation and is very much aware of the vicissitudes of litigation and needs no protection."

27. It is clear, therefore, that previous judgments have made a distinction between one class of purchasers in court auctions and another: if a decree holder purchases the property and the sale is upset because the underlying

decree is reversed, or for other reason, the sale transaction can be avoided. On the other hand, if the purchaser is a third party, *bona fide* buyer of the property, he is immune to the vicissitudes of the underlying litigation as the law deems that he has no notice of such developments.

28. The relevant provisions of the Companies Act are Sections 441, 536 and 537. The relevant extracts of Sections 536-37 are reproduced below:

“536. Avoidance of transfers, etc. after commencement of winding up-. xxxxxxxxxxxxxxxxxxxx

(2) In the case of a winding up by [the Tribunal], any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall [unless the Tribunal] otherwise orders, be void.”

“537. Avoidance of certain attachments, executions, etc., in winding up by Tribunal- (1) Where any company is being wound up by Tribunal- xxxxxxxxxxxxxxxxxxxx

(b)any sale held, without leave of the Tribunal of any of the properties or effects of the company after such commencement shall be void.”

Section 441 on the other hand, enjoins that upon admission of a winding up petition, it shall be “deemed to” relate back to the date of its filing. Whilst there is no doubt that upon winding up order being passed, there would be a “relation back” to the date of its presentation, yet the corollary that prior to the making of an order for winding up the legal consequence of dispositions (especially a court auction) being rendered void does not follow. In other

words disposition is rendered void if and when an order for winding up is passed. However, the Company Judge has the discretion to hold that an individual transaction made during the interregnum is valid. This position emerges from a reading of *Gorakhpur Electric Supply Co. Ltd. v. Nariman & Co.* (1947) 17 Comp Cas 87, *A.C. Goel v. First National Bank Ltd., Delhi* AIR 1960 P & H 476, *S.P. Khanna v. S.N. Ghosh*, 1976(6) TLR 1740 and *Re Sidhpur Mills Company Ltd.*, (1987)1 Comp LJ 71. On an application of the principles underlying those authorities, it is therefore held, that in the present case, since the winding up order had not been made on the date of attachment, and later, the date of auction, the exercise of discretion by the learned Single Judge cannot be faulted.

29. The relationship between Anita Sharma, nee Jain and VK Sharma, apparently did not begin with their marriage; the SFIO report stated that funds of JVG Finance, (the affairs of which were investigated by the SFIO) were used to buy various properties, including the suit property. This emerges from a reading of the order in *Rohan Mehta v VK Sharma* (CCP(CO.) 17/2007 in CP 265/1998 order dated 30th April, 2012)

“22. Further, the SFIO in its report has found that M/s. Yusuf Engineering Company Pvt. Ltd. owning property bearing No. A-24, Okhla Industrial Area, Phase-I, New Delhi, had been purchased from the funds of JVG Finance Limited. The amount of money transferred by JVG Finance Limited to Yusuf Engineering Pvt. Ltd. as well as to its ex-Directors is reproduced hereinbelow:...”

Again, in *Brain Bridge Advertising v. Ambica Research and Development (P) Ltd* (order dated 8th May 2012 in CP 123/2010) it was stated that:

“The modus operandi adopted by accused / Petitioner Vijay Kumar Sharma is that he floats a large number of companies and rotates the Directors, funds and MOUs between these companies to keep the innocent investors and government agencies in dark. The Petitioner Vijay Kumar Sharma and other directors are having interconnected links in several companies including M/s PSG Developers & Engineers Ltd, M/s Vian Infrastructure Ltd., M/s JVG groups of companies, M/s Yusaf Eng. Ltd., etc. The accused persons / directors of these companies in active collusion with each other rotated themselves in these companies and transferred / siphoned off / utilized the funds collected from the innocent investors by opening a large number of bank accounts in the name of these companies. The present petitioner / accused Vijay Kumar Sharma is the mastermind behind these activities.”

The other orders adverted to by the learned Single Judge also reveal that ARD too, apparently, was a front set up to ferret or tap the monies of investors. On the other hand, there is nothing on the record to suggest that the transaction, which was the basis of the arbitration award, was not *bona fide*. In the light of these facts, it is held that the submissions of Yusuf that it could not be held responsible for the liabilities of its shareholder or director, are without force.

30. The court is of opinion that the learned Single Judge, in lifting the corporate veil, to discern the real involvement of individuals who set up a network of corporate entities to evade their liabilities and also to dupe the innocent public, cannot be faulted. The doctrine of lifting the corporate veil has been resorted to by the Supreme Court in several decisions, such as *Commissioner of Income Tax v. Sri Meenakshi Mills Ltd.* AIR 1967 SC 819; *Life Insurance Corporation of India v. Escorts Ltd.* (1986) 1 SCC 264 and *New Horizons Ltd. and Anr. v. Union of India & Ors.* 1995 (1) SCC 478. In

a recent decision, *State of Rajasthan v. Gotan Lime Stone Khanij Udyog (P) Ltd* 2016 (4) SCC 469 it was held that:

“23. The principle of lifting the corporate veil as an exception to the distinct corporate personality of a company or its members is well recognized not only to unravel tax evasion[7] but also where protection of public interest is of paramount importance and the corporate entity is an attempt to evade legal obligations and lifting of veil is necessary to prevent a device to avoid welfare legislation[8]. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.”

31. In the present case, the lifting of ARD and Yusuf’s corporate veil was justified and warranted. Given that V.K. Sharma and Anita Sharma had shareholding in Yusuf to the extent of 97% (and Anita Sharma also had corporatized ARD after the liabilities arose) the SFIO’s report was correctly appreciated in the impugned order.

32. As far as D.K. Warehouse goes, it is significant to note that the application filed by Yusuf did not mention about an agreement to sell with it at all. Furthermore, the agreement is unregistered. It was entered into after the auction sale. There is nothing mentioned in the application to say that DK Warehousing had not inspected the properties, which had been attached, or that it had no notice of the court auction. In these circumstances, the court is of opinion that the learned Single Judge’s conclusion that its claim to have purchased the property in a *bona fide* manner, after the auction sale, is without foundation.

33. In the light of the foregoing analysis the company appeals are dismissed; the applications to recall the order dismissing the execution appeals is also, for the same reason, dismissed. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MARCH 16, 2017

