IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 15TH DAY OF OCTOBER 2019

THE HON'BLE MR. JUSTICE K.KALYANASUNDARAM

A.Nos. 6894 & 6895 of 2019
in
E.P.No.74 of 2018
and
A.Nos. 6896 & 6897 of 2018
in
E.P.No.75 of 2018

E.P.No.74 of 2018:

BFIL FINANCE LIMITED
Eucharistic Congress Building No.1
4th Floor, 5 Convent Street,
Colaba, Mumbai 400 039
(Formerly known as ITC Bhadrachalam
Finance and Investments Limited and since
amalgamated with Russell Credit Limited)
... Petitioner/Decree Holder

Vs.

M/s. G-Tech Stone Limited
No.7, 1st Floor, LVR Centre,
Seshadri Road, Alwarpet,
Chennai 600 018. ... Respondent/Judgment Debtor

A.Nos.6894 & 6895 of 2019:

M/s. G-Tech Stone Limited
No.7, 1st Floor, LVR Centre,
Seshadri Road, Alwarpet,
Chennai 600 018. ... Applicant/Judgment Debtor

-vs-

BFIL FINANCE LIMITED
Eucharistic Congress Building No.1
4th Floor, 5 Convent Street,
Colaba, Mumbai 400 039
(Formerly known as ITC Bhadrachalam
Finance and Investments Limited and since
amalgamated with Russell Credit Limited)
... Respondent/Decree Holder

A.No.6894 of 2019:

Application praying that this Hon'ble Court be pleased to set aside the order dated 28.08.2019 issued by the Learned Master in E.P.No.74 of 2018 as against the L.R.Siva Prasad the Director of M/s. G-Tech Stone Ltd.,.

A.No.6895 of 2019:

Application praying that this Hon'ble Court be pleased to stay the operations of the order dated 28.08.2019 issued by the Learned Master in E.P.No.74 of 2018.

E.P.No.75 of 2018:

BFIL FINANCE LIMITED
Eucharistic Congress Building No.1
4th Floor, 5 Convent Street,
Colaba, Mumbai 400 039
(Formerly known as ITC Bhadrachalam
Finance and Investments Limited and since
amalgamated with Russell Credit Limited)
... Petitioner/Decree Holder

Vs.

M/s. G-Tech Stone Limited
No.7, 1st Floor, LVR Centre,
Seshadri Road, Alwarpet,
Chennai 600 018.
Rep.by its Mr.L.V.Sivaprasad
No.7, 1st Floor, LVR Centre,
Seshadri Road, Alwarpet,
Chennai 600 018. ... Respondent/Judgment Debtor

A.Nos.6896 & 6897 of 2019:

M/s. G-Tech Stone Limited
No.7, 1st Floor, LVR Centre,
Seshadri Road, Alwarpet,
Chennai 600 018.
Rep.by its Mr.L.V.Sivaprasad
No.7, 1st Floor, LVR Centre,
Seshadri Road, Alwarpet,
Chennai 600 018. ... Applicant/Judgment Debtor

-vs-

BFIL FINANCE LIMITED
Eucharistic Congress Building No.1
4th Floor, 5 Convent Street,
Colaba, Mumbai 400 039
(Formerly known as ITC Bhadrachalam
Finance and Investments Limited and since
amalgamated with Russell Credit Limited)
... Respondent/Decree Holder

A.No.6896 of 2019:

Application praying that this Hon'ble Court be pleased to set aside the order dated 28.08.2019 issued by the Learned Master in E.P.No.75 of 2018.

A.No.6897 of 2019:

Application praying that this Hon'ble Court be pleased to stay the operations of the order dated 28.08.2019 issued by the Learned Master in E.P.No.75 of 2018 as against L.R.Siva Prasad the Director of M/s. G-Tech Stone Ltd., These Applications coming on this day before this court for hearing, the Court made the following order:-

Application (Appeal) Nos.6894 & 6896 of 2019 are directed against the orders passed by learned Master in E.P.Nos.74 & 75 of 2018 respectively, dated 28.08.2019.

2. <u>Brief facts necessary for disposal of these appeals would run thus:-</u>

2 [i] A Three Member Arbitration Tribunal passed an Award dated 14.06.2001, directing the appellants to pay a sum of Rs.8,10,00,000/- to the respondent, which was formerly known as ITC Bradrachalam Finance and Investments Limited, within a period of two months, failing which, the said amount would carry interest at the rate of 15% per annum. Though the Award was set-aside by a learned Single Judge of Bombay High Court in Arbitration Petition No.499 of 2001, however on an appeal preferred by the respondent, the Division Bench in Appeal No.284 of 2002, dated 07.08.2002, reversed the order of the learned Single Judge, and the same was confirmed by the Hon'ble Apex Court in Civil Appeal No.6495 of 2003.

2 [ii] During the pendency of the Appeal before the

Hon'ble Supreme Court, E.P.No.204 of 2002 was filed by the respondent for recovery of the Award amount by way of attachment and sale of movable properties of the applicant-Company. The Execution Petition came to be dismissed, citing pendency of the appeal before the Apex Court. Subsequent to the dismissal of the S.L.P. on 07.09.2010, the respondent filed O.A.No.991 of 2010 under Section 9 of Arbitration and Conciliation Act, praying for an order of interim injunction, restraining the applicants herein from alienating its assets. This Court, by an order dated 17.09.2010, allowed the Original Application in O.A.No.991 of 2010, granting an order of interim injunction as prayed for.

2 [iii] The respondent filed Execution Petition No.15 of 2012 for attachment and sale of movable properties of the 1st applicant. In the Execution Petition, Application No.6900 of 2014, came to be filed under Order XXI Rule 41 of CPC for disclosure of assets of the applicant-Company. Since the Managing Director of the applicant-Company failed to appear before the learned Master, an arrest warrant was issued on 05.08.2016. In pursuance of the warrant, the second applicant-Mr.L.R.Sivaprasad was arrested and

produced before the learned Master on 15.09.2016. At that time, he undertook to settle the issue within a period of four weeks, and thereafter filed an affidavit disclosing the assets, which would satisfy the Award, dated 14.06.2001. In view of the affidavit filed by the applicants, the Execution Petition was closed, granting liberty to the respondent to file a fresh Execution Petition on the basis of assets disclosed on 12.07.2017.

2 [iv] Subsequently, two Execution Petitions have been filed by the respondent in E.P.Nos.74 & 75 of 2018 for attachment of movable properties and for arrest of the Managing Director respectively. Application No.5640 of 2019 was filed by the second applicant in E.P.No.75 of 2018 to dismiss the Execution Petition, contending that there was no Award passed against him and hence, he is not liable to pay the Award amount. The learned Master, by a common order, dated 28.08.2019, allowed both the Execution Petitions and dismissed the Application No.5640 of 2019. Assailing the order, the present Appeals have been filed.

3. Mr.R.Thiagarajan, learned counsel for the applicants / appellants would urge that the learned Master ought not

to have entertained the Execution Petitions; one for attachment and sale of Company properties and simultaneously an execution petition as against the Director for arrest and detention inasmuch as the Director not being personally liable and hence, the order of arrest of the Director is ex-facie illegal.

4. The learned counsel would further add that when the properties of the Judgment Debtor are available, the properties can be attached and sold and the sale proceeds so realized can be equally distributed among the body of the creditors, which would meet the ends of justice and the order of detention of the Director is in violation of Article 21 of the Constitution of India. The provisions of law ought not to be used as a tool to harass the Judgement Debtor, when the assets of the Company would satisfy the claim of the Decree Holder. In support of his contentions, the learned counsel has cited the following judgments:-

(i) ***Jolly George Varghese and Ors. Vs. The Bank of Cochin*** *[MANU/SC/0014/1980]*

(ii) ***K.S.Narasimhan Vs. The Commercial Tax Officer*** *[MANU/TN/7268/2007]* *(iii)* ***V.K.Uppal Vs. M/s.Akshay International Pvt. Ltd.,*** *[Ex.App.No.516 of 2009 in Ex.P.No.295 of 2003, dated 09.02.2010]*

(iv) ***Vimalchand Vs. Arora Distillery Pvt. Ltd., Company and Anr.*** *[MANU/MP/0232/2009]*

(v) ***Sreyas Sripal V. Upasana Finance Ltd.,*** *[2007 (4) CTC 161]*

5. *Per contra* Mr.Krishna Srinivasan, learned counsel appearing for the respondent would contend that though the Award passed by the Three Member Arbitration Tribunal in the year 2001 has been confirmed by the Hon'ble Apex Court in Civil Appeal No.6495 of 2003, on 07.09.2010, the respondent is not able to enjoy the fruits of the Award, in view of the deliberate actions and technical pleas raised by the applicants herein. It is the submission of the learned counsel that despite an order of this Court in O.A.No.991 of 2010, dated 17.09.2010, assets of the applicant-Company was sold for Rs.20 Crores, but no amount has been paid to settle the legitimate dues of the respondent and that since the Managing Director of the applicant-Company on 15.09.2016 undertook to settle the

dues of the respondent, he cannot turn round to say that the execution for arrest of the Managing Director is not maintainable.

6. The learned counsel further submitted that in Application No.3377 of 2018, a leave was granted on 18.04.2018, for filing simultaneous execution petitions and only thereafter, the Execution Petitions are filed and hence, both the Execution Petitions are maintainable.

7. The learned counsel for the respondent would further urge that the second applicant-L.R.Sivaprasad is a Director in first applicant-Company, viz., M/s.G-Tech Stone Limited and also in M/s.Perfect Stone Limited. The search and seizure conducted in both the Companies, the Income Tax Department found that there were fictitious transactions between both the Companies and hence, initiated proceedings under the provisions of the Income Tax Act, which would show that the Judgment Debtor, after initiating the Arbitration Proceedings, made various cash transactions to its sister Company in order to defraud the respondent and therefore, the Execution Petition under Section 51 of C.P.C. was rightly filed by the respondent.

8. The learned counsel, by placing reliance on the decision of the Hon'ble Apex Court in the case of ***Singer India Ltd., Vs. Chander Mohan Chadha and others*** *[(2004) 7 SCC 1]* has submitted that it is a fit case, the corporate veil should be lifted and the persons responsible for the affairs should be held liable for committing illegality and defrauding the respondent. According to the learned counsel, the decisions relied on by the learned counsel for the applicants would not help them as the facts involved in those cases are not identical.

9. Heard the rival submissions and perused the materials available on record.

10. These appeals have been preferred by the Judgment Debtors on the grounds that as there was no personal Decree against the second applicant, E.P.No.75 of 2018 is not maintainable and that the respondent failed to obtain a leave to file simultaneous petitions.

11. Before going into merits of the matter, I would like to consider the decisions relied on by the learned counsels on either side.

12. The Hon'ble Supreme Court in the case of ***Jolly George Varghese and Ors. Vs. The Bank of Cochin*** *(supra)*, has observed that simple default to discharge is not enough and the element of bad faith beyond mere indifference to pay in form of some deliberate disposition must be established and order of arrest made without considering attitude of refusal to pay on demand is liable to be set-aside.

13. In the case of ***K.S.Narasimhan Vs. The Commercial Tax Officer*** *(supra)*, this court has held that a Company is a legal entity by itself and it can sue or can be sued as legal entity and any dues from the Company had to be recovered only from the Company and not from its Directors. The same view was taken by the Delhi High Court in the case of ***V.K.Uppal Vs. M/s.Akshay International Pvt. Ltd.,*** *(supra)* and Madhya Pradesh High Court in the case of ***Vimalchand Vs. Arora Distillery Pvt. Ltd., Company and Anr*** *(supra)*.

14. In the case of ***Sreyas Sripal V. Upasana Finance Ltd.,*** *(supra)*, this Court has observed that mere omission

to pay the decree amount is not enough to attract the order of arrest but attitude of refusal on demand verging on dishonest disowning of obligation under the decree is essential.

15. The Hon'ble Apex Court in the case of ***Singer India Ltd., Vs. Chander Mohan Chadha and others*** *(supra)* had an occasion to consider under what circumstances, the corporate veil is to be lifted. The relevant paragraphs are extracted hereunder:-

> *"14. In Palmer's Company Law (24th Edn), in chapter 18, para 2 onwards some instances have been given in which the modem company law disregards the principle that the company is an independent legal entity and also when the Courts would be inclined to lift the corporate veil and the important ones being in relation to the law relating to trading with enemy where the test of control is adopted and also where the device of incorporation is used for some illegal or improper purpose. In Gower's Principle of Modem Company Law (4th Edn), in chapter 6, the topic of lifting the veil has been discussed. The learned author has said that there is no consistent principle beyond a refusal by the legislature and the judiciary to apply the logic of the principle laid down in Solomon's case where it is too*

flagrantly opposed to justice, convenience or the interest of the Revenue. In the cases where veil is lifted, the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity or ignores the separate personality in favour of the economic entity constituted by a group of associated companies. The principal grounds where such a course of action can be adopted are to protect the interest of the Revenue and also where the corporate personality is being blatantly used as a cloak for fraud or improper conduct.

15. The question of lifting the corporate veil was examined by a Constitution Bench in Tata Engineering and Locomotive Co. Ltd etc. v. The State of Bihar and Ors. MANU/SC/0036/1964 : [1964]6SCR885 . The Court observed that the doctrine of lifting of the veil postulates the existence of dualism between the corporation or company on the one hand and its members or shareholders on the other. After review of a number of authorities and standard books, the parameters where the said doctrine could be applied were indicated in consonance with the principles indicated in the preceding paragraph. In Delhi Development Authority v. Skipper Construction Company (P) Ltd. and Anr. MANU/SC/0497/1996 : AIR1996SC2005 , Mr. Justice

B. P. Jeevan Reddy has examined the question in considerable detail and it will be useful to reproduce the relevant paragraph of the judgment which is as under:

"Lifting the corporate veil:

24. In Aron Salomon v. Salomon & Company Limited (1897) AC 22, the House of Lords had observed,

"the company is at law a different person altogether from the subscriber.....;and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands received the profits, the company is not in law agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by that Act".

Since then, however, the Courts have come to recognize several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is "when the corporate personality is being blatantly used as a cloak for fraud or improper conduct" (Gower: Modern Company Law - 4th Edn. (1979) at P. 137) Pennington (Company Law - 5th Edn. 1985 at P.53) also states that "where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the Court will disregard the corporate veil .... "

It was held that broadly, where a fraud is intended to be prevented, or trading with enemy is sought to be defeated, the veil of corporation *is lifted by judicial decisions and the shareholders are held to be 'persons who actually work for the corporation'. The main principle on which such a course of action can be taken was stated in paragraph 28 of the report and the relevant part thereof is being reproduced below:*

> *"28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned........"*

16. In the matter on hand, it is not disputed that the Award passed by Three Member Arbitration Tribunal, dated 14.06.2001, has reached finality, upon dismissal of the Civil Appeal No.6495 of 2003, dated 07.09.2010.

17. It is true that no Award is passed against the second applicant-Mr.L.R.SIvaprasad, but Indisputably, in Execution Petition No.15 of 2012, pursuant to the arrest warrant issued by the learned Master, the Managing Director of the first applicant-Company / the second applicant was arrested and produced before the learned Master and he

undertook to settle all the dues within a period of four weeks. Hence, as rightly contended by the learned counsel for the respondent that after giving undertaking before this Court, it is not open to the second applicant to contend that the Execution Petition No.75 of 2018 is not maintainable as there was no personal Decree against him.

18. A perusal of the order passed in Application No.3377 of 2018 would reveal that the respondent-Decree Holder, before filing the Execution Petition Nos.74 and 75 of 2018, filed the application, seeking leave of this Court to file simultaneous petitions and the application was allowed on 18.04.2018.

19. In the instant case, it is apposite to mention here that in O.A.No.991 of 2010, the application filed under Section 9 of the Arbitration Act, this Court by an order dated 17.09.2010, granted an order of interim injunction, restraining M/s.G-Tech Stone Limited, the first applicant herein, from any manner alienating or transferring or encumbering its assets, both movable and immovable. The information furnished by the Ministry of Corporate Affairs, Government of India, dated 23.09.2019 would show that one of the accounts of the first applicant Company was closed on 30.09.2013 on payment of Rs.20 Crores.

20. It is seen from the order passed by the Income Tax Appellate Tribunal, "A" Bench, Chennai in I.T.A.No.1610 of 2017 & etc., batch, the Income Tax Officer, 121, Uthamar Gandhi Salai, Chennai-34, based on the search and seizure carried out in the concerns of M/s.G-Tech Stone Limited and M/s.Perfect Stones Limited, found that for the period from 01.04.2005 and 31.03.2012, the assessee M/s.Perfect Stones Limited was in respect of cash on various dates from the sister concern M/s.G-Tech Stone Limited / the first applicant herein. Though the Income Tax Appellate Tribunal "A" Bench, Chennai, by an order dated 27.12.2017 remanded the case for fresh disposal on technical grounds, it is evident that the first applicant-Company has made various cash transactions to its sister concern M/s.Perfect Stones Limited between 2005 and 2012. It is not disputed that the second applicant is the Director of both the Companies.

21. In the light of the facts narrated supra, this Court is of the considered opinion that the decision in the case of ***Singar India Ltd.*** *(supra)* would squarely apply to the case on hand and the decisions cited by the counsel for the appellants, do not help them. Therefore, I find no

illegality or irregularity in the orders impugned in these appeals, warranting interference.

22. In the result, both the applications in Appln. (Appeal) Nos.6894 & 6896 of 2019 in E.P.Nos.74 and 75 of 2018 are dismissed and Appln. (Appeal) Nos.6895 & 6897 of 2019 in E.P.Nos.74 and 75 of 2018 are closed. There is no order as to costs.

Sd/-M.K.K.S.J
15/10/2019

//Certified to be true copy//
Dated at Madras this the day of 2019.

COURT OFFICER(O.S.)

JJ 23/10/2019

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