

Sharayu Khot & Jitendra

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

CHAMBER SUMMONS NO. 157 OF 2019

IN

EXECUTION APPLICATION NO. 809 OF 2014

Mitsui OSK Lines Ltd. (Japan)

...Applicant/
Award Holder/
Judgment Creditor

In the matter between

Mitsui OSK Lines Ltd. (Japan)

...Award Holder/
Judgment Creditor

Versus

Orient Ship Agency Pvt. Ltd.

...Respondent/
Judgment Debtor

And

- 1 Ornate Multi Modal Carriers Pvt. Ltd.
- 2 I.K. Marine Agencies Pvt. Ltd.
- 3 Pan Orient Shipping & Logistics Pvt.Ltd.
- 4 Fulcrum Shipping & Logistics Pvt.Ltd.
- 5 Jalal S. Jalali
- 6 Jamil S. Jalali
- 7 Mehdi S. Jalali
- 8 Jalil S. Jalali

...Additional
Respondents

Mr. Kevic Setalvad, Senior Advocate a/w Mr. Gaurang Mehta, Ms. Poorva Garg, Mr. Parikshit Barpujari and Mr. Jehan Lalkaka i/b Mulla & Mulla And C.B.& C., for the Applicant/Award Holder.

Mr. Sanjay Jain a/w Mr. Prathamesh Kamat and Ms. Aditi Pawar, i/b Ms. Sapna Rachure, for the Additional Respondent No. 1.

Mr. Sanjay Jain a/w Mr. Prathamesh Kamat and Ms. Aditi Pawar, i/b A Mehta Laljee and Co., for Additional Respondent Nos. 2, 3 and 5 to 8.

Mr. Rahul Narichania, Senior Counsel a/w Harsh B. Buch i/b Govind Solanki, for Additional Respondent No. 4.

CORAM : R.I. CHAGLA J.

Reserved on : 29 November 2019

Pronounced on : 07 February 2020

ORAL JUDGMENT :

1. This Chamber Summons has been filed by the Award Holder in the above Execution Application seeking leave of this Court to amend the Execution Application in accordance with the draft amendments set out in the Schedule annexed to this Chamber Summons. The Award Holder has by way of the amendment sought enforcement and execution of the Foreign Award dated 2nd February 2009 that was passed against the Respondent, against the third parties/entities mentioned therein as the “Associate Companies”

(being Additional Respondent Nos. 1 to 4) and “the Jalalis” (Additional Respondent Nos. 5 to 8) in their personal capacity as being jointly and severally liable to pay the awarded dues under the said Foreign Award to the Applicant/Award Holder. Further, the Award Holder has sought for incidental and consequential relief in the Chamber Summons.

2. The Award Holder is in the shipping business and operates vessels/ocean liners. The Respondent/Judgment Debtor is a company registered under the Companies Act, 1956 and is in the business of shipping agency and other businesses related to water transport and ocean transportation. The Award Holder had entered into an agency agreement dated 1st April 1964 under which the Respondent was appointed as its general agent for the West Coast of India, North of Calicut. Under the agency agreement, the Respondent was required, *inter alia*, to collect freight and other monies due and payable to the Award Holder in the area of management, operation and business of the vessel and liners and to account for and make over the same to the Award Holder. The Respondent had under the agency agreement been forwarding on a monthly basis General Statements of Accounts (“**GSA**”). It was the case of the Award Holder

that there were certain irregularities in the GSA since December 2000. Disputes and differences between the Award Holder and the Respondent concerning the forwarding of freight amount and other amounts collected by the Respondent which belonged to the Award Holder and which the Award Holder claimed that the Respondent had wrongfully and unauthorisedly withheld. This was claimed to be in order to deny payments to the Award Holder and unjustly enrich the Respondent. The Award Holder by letter dated 5th April 2002 terminated the agency agreement on account of what is stated to be serious breach of the agency agreement and financial irregularities committed by the Respondent which were not remedied or rectified by the Respondent. Due to the dispute and differences between the parties, the Award Holder invoked arbitration by the said letter raising various claims made against the Respondent.

3. It is the case of the Award Holder that the Respondent had not cooperated in the constitution of the Arbitral Tribunal despite of the invocation of arbitration under the provisions of agency agreement. The Award Holder was thus, constrained to adopt proceedings before the Tokyo District Court which by judgment dated 9th February 2005 appointed an Arbitrator. The Respondent had

preferred an appeal from the judgment dated 9th February 2005 which appeal failed.

4. The arbitration proceedings before the Arbitral Tribunal in Tokyo, Japan started only in the year 2006 and the same resulted in the Foreign Award which was published on 2nd February 2009. In October 2009 or thereabouts, the Award Holder filed Arbitration Petition No. 842 of 2009 seeking leave of this Court to enforce the Foreign Award against the Respondent. The Award Holder has referred to an earlier Arbitration Petition No. 446 of 2003 which had been filed by the Award Holder under Section 9 of the Arbitration and Conciliation Act, 1996 and in which an order of status quo had been passed by this Court in respect of the immovable properties of the Respondent. A similar order dated 4th February 2010 was passed by this Court in Arbitration Petition No. 842 of 2009. The Award Holder has referred to the immovable properties of the Respondent which were listed in Exh.M to Arbitration Petition No. 842 of 2009 and in respect of which the status quo order had been passed. These immovable properties of the Respondent included (i) premises at Udyog Bhavan, Ground Floor, Ballard Pier, Mumbai – 400 038 (admeasuring 3800 sq.ft.) (“**the U Bhavan premises**”); (ii) premises

at Nav Vyapar Bhavan, Unit No. 226, P. D'Mello Road, Carnac Bunder, Mumbai – 400 009 (“**N.V. Bhavan premises**”); (iii) premises at Orient House, 4th Floor, Ballard Estate, Mumbai.

5. The Award Holder has stated in the Affidavit in Support of the Chamber Summons that the Respondent did not disclose to this Court either in the Arbitration Petitions filed in 2003 and/or in 2009 that U. Bhavan premises and N.V. Bhavan premises had been mortgaged or that the banks concerned had enforced the mortgage by selling the premises under SARFAESI Act.

6. The Arbitration Petition No. 842 of 2009 was made absolute by an order and judgment dated 28th January 2014, holding that the Foreign Award was enforceable in India in the same manner as if it were a Decree of this Court. By order dated 25th February 2014, this Court continued the status quo order dated 4th February 2010 in respect of the Respondent's immovable properties.

7. It is stated by the Award Holder in the said Affidavit in Support that the Respondent considerably delayed the arbitration process which although having been commenced in the year 2002,

culminated in the Foreign Award dated 2nd February 2009 i.e. after a period of about seven years. The Respondent had thereafter, sought adjournments in the Arbitration Petition No. 842 of 2009 which came to be disposed of by the said order and judgment dated 28th January 2014 i.e. after an expiry of five years. The Award Holder was thus, able to put the Foreign Award in execution in India only in March 2014 by filing the above Execution Application in this Court. It is the case of the Award Holder that the Jalalis used and utilised the period between the years 2002 to 2014 and even thereafter, during the pendency of the Execution Application to systematically denude and strip the Respondent of all its assets, properties, business, income and monies, *inter alia*, by transferring and/or diverting the same to the Associate Companies and Jalalis themselves and/or by siphoning off the monies and funds of the Respondent to leave the Respondent a shell company without any assets and without any business. Thus, no recoveries could be made by the Award Holder, in the enforcement proceedings concerning the Foreign Award against the Respondent.

8. The Award Holder has referred to the proceedings in the Execution Application including the Chamber Summons No. 292 of 2014 filed in this Court as well as the orders and directions passed by

this Court against the Respondent and the Jalalis for disclosure of the assets and properties of the Respondent which may be available for satisfying the awarded dues and for attachment and sale of these assets and properties of the Respondent. The Award Holder has referred in particular to the order dated 9th April 2014 passed by this Court in the said Chamber Summons by which the Additional Respondent Nos. 5 and 6 (referred to as “the Jalalis”) were directed to file Disclosure Affidavits disclosing all the assets, effects and properties of the Respondent. Since the Jalalis failed to file Disclosure Affidavits within the stipulated period of four weeks, an order dated 9th September 2014 came to be passed by this Court directing issuance of bailable warrants against the Jalalis. It is thereafter stated that more than 20 weeks after the order dated 9th April 2014 that the Jalalis filed Affidavit dated 17th September 2014 purporting to make disclosure of the assets and properties of the Respondent Company. Since the Disclosure Affidavit had not completely disclosed the particulars or details of the Respondent’s assets and properties and had only annexed the Respondent’s annual accounts for financial year 2012-13 and not for financial year 2013-14; further orders came to be passed by this Court by which the Jalalis were required to file further Affidavits and documents including copies of the

Respondent's Income Tax Returns, Annual Accounts, Bank Statements, etc. These were thereafter, filed from time to time by the Jalalis till October, 2015. A total of eight Affidavits were filed by the Jalalis in the Chamber Summons No. 292 of 2014.

9. The Award Holder in the said Affidavit in Support has thereafter, referred to the state of affairs of the Respondent as reflected in the Annual Accounts/Financial Statements. It is stated that from a perusal of the Articles of Association, it is clear that the Directors are not liable to retire by rotation at the Annual General Meeting indicating that Respondent's Directors are permanent Directors as confirmed by the Respondent's Auditors in their Audit Report annexed to each financial statement. It was brought to light by way of the 2014 Disclosure Affidavit that the U. Bhavan premises had been sold in proceedings under SARFAESI Act while the N.V. Bhavan premises had been attached and thereafter, sold in the year 2007 or thereabouts. The U. Bhavan premises which belong to the Respondent had been sold by the Jalalis to liquidate the financial facilities availed by the Additional Respondent No. 1, Ornate Multi Modal Carriers Pvt. Ltd. ("**Ornate**") and discharge the guarantees of the Jalalis. It is the Award Holder's case that the Jalalis in order to

cover up the correct position had falsely stated in the 2014 Disclosure Affidavit that the U. Bhavan premises had been auctioned in the year 2007 since the Respondent could not be repay the loan amount. The Jalalis had thus, suppressed the position that the loan had been in fact availed by the Additional Respondent No. 1, Ornate. It is further, stated by the Award Holder that the N.V. Bhavan premises had been mortgaged to Mandvi Bank and the same was subsequently purchased by the Bank in the year 2007 and thereafter, the Respondent had no interest in the said property. However, from the Sale Deed dated 31st August 2006 produced by the Jalalis by way of Disclosure Affidavit dated 17th December 2014, it was evident that the N.V. Bhavan premises had been sold by the Respondent as Transferor and Mandvi Bank as Transferee. The property had never been mortgaged to the Bank and/or never been attached and transfer of N.V. Bhavan premises was a case of voluntary sale and transfer effected by the Respondent on account of private negotiations between the Jalalis and Mandvi Bank. It is stated that this is clear from the Minutes of the Meetings of the Respondent's Board of Directors annexed to the Sale Deed and the Board Resolution passed by the Board of Directors of Mandvi Co-operative Bank annexed to the Sale Deed. The Board Resolution records that the bank was in

need of additional office space. Hence, the proposal for the purchase of the N.V. Bhavan premises. The Board Resolution mentioned the seller as “**ORNATE**” and not the Respondent.

10. The Award Holder in the said Affidavit in Support has also referred to the Auditors Report and qualifications of the auditors therein, in particular, to show that the transactions of the Respondent with Companies/entities listed in the register maintained under Section 301 of the Companies Act, 1956 which are referred to therein. The Auditor’s Report does not have the Auditors opinion on the bonafides of the purported transactions with related parties and Associate Companies contemplated by the said Section 301 of the Companies Act, 1956.

11. Thereafter, the Award Holder has in the said Affidavit in Support referred to the transactions with the related parties. These included salary/remuneration drawn by the Additional Respondent’s Directors (being the Jalalis). It is mentioned that for last 15 years the Jalalis have drawn/taken away from the Respondent Company and I.K.M. Limited amounts of Rs. 8.37 Crores and Rs. 3.13 Crores respectively, by way of salary/remuneration. It is mentioned

that in case of the Respondent Company, the salary/remuneration drawn by the Jalalis had been increased systematically from Rs. 29.77 Lakhs in F.Y. 2007-08 to Rs. 1.61 Crores in F.Y. 2012-13 even in a scenario of falling turnover of the Respondent. It is stated that the significant portion of the Respondent's turnover (almost 90% in F.Y. 2012-13) had been diverted to make payment towards the salary/remuneration to the Jalalis whilst denying the payment to the creditors of the Respondent like the Award Holder who is the Judgment Creditor. It is stated that there is no legal process for payment of salary/remuneration to the Jalalis since no contract between the Respondent and its Directors relating to payment of salary/remuneration has been produced and none appears to have been shown to the Respondent's Auditors. The Jalalis had also drawn amounts of salary/remuneration from the Associate Companies. The Award Holder has relied upon the Chart regarding annual salary/remuneration received by the Jalalis from the Respondent and the Associate Companies for the certain years mentioned therein which is stated to be based on the limited information available to the Award Holder from perusal of the available financial statements of the Respondent and Associate Companies.

12. The Award Holder has also referred to certain loans/advances given by the Respondent to Associate Companies and which are recorded in the Respondent's financial statements. This includes a loan of Rs. 22.50 Crores advanced by the Respondent to Ornate almost 15 to 16 years back. This has been mentioned in the Affidavit of Disclosure dated 25th November 2014 filed in the Chamber Summons No. 292 of 2014 where the said loan has been described as inter-corporate advance given by the Respondent to Ornate. For more than 16 years Ornate neither paid interest on the loan amount nor repaid the same. The Award Holder has stated that the alleged loan was a mere book entry structured by the Jalalis in the financial statements of the Respondent and Ornate to cover up the removal/transfer by the Jalalis of the sum of Rs. 22.50 Crores from the Respondent to Ornate without any consideration flowing to the Respondent for the same. The Award Holder has also referred to the transactions with the Associate Companies reflected in the financial statements which are under the heads, (a) Repairs and Maintenance; (b) Transportation Charges and (c) Administration Charges indicating the Respondent had availed of services from the Associate Companies on a regular basis. The Award Holder stated that there are no details/particulars of the contracts relating thereto

between the Respondent and the concerned Associate Companies recorded in the register maintained under Section 301 of the Companies Act, 1956 nor were the contracts shown to the Respondent's Auditors. It is stated that this can lead to only one conclusion that the entries in the financial statements showing transactions with the Associate Companies are false, fraudulent and mere book entries in the Respondent's financial statement. The Award Holder has referred to a chart showing monies purported to have been paid by the Respondent to the related entity/Associate Company on account of alleged services rendered between the periods 2007-08 till 2015-16. It is stated that these transactions of a total amount of Rs. 11.21 Crores or thereabouts was transferred by the Jalalis out of the Respondent to the Associate Companies which are also fully controlled by them.

13. The Award Holder has also in the said Affidavit in Support referred to investments in Related Entities/Associate Companies. This includes an amount of Rs. 7.50 Crores invested by the Respondent in Preference Shares in Ornate. It is stated that the Respondent has not received preferential dividend of 15 percent for a single year and the entire preferential dividend has been in arrears

ever since issuance of the Preference Shares. The Preference Shares have not been redeemed by the Respondent. The loss of the Respondent on account of non receipt of dividends over the last 17 years would be to the tune of Rs. 19.04 Crores. It is further stated that the investment of the Respondent monies in the Preference Shares of Ornate was a transaction consciously structured by the Jalalis to cause losses to the Respondent by way of loss of interest as also the loss of the invested amount of Rs. 7.50 Crores.

14. The Award Holder has referred to a gradual and structured decrease in the fixed assets of the Respondent Company. This is stated to be by the sale of U. Bhavan premises as well as N.V. Bhavan premises. It is stated that in the very same F.Y. 2008-09 as the Foreign Award was passed, the Jalalis accelerated their planned structuring of gradual reduction and depletion of the Respondent's fixed assets. Thereafter, during the pendency of the Arbitration Petition No. 842 of 2009 and subsequently, during the pendency of the above Execution Application, the Jalalis continued their planned depletion of the fixed assets of the Respondent, so that between the F.Y. 2008-09 and F.Y. 2015-16, the value of the fixed assets reflected in the Respondent's financial statements have been reduced from

6.36 Crores to Rs. 1.08 Crores only. The Award Holder has prepared a chart showing the gradual depletion of the fixed assets which is annexed as Exh.G to the Chamber Summons.

15. The Award Holder has thereafter, referred to the siphoning off, of the monies of the Respondent lying in the bank accounts by transfer to the Jalalis and Associate Companies which are stated to be all related entities. This has been set out in paragraph 11(xiii) of the said Affidavit in Support. An order dated 7th September 2015 has been referred to wherein it is recorded that the transfer/withdrawal of the monies from the Respondent's bank account had taken place between the period of the order directing disclosure i.e. 9th April 2014 and the date of the Disclosure Affidavit i.e. 17th September 2014. By the said order dated 7th September 2015, the Jalalis were required to show cause why they should not be arrested for siphoning off funds of the Respondent Company after the order directing disclosure dated 9th April 2014 had been passed. The Award Holder has referred to the bank statements reflecting the transfers to IKM Ltd. (Additional Respondent No. 2) and self withdrawals by the Jalalis from the Respondent's bank accounts as well as reflecting the transfers made from the Respondent's bank

accounts to Pan Orient and Fulcrum. Reference is made to the bank statements with Ratnakar Bank and Saraswat Bank. These have been annexed to the Chamber Summons as Exh.J and Exh.K. The Award Holder has stated that the transfer of the monies to the Associate Companies was not pursuant to any contract or arrangement for sale of goods or rendering of services, but are merely accommodation/circular transactions structured by the Jalalis.

16. The Award Holder has also mentioned in the said Affidavit in Support that there are abnormally high amounts shown in the Respondent's financial statements towards expenditure not commensurate with the turnover/revenue from operations. The Respondent had shown huge amounts towards employee benefit expenses and remuneration to the Directors for the F.Y. 2008-09 till F.Y. 2016-17. The Respondent is shown to having incurred expenses totalling to Rs. 23.89 Crores approximately over nine years. The Award Holder has stated that there is no record at all and none had been shown/produced to justify and/or support the abnormally high expenditure shown to have been incurred by the Respondent. The Award Holder has further stated that the Respondent had shown substantial amount incurred towards office and general expenses as

well as office administration charges in its financial statements and similar entries are found in the financial statements by the Ornate and Pan Orient. The Award Holder has relied upon a chart which is at Exh.N to the Chamber Summons showing expenses of the Respondent under various heads as reflected in the various financial statements. The Award Holder has stated that the amounts alleged to have been incurred towards employee benefit expenses and remuneration to Directors are grossly overstated and/or inflated in an attempt to transfer and/or withdraw monies of the Respondent from its Bank Accounts and/or transfer the same to the Jalalis and their Associates.

17. The Award Holder has referred to the sudden and abnormal provision made in the Respondent's financial statements for F.Y. 2013-14 for diminution in the value of the investments of the Respondent Company and other instances of window dressing of the Respondent Company's financial statements. A comparison in between the financial statements of the Respondent Company drawn for the periods prior to the filing of the above Execution Application and the period thereafter. The Respondent had been a profit making company having healthy reserved positions, substantial fixed assets

and substantial current investments in the prior period. It is then stated that losses were engineered in the Respondent's financial statements for F.Y. 2013-14 showing a lower turnover of operations in a sum of Rs. 3.69 Crores against the previous turnover of Rs. 5.71 Crores. The Respondent's financial statements were structured to reflect high expenditure towards employee benefit expenses of (Rs. 3.52 Crores) and other expenses (Rs. 1.72 Crores) even on a low turnover of Rs. 5.71 Crores. It is stated that the Jalalis had thus, engineered huge losses in the financial statements of the Respondent and left the Respondent with negligible assets to thwart and defeat the enforcement of the Foreign Award against the Respondent.

18. The Award Holder has referred to the state of affairs of the related entities/Associate Companies as reflected from their Annual Accounts/Financial Statements. In relation to Additional Respondent No. 2, I.K. Marine Limited Agency Pvt. Ltd. (for short "**IKM Ltd.**"). It is stated that the company was promoted in the 1972 with the main object to carry on business of shipping agents, ship managers, loading brokers, crewing-agents and to act as agents for ship-owners. It is stated that the Company is an Associate Company of the Respondent being under the same management and IKM Ltd.'s

affairs are inextricably interlinked with the Respondent and other Associate Companies controlled by the Jalalis. The Company had an equity capital of Rs. 1 Lakh divided into 10,000 shares of Rs. 10/- each. The Jalalis through the Respondent/Judgment Debtor took over control and management of IKM Ltd. which became a fully owned subsidiary of the Respondent. The Award Holder has referred to and given particulars of the state of affairs of the Respondent Company for three distinct periods as under:-

- (i) First period i.e. pre-termination; when the paid up capital of IKM Ltd. remained constant at Rs. 1.00 Lakh and during this period, IKM Ltd.'s annual revenue from operations never exceeded Rs. 57/- Lakhs or thereabouts. During this period IKM Ltd.'s profit/loss after paying taxes ranged from a profit of Rs. 10.21 Lakhs to a loss of Rs. 3.07 Lakh. The Auditors were M/s. P.K. Sanghvi & Company, Chartered Accountants for the period F.Y. 1997-98 to 2002-03. They were replaced by to M/s. S.D. Gunjal & Company from F.Y. 2003-04 onward. Subsequent to the change, the turnover increased from Rs. 4.44

Lakhs for F.Y. 2002-03 to Rs. 4.05 Crores in F.Y. 2003-04. The Auditors Report indicate that IKM Ltd. does not have internal audit system and fully operates under the Director's control and supervision. IKM Ltd. is in the business of transportation and container handling which is also one of the businesses of the Respondent Company. IKM Ltd. also had no staff or personnel and used paid service charges to the Respondent.

- (ii) The second period was from the date of termination of the Agency Agreement till the date of the Arbitral Award. During the second period (from 2002-2008) the paid up Share Capital continued to remained at Rs. 1.00 Lakh. In F.Y. 2003-04 IKM Ltd.'s turnover rose dramatically almost 100 times from Rs. 4.44 Lakh (in F.Y. 2002-03) to Rs. 4.05 Crores (in F.Y. 2003-04). During second period, the turnover ranged from Rs. 4.44 Lakh to 6.64 Crores and the Company earned annual profit after tax ranging between 8.93 Lakhs to Rs. 45.05 Lakhs. By the end

of F.Y. 2008-09 the written down value of IKM Ltd.'s fixed assets had substantially increased to Rs. 172/- Lakhs. In F.Y. 2008-09 the Jalalis in their personal capacity took almost 92% stake in IKM Ltd. The paid-up capital of the company increased to Rs. 12/- Lakh by issuing fresh paid up capital of 11,000 shares of Rs. 10/- each to the Jalalis.

(iii) The third period (post Award); commences from March 2009 when the Award Holder filed Arbitration Petition No. 842 of 2009 in this Court for enforcement of the Foreign Award and continues till date. During this period the turnover increased substantially and was in the region of Rs. 10/- Crores to Rs. 28/- Crores. In F.Y. 2015-16 long terms loans/secured loans were taken by IKM Ltd. against hypothecation of book debts, vehicles and against personal guarantees of the Jalalis increased to Rs. 8.72 Crores. IKM Ltd.'s fixed asset had also increased from Rs. 2.03 Crores (F.Y. 2009-10) to Rs. 7.10 Crores (F.Y. 2012-13). The fixed assets

increased primarily on account of addition of office premises, vehicles trailers, etc. Pertinently, during the same period, the Respondent's fixed assets decreased from 29.49 Crores (in F.Y. 2005-06) and Rs. 18.86 Crores (in F.Y. 2006-07) to Rs. 1 Crore (in F.Y. 2015-16). The Award Holder has stated that this was due to the diversion of business as well as assets from the Respondent Company to IKM Ltd. by the Jalalis who sought to make IKM Ltd. as the flagship company. It is further stated that during this period, huge expenses were recorded in the financial statements on a regular basis towards, employees benefit expenses and which was slightly lesser than the turnover to show negligible profits in IKM Ltd.'s books. IKM Ltd. had also granted loans to the Associate Companies which included the loans advanced by the IKM Ltd. to Ornate shown in the Balance Sheet of 2013-14 of an amount of Rs. 2.93 Crores. In IKM Ltd.'s Auditor's letter dated 18th December 2017 to the Prothonotary & Senior Master of this Court it is stated that the loans and

advances given by IKM Ltd. had increased to Rs. 6.75 Crores and that Ornate will not be able to repay the amount of Rs. 6.75 Crores and accordingly, the valuation of IKM Ltd.'s shares would be in the negative.

19. The Award Holder has then referred to the statement of affairs of related entity/Associate Company being Ornate as reflected from its Annual Accounts/Financial Statements. It is stated that Ornate is a related entity and/or Associate Company of the Respondent being under the same management and Ornate's affairs are also inextricably interlinked with the Respondent and other Associate Companies controlled by the Jalalis. The objects of Ornate mirror those of the Respondent Company as also IKM Ltd. and they all operates in similar lines of business.

20. Ornate's equity capital paid-up share capital is Rs. 50/- Lakh divided into Rs. 100/- each fully paid-up. All the equity paid-up shares belonging to Jalalis in equal shares. Pertinently 40,000 out of 50,000 shares are issued as Bonus Shares. Thus, the contribution of Jalalis to Ornate's equity capital is only Rs. 10/- Lakh.

Ornate has also issued Preference Shares of total value of Rs. 7.50 Crores to the Respondent Company. Thus, total share capital of Ornate reflected in the Ornate financial statement is Rs. 8/- Crores out of Rs. 7.50 Crores is attributable to the Preferential Shares issued by Ornate to the Respondent Company. The Respondent Company therefore, is a major stake-holder in Ornate.

21. The Award Holder has stated that the Garnishee Notice No. 179 of 2015 had been issued to Ornate in respect of the debt due by Ornate to the Respondent and by an order dated 12th March 2015, this Court had made the Garnishee Notice absolute. Thus, an order and decree has been passed in favour of the Award Holder and against Ornate for a sum of Rs. 21.51 Crores along with interest. To enforce the Garnishee Decree, the Award Holder filed a fresh Execution Application No. 919 of 2016 against Ornate. Chamber Summons No. 13 of 2016 had been taken out by the Award Holder in the Execution Application No. 919 of 2016 for compelling disclosure by Ornate and its Directors, the Jalalis of the assets and properties of Ornate available for satisfaction of dues payable to the Award Holder under the Garnishee Decree. Along with the Disclosure Affidavits filed by the Ornate in Chamber Summons No. 13 of 2016,

the Jalalis/Ornate had forwarded to the Award Holder's Advocates copies of the Annual Accounts/Financial Statements of Ornate for F.Y. 2013-14, 2014-15 and 2015-16. The Financial Statements of Ornate shows that there has been gradual decrease in the fixed assets of Ornate. It is stated that the Jalalis intentionally/consciously and deliberately removed the immovable properties from Ornate. The Financial Statements of Ornate indicate no reasons for disposal of the immovable properties. Further, the value of other fixed assets such as machinery/equipment (after depreciation) had reduced to a negligible amount which is apparent from the schedule annexed to Ornate's Balance Sheet (as of F.Y. 2016-17) when compared to the schedule annexed to the Balance Sheet (as of 31st March 2009). There has also been a decline in Ornate's revenue from operations/turnover from Rs. 11.27 Crore (in F.Y. 2001-08) to Rs.1.59 Crore (in F.Y. 2016-17). The Jalalis have used Ornate's staff, infrastructure and assets for rendering service which has been billed for by IKM Ltd. The employee benefit expenses have been recorded in Ornate's financial statement.

22. The Award Holder has also referred to discrepancies in the statements made by the Jalalis through their

Advocate's correspondence when compared to the Financial Statements in relation to the loans and advances and repayment thereof. Certain mention is also made of awarded dues of Rs. 86/- Lakhs received by Ornate from JNPT in the year 2016 which were transferred to IKM Ltd. by evading payment to the Award Holder.

23. The Award Holder has then referred to the siphoning off, of monies of Ornate lying in its Bank Accounts to transfer to the Jalalis and Associate Companies all stated to be related entities.

24. The Award Holder has then referred to the state of affairs of the related entity/Associate Company being Additional Respondent No. 3 Pan Orient Shipping & Logistics Pvt.Ltd. (for short "**Pan Orient**") as reflected from its Annual Accounts/Financial Statements. It is stated that the Pan Orient is a related entity and/or an Associate Company of the Respondent, being under the same management and Pan Orient's affairs are also inextricably interlinked with the Respondent and other Associate Companies controlled by the Jalalis. Pan Orient is a Private Limited Company promoted by the Jalalis to carry on business of clearing, freight forwarding by

shipping, airways, land ways, etc. Pan Orient was incorporated in the year 2007 i.e. during pendency of the arbitral proceedings. It is stated that the Financial Statements of the Pan Orient reveal that;

- (a) The Auditor's Report annexed to Pan Orient's annual accounts for F.Y. 2014-15, states that the company's business is that of carrying freight and forwarding and supplying manpower for administrative services.
- (b) Pan Orient has no fixed assets and uses and utilises the office infrastructure of the Respondent Company for carrying on its day to day operations without charge.
- (c) The summary of Pan Orient's Profit and Loss Accounts for F.Y. 2013-14, F.Y. 2014-15, F.Y. 2015-16 and F.Y. 2016-17 have been set out by the Award Holder and which reflects negligible profits for F.Y. 2013-14, F.Y. 2014-15 and F.Y. 2015-16 and loss for year 2016-17.

(d) From the Annual Accounts of Pan Orient it reveals that the revenue from operations reflected in Pan Orient's Profit & Loss Account are attributable only to the related transactions and are amounts received from the Respondent Company (as purported administrative charges) and from IKM Ltd. (as freight and forwarding charges). From the revenue from operations almost equal amounts are shown to have been expended towards expenditure for operating costs including employee benefit expenses.

(e) The Financial Statements of Pan Orient shows that Pan Orient had been incorporated only for purpose of the diversion and transfer of certain amounts on a regular basis from the Respondent Company and the IKM Ltd. to itself.

(f) In Form No. AOC-2 filed with FY. 2014-15 it had been stated that there was no board of Directors approval for the related party transactions with the

Respondent Company or IKM Ltd. and that there was no contract/arrangement or agreement concerning these purported transactions.

25. The Award Holder has then referred to the state of affairs of the related entity/Associate Company being Additional Respondent No. 4 Fulcrum Shipping & Logistics Pvt.Ltd. (for short “**Fulcrum**”) as reflected from its Annual Accounts/Financial Statements. It is stated that Fulcrum is a related entity and/or Associate Company of the Respondent, being under the same management and Fulcrum’s affairs were also interlinked with the Respondent and other Associate Companies controlled by the Jalalis. Fulcrum is a Private Limited Company promoted by the Jalali family in the year 2012 after passing of the Foreign Award against the Respondent. Fulcrum’s main objects are to carry on the business of logistics and to act as international freight forwarding and shipping agents, fleet owners, warehousing, container agents, cargo agents, charting agents, freight brokers. The main objects of Fulcrum are similar to those of the Respondent and Associate Companies. The Respondent and all the Associate Companies operate in similar lines of business. From the Memorandum of Association and Articles of

Association and Financial Statement of Fulcrum for F.Y. 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17 following are shown:-

- (i) Fulcrum is promoted by the family of the Jalalis.
- (ii) The Directors of Fulcrum are Jamil Jalali (Additional Respondent No. 6), Sadegh Jalali (son of Jamil Jalali) and Ali Jawad Jalali (nephew of Jamil Jalali). Fulcrum's Directors are the members of the Jalali family. Fulcrum was incorporated with a small equity paid-up capital of Rs. 1/- Lakh divided into 10,000 equity shares of Rs. 10/- each divided equally between the above mentioned three Jalalis. In F.Y. 2014-15 i.e. within two years of incorporation, the paid-up shares capacity was increased from Rs. 1/- Lakh to Rs. 22/- Lakh.
- (iii) Fulcrum commenced operations in F.Y. 2012-13 which is first year of operations. Fulcrum had taken a loan of Rs. 1.31 Crores from L & T Finance Ltd. against security of hypothecation of vehicles and

personal guarantees of the Directors, which is reflected as long term liabilities in the books of Fulcrum. The Fixed Assets of Rs. 1.52 Crores is reflected in F.Y. 2012-13 out of which a sum of Rs. 1.48 Crores represent Trailers. Fulcrum is shown to be in the business of giving out Trailers on hire and admittedly, engaged in the business of “Transportation Services and Freight Forwarders”. Pertinently, IKM Ltd.’s list of fixed assets reflects ownership of Trailers.

- (iv) Fulcrum in F.Y. 2012-13 are turnover of Rs. 76.80 Lakhs out of which Rs. 72.80 Lakhs was attributable to transactions for transportation with IKM Ltd. Thus, the only major source of revenue for Fulcrum during F.Y. 2012-13 is IKM Ltd. Fulcrum has shown net profit (after depreciation and tax) of Rs. 5,70,029/- in F.Y. 2012-13.

26. It is stated by the Award Holder that based on these Financial Statements, the Fulcrum is nothing but the another

front of the Jalalis created to divert business and income of the other Associate Companies to itself.

27. Thereafter, in paragraph 17 of the said Affidavit in Support, it is stated thus:-

“17. It is clear and evident from the above narration culled out from the financial statements of the Respondent and the Associate Companies that the affairs of all these Companies are interlinked and that all these Companies along with the Jalalis constitute one single economic entity as is also reflected by the following:

- (i) The Jalalis are common Shareholders and Directors of all these Companies and the Jalalis constitute the management thereof.*
- (ii) The Jalalis are the Permanent Directors of all these Companies.*
- (iii) Three of these Companies being the Respondent, Ornate and Pan Orient have common office premises and have their registered office at a common address. Ornate and Pan Orient have shown their registered address at the registered office address of the Respondent.*

- (iv) The website of the Respondent i.e. www.orientshipgroup.com was the common website of the Respondent and all the Associate Companies as can be seen from their letterheads. Hereto annexed and marked as EXHIBIT - "X", EXHIBIT "Y" and EXHIBIT "Z" are copies of letterheads taken from financial statements of IKM Ltd., Ornate and Pan Orient respectively.*
- (v) All these Companies carry on the same or similar business all concerned with shipping, water transport, transaction and freight handling.*
- (vi) All these Companies have common Chartered Accountants / Auditors being M/s. S.D. Gunjal & Co., Chartered Accountants.*
- (vii) That till the year 2008, IKM Ltd. was the wholly owned subsidiary of the Respondent. In the year 2008, on account of issuance of additional capital which was subscribed to by the Jalalis, the Jalalis took 92% stake in IKM Ltd. and the Respondent remained the Owner of the balance 8% shares."*

28. It is further stated that the financial statements of all the Companies i.e. the Respondent as well as its Associate Companies have shown huge amounts incurred towards the Director's remuneration, salaries/wages of employees and employee

benefit expenses, which expenses bear no relevance to the scale of operations/turnover of the concerned Company. A Chart of F.Y. 2011-12 onwards i.e. till F.Y. 2016-17 has been set out in paragraph 18 of the said Affidavit and which it is stated reflects this position. It is further stated that the Respondent and Associate Companies have common employees doing work generated by the Jalalis and distributed amongst the Respondent as well as Associate Companies. It is further stated that the Jalalis clearly treat the Respondent and Associate Companies as their own proprietary or partnership concerns. There are related party transactions reflected in the financial statements by reason of which the funds of the Respondent have been transferred to the Associate Companies. It is further stated that the nature of fixed assets reflected in the Financial Statements of the Respondent as well as Associate Companies are substantially similar and they are all shown to be carrying on the same business. The Award Holder has stated that the Jalalis have consciously and deliberately structured defaults in repayment of unsecured loans advanced by the Respondent to the Associate Companies. This includes defaults on the part of the Ornate in making repayment of loan of Rs. 21.50 Crores advanced by the Respondent to Ornate several years ago so that the money never reached the Respondent. It

is mentioned that the Jalalis could manage this only because these Companies were under their management and control and are group companies.

29. In paragraph 26 of the said Affidavit in Support, the Award Holder has stated that there has been regular and structured siphoning off, of the Respondent's funds and/or removal/reduction of the Respondent's assets. This has been stated to defeat and delay the Foreign Award passed against the Respondent. It is further stated that pursuant to this objective and taking aid of the corporate structure of the Associate Companies which are fully owned and controlled by the Jalalis, the Jalalis structured a regular siphoning off, of the Respondent's monies and funds and gradual reduction of the Respondent's assets by using methods and devices, which are stated as under:-

- (i) *Repayment of the loans availed by the Associate Companies from Bankers/Lenders by sale of the immovable property of the Respondent. The Respondent lost a very valuable immovable property at Udyog Bhavan [adm. 3800 sq.feet] on*

account thereof.

- (ii) Voluntary sale of the Respondent's property at Nav Vyapar Bhavan.*
- (iii) Payment of high amounts to the Jalalis towards managerial remuneration.*
- (iv) Showing high operating expenses every year and paying huge amounts towards salaries/wages and employees benefit expenses.*
- (v) Transferring monies and funds of the Respondent to Associate Companies under the guise of related party transactions.*
- (vi) Regular withdrawal of cash from the Bank Accounts of the Respondent and then giving legitimacy to such cash withdrawals by alleging the same to be withdrawals in the normal course of business.*
- (vii) Ensuring non-payment of the loans payable by an Associate Companies to the Respondent so that the loan amount remained with the Associate Companies forever.*

(viii) Ensuring that no dividends were paid on the Preference Shares and the Preference Shares were never redeemed by the Associate Companies [Ornate] so that the monies invested by the Respondent in the Preference Shares always remained in the control of the Jalalis through Ornate.

(ix) Ensuring diminishing turnover of the Respondent over the years by diverting business and income to the Associate Companies being IKM Ltd. whose turnover increased dramatically between the period 2002 to 2008 while that of the Respondent decreased and became almost negligible by F.Y. 2015-16 [i.e. two years after the filing of the above Execution Application against the Respondent].

(x) Reducing and making zero the Fixed Assets like vehicles and trucks of the Respondent so that the Respondent would not be able to take up any transportation or container handling business, which business would be diverted to IKM Ltd. or

other Associate Companies. Pertinently, the Jalalis purchased trailers worth Rs. 1.63 Crores and the same is reflected in Fulcrum's financial statements for FY. 2012-13. Further there are entries for purchase of containers in foreign currency to the tune of Rs. 68/- Lakhs in FY. 2016-17 by Fulcrum.

30. It is thereafter stated that the above is the manner in which over a period of time (during the pendency of the arbitration and thereafter) the Jalalis systematically stripped and denuded the Respondent of its assets, properties and monies, with intent to defeat and delay the claims of the Award Holder under the Foreign Award.

31. The Award Holder has also referred to the conduct of Jalalis, the Respondent and the Associate Companies during the pendency of the Execution Application. It is mentioned that due to this conduct which took place between March 2014 and May 2018, by way of execution, the Award Holder has managed to recover from the Respondent only a paltry sum of Rs. 1,39,24,210/- approximately, which is a small fraction of the awarded amount of Rs. 66/- Crores

along with further interest. The Award Holder has thereafter narrated what it claims are instances of the conduct of the Jalalis/Respondent during the pendency of the execution proceedings in this Court over the past five years. This they claim demonstrated the obstructionist attitude of the Jalalis to defeat and delay the Execution proceeding and ensure that the Award Holder is not in a position to enjoy the fruits of the Foreign Award. The Award Holder has referred to the delay in filing of the Disclosure Affidavits for about five months to enable the Jalalis to allow themselves time to withdraw and remove the income from the Respondent and transfer it to the Associate Companies/entities controlled by the Jalalis.

32. The Award Holder has submitted that the Corporate Veil is required to be lifted to fasten liability for payment of the awarded dues owed by the Respondent under the Foreign Award, upon the Associate Companies and the Jalalis. This in view of the Jalalis having used the corporate cloak of the Associate Companies to transfer monies out of the Respondent and Associate Companies using various means and devices and thus, perpetuating fraud upon the Award Holder. It is stated that upon lifting the Corporate Veil, the Jalalis are the only persons found behind the

corporate facade of all these Companies. Accordingly, the Award Holder has submitted that the Foreign Award be enforced and executed against the Jalalis and the Associate Companies in their personal capacity who are all jointly and severally liable to pay the awarded dues under the Foreign Award which with interest is a large sum of approximately Rs. 78/- Crores, even after giving credit for the amounts recovered with further interest still accruing on the awarded amounts.

33. Affidavits in Reply have been filed by the Respondent/Judgment Debtor as well as the Additional Respondents which are more or less similar in nature, filed for the purpose of opposing grant of urgent ad-interim/interim relief. The Affidavits have not dealt with the factual averments in the Chamber Summons but have opposed the maintainability of the Chamber Summons on various grounds raised therein. The first being on the ground of limitation. It is stated that the Award Holder despite being aware of the various disclosures made by way of the Affidavits filed in the year 2014-15 i.e. of the state of affairs of Companies and entities proposed to be added as Additional Respondents in the Execution Application and the transactions now referred to in the said Affidavit, failed to

take any step to bring the proposed Additional Respondents on record. Hence, the Chamber Summons which now seeks to bring the proposed Additional Respondents as parties to the Execution Application and seeks execution of the Foreign Award against them in their personal capacity are hopelessly barred by limitation. Another ground raised by the Respondent as well as the Additional Respondent is that there is no privity between the proposed Additional Respondents and the Award Holder. The proposed Additional Respondents were not parties to the arbitral proceedings. An Execution Application can only be executed against parties against whom an Award is passed and not third parties who have no privity whatsoever with the Award Holder. Thereafter, they have raised the ground that the issues raised in the Chamber Summons is a matter of trial. It is stated that the Applicant is trying to fasten liability on the proposed Additional Respondents without substantial evidence against them. The allegations of siphoning off monies, fraud, lifting of Corporate Veil are a matter of trial and thus, such a trial cannot be ignored. These allegations in the said Affidavit in Support of the Chamber Summons i.e. of fraudulently siphoned off monies are nothing but bald allegations without any credible evidence attached to them. The allegations of fraud cannot be tested

on mere Affidavits and unless fraud is established conclusively this Court cannot hold commonality of identity for lifting of Corporate Veil. Thereafter, they have raised the contention that the Executing Court cannot go beyond the merits of the award or behind what the award says.

34. The proposed Additional Respondent No. 4 in its Affidavit has sought to answer certain of the factual allegations made against it. The Affidavit states that two out of three Directors of the proposed Additional Respondent No. 4 namely Sadegh Jalali and Ali Jawed Jalali are not proposed to be made parties or Additional Respondents. The Additional Respondent No. 4 has relied upon a copy of the tabulation extracted from its ledger of accounts which is annexed to the compilation of documents tendered along with the Affidavit in Reply in order to show that the remuneration has been paid to the Directors of the proposed Additional Respondent No. 4 since the years 2012 to 2017. This indicates the proposed Additional Respondent No. 6 never received any remuneration from proposed Additional Respondent No. 4 which is in contrast to the submissions made by the Applicant before this Court. It is stated that the proposed Additional Respondent No. 4 and the Respondent

Judgment Debtor are two separate and distinct legal entities conducting separate and distinct businesses. The proposed Additional Respondent No. 4 and the Respondent Judgment Debtor are involved in inter se business of providing services to and fro as and when required by the Respondent Judgment Debtor or any other business entity. The invoices raised by the proposed Additional Respondent No. 4 have been annexed in the compilation of documents and marked as TAB 2 to TAB 3 which were raised as and when services were rendered to the Respondent Judgment Debtor by the proposed Additional Respondent No. 4 for services rendered in moving containers in New Delhi for the Judgment Debtor's principals. The proposed Additional Respondent No. 4 has also given an answer to the allegation of the siphoning off funds of Rs. 4,00,000/- from the Respondent Judgment Debtor to the proposed Additional Respondent No. 4's account. It is stated that the sum of Rs. 4,00,000/- was advanced to by the proposed Additional Respondent No. 4 to the Respondent/Judgment Debtor in connection with service of booking of space for carriage of certain cargo through the Judgment Debtor. However, owing the certain unforeseen circumstances, the Judgment Debtor was unable to complete this booking and had to return the advance received by it. The Judgment Debtor refunded the same

amount of Rs. 4,00,000/- to the account of the proposed Additional Respondent Nos. 4 and this is reflected in the bank statements for the relevant period which is annexed and marked in the compilation of documents as TAB 4. It is thereafter stated in the said Affidavit that the proposed Additional Respondent No. 6 is merely a Director holding a minuscule 1.54 percent shareholding in the proposed Additional Respondent No. 4. The proposed Additional Respondent No. 6 is only a Director and has no controlling interest in the proposed Additional Respondent No. 4. The Replies have thus, sought dismissal of the Chamber Summons.

35. The Affidavit in Rejoinder has been filed by the Award Holder which denies what is stated in the Affidavit in Reply of the Judgment Debtor as well as the Additional Respondents.

36. Mr. Kevic Setalvad, the learned Senior Counsel appearing on behalf of the Award Holder has submitted that the Award Holder has till date been able to satisfy the Foreign Award only to the extent of approximately Rs. 2 Crores. He has submitted that at the time when Arbitration Petition No. 842 of 2009 was filed by the Award Holder for enforcement of the Foreign Award, the

status quo order dated 4th February, 2010 was passed in respect of three properties of the Judgment Debtor. The Award Holder at that time was reasonably certain of recovering a substantial part of the Award from the sale of these properties. The Judgment Debtor although aware when the status quo order was passed that these three properties had already been disposed of, did not bring to the knowledge of this Court till about the year 2015 when the Execution Proceedings commenced, that these properties had been sold to clear the debts of Ornate. He has submitted that the Judgment Debtor was made a shell company by the Jalalis in order to defeat award. He has submitted that the sum of Rs. 21 Crores which had been attached in garnishee proceedings against Ornate, a group / sister company of the Judgment Debtor has also been placed out of reach of the Award Holder by alleging that the Additional Respondent No.1 is facing winding up proceedings. The winding up proceedings have been commenced by the Additional Respondent No.1's own former director and managing director.

37. He has submitted that the Chamber Summons which has been filed to lift the Corporate Veil in order to attribute liability to the four common directors of the Judgment Debtor (the

Jalalis) and its group companies. Pursuant to the filing of the present Chamber Summon, an order dated 14th February, 2019 was passed by this Court (K.R. Shriram, J.) at the interim stage granting time till 20th March, 2019 to the Respondent and Additional Respondents to file Affidavit in Reply. The Respondent and Additional Respondents by letter dated 12th April, 2019 served their respective Affidavits in Reply upon the Advocates of the Applicant / Award Holder raising preliminary objections to the Application. When the matter was placed for final hearing, an opportunity was once again given to the Respondent and Additional Respondents to file Affidavit-in-Reply on merits on or before 7th June, 2019. The Respondent / Additional Respondents despite this opportunity did not deal with the application on merits but served the very same Affidavits in Reply upon the Advocates of Applicant / Award Holder on 6th June, 2019. Thus the Respondent and Additional Respondents chose not to respond on merits. He has submitted that the averments pleaded by the Award Holder that the Respondent and Additional Respondents are all one entity have not been denied by the Respondent and Additional Respondents.

38. He has submitted that in support of the Chamber

Summons, the Applicant has relied upon the Respondent / Additional Respondents own documents including their financial statements and filings with the Registrar of Companies. The Applicant has during the arguments tendered a compilation of documents viz. Volumes I to III. Volume I includes a note on the two premises at Nav Vyapar Premises and Udyog Bhavan premises and the documents in respect thereof. Volume II are the bank accounts and audited accounts disclosed by Respondent. Whereas in Volume III is a Note on Related party transactions inter-corporate loans. Another compilation in volume III are the Chamber Summons No. 13 of 2016 and Execution Application No.919 of 2016 filed by the Award Holder against the garnishee viz. Ornate. There are other Notes on nexus between Respondent and Related Companies, loans given by the Respondent to Additional Respondent No.1 and Preference Shares of Ornate subscribed to by the Respondent as well as Note on the Respondent's financial statements from F.Y. 2003-04 to F.Y. 2016-17 which are available on MCA Website.

39. He has submitted that in view of undisputed factual position pleaded by the Applicant in the Chamber Summons and not denied by the Respondent / Additional Respondents, the

Applicant is entitled to lift the Corporate Veil. This aspect will have to be dealt with by the Executing Court by virtue of Section 47 of the Code of Civil Procedure, 1908. He has submitted that Jalalis though represented by their counsel made no separate / independent arguments on behalf of themselves to refute the Applicant's claim that the Jalalis were behind all these companies.

40. In support of his submission that the Corporate Veil of the Respondent is to be lifted, he has relied upon the judgment of the Division Bench of this Court in ***Bhatia Industries and Infrastructures Ltd. Vs. Asian Natural Resources (India) Ltd.***¹ The Division Bench of this Court upheld an order of a Single Judge and decided the question as to whether the Corporate Veil can be lifted by the Court and whether the concept of lifting the Corporate Veil is also available in Execution proceedings. He has submitted that the Division Bench of this Court after considering several judgments has held that the doctrine of lifting the Corporate Veil does apply in the case of Execution proceedings. He has submitted that the parameters laid down by the Division Bench of this Court apply to the Respondent and Additional Respondent Nos. 1 to 8. The Additional

1 (2017) 201 Company Cases 46 (Bom.).

Respondent Nos. 1 to 8 are inextricably interlinked with the Judgment Debtor. He has submitted that the Associate Companies as well as the four common Directors (the Jalalis) are nothing but a single entity and their business is conducted in such a manner as to defeat the execution of the Award passed in favour of the Applicant. He has submitted that the Special Leave Petition which has been filed from the judgment of the Division Bench of this Court in ***Bhatia Industries*** (supra) has been disposed of, leaving the question of law open. This does not mean that the judgment passed by the Division Bench of this Court is per incuriam as sought to be contended by the Respondent. He has relied upon judgment of the Supreme Court in ***Khoday Distilleries Ltd. & Ors. Vs. Shri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollegal***² which has held that an order refusing special leave to appeal does not stand substituted in place of the order under challenge. The Supreme Court has held that refusing special leave to appeal does not attract the doctrine of merger.

41. He has submitted that the Additional Respondent Nos. 1 to 8 are nothing but the Respondent / Judgment Debtor and all of them are one entity disguised as separate corporate entities. He

2 (2019) 4 Supreme Court Cases 376.

has relied upon the decision of the Supreme Court in ***Gangabai Mohata Vs. Fulchand & Ors.***³ which had occasion to consider who would be a “representative” of the Decree Holder under Section 47 of the Code of Civil Procedure, 1908 (for short “CPC”). He has submitted that the Supreme Court has held that where a person approaches the Executing Court claiming to be a representative of the decree holder’s interest and the decree holder disputes it, the Executing Court has power to resolve the dispute. The Supreme Court held that the word “representative” used in Section 47 of the CPC is much wider than the words “legal representative” used in Section 50 of the CPC. The very object of Section 47 of the CPC is to avert another suit concerning the decree in execution. He has submitted that the Jalalis being the common directors (Additional Respondent Nos.5 to 8) as well as the associated companies (Additional Respondent Nos.1 to 4) are nothing but a representative of the Judgment Debtor, being one common entity. He has submitted that the attempt of the Additional Respondent No.4 to disassociate itself from the Respondent and Additional Respondent Nos. 1 to 3 and 5 to 8 is nothing but an attempt to wriggle out of the reliefs claimed against it in the present application. On lifting of the

3 (1977) 10 Supreme Court Cases 387.

Corporate Veil it can be seen that the Additional Respondent No.4 is nothing but an alter ego of Judgment Debtor and Additional Respondent Nos. 1 to 3.

42. He has relied upon the decision of the Delhi High Court in ***Formosa Plastic Corporation Ltd. Vs. Ashok Chauhan & Ors.***⁴ and the decision of the Punjab and Haryana High Court case in ***Sai Sounds Pvt. Ltd. Vs. Kiran Contractors P. Ltd.***⁵ which were considered in ***Bhatia Industries*** (supra). Both the Courts had held that the Court has the power to lift the Corporate Veil, in execution proceedings. He has submitted that such power will be exercised by the Court by lifting the Corporate Veil where a fraud was being committed to defeat the process of Court and for realization of the decree. He has submitted that in the present case it is in the interest of justice that injunction and disclosure orders be passed against Additional Respondent Nos. 1 to 8 from alienating their assets so that the Applicant is not left with a *fait accompli*, as the Respondent and Additional Respondents seek to do. In the present case, the party executing the Award in India is a foreign party and has spent

4 (1998) Supreme Court Cases Online Del.743.

5 (2016) 19 Comp Case. 636 (P&H)

considerable time in enforcing the Foreign Award. If such relief is not granted an unscrupulous Award Debtor can always prolong the matter so as to give it sufficient time to arrange its affairs in such a manner so as to defeat a foreign award.

43. He has submitted that although it was contended by the learned Counsel appearing for the Additional Respondents that the judgment viz. *Jawarha Lal Nehru Hockey Tournament Society V Radiant Sports Management P. Ltd.*⁶ relied upon by the Punjab and Haryana High Court in *Sai Sound* (Supra) while arriving at its conclusion, has been overruled, by Division Bench of Delhi High Court on 7th November, 2008. He has submitted that both the judgments of the Single Judge and Division Bench are of no relevance to the present case as the facts in that matter were different. He has submitted that what is relevant is the observation made in *Sai Sounds* (Supra) that the Corporate Veil can be lifted even the execution proceedings particularly in cases of of a closely held company where the Court is satisfied about the need to follow such a course. He has submitted that this observation stands uncontroverted and squarely applies to the present case. He has submitted that the

⁶ (2008) 149 DLT 749.

facts and circumstances in *Sai Sounds* (supra) are similar to the facts in the present case. In that case the justification for proceeding against the assets of the director was based on a plea that he had committed fraud by running away from the execution process by filing an appeal and neither complying with the condition of stay nor the directions for making payment as was directed to be done when the company court admitted the winding up petition. He has submitted that in the present case, the Jalalis had for a period of almost five years after the Award Holder had in its favour an order of status quo on certain immovable properties of the Judgment Debtor, failed to disclose either at the time of order granting status quo or even thereafter till commencement of execution proceedings that those properties did not exist. These Jalalis had played fraud upon this Court by allowing a status quo order to be passed and thereafter allowing it to continue for a period of almost five years, knowing full well that the order of status quo was infructuous at the outset. Further, the Jalalis failed to make proper disclosures and filed as many as eight Affidavits / Disclosure Affidavits, over several months and even bailable warrants had to be issued against them to compel them to make disclosures. The Jalalis adopted all measures to delay the execution proceedings by filing appeals at each and every stage,

including appealing against the judgment of this Court which enforced the Foreign Award to the Supreme Court. Thereby gaining time to manage their affairs and to deplete the assets and net worth of the Judgment Debtor and divert business to their other companies being Additional Respondent Nos. 1 to 4.

44. He has thereafter relied upon the decision of the United Kingdom Supreme Court in *Prest V. Petrodel Resources Ltd. and Ors.*⁷ in support of his submission that the Court has recognized the concealment principle apart from the evasion principle and held that the concealment principle is legally banal and does not involve piercing the Corporate Veil at all. It is the interposition of a company or perhaps several companies so as to conceal the identity of the real actors. This will not deter the Court from identifying them, assuming that their identity is legally relevant. In these cases, the Court is not disregarding the “facade”, but only looking behind it to discover the facts which the corporate structure is concealing. He has submitted that several cases were referred to and relied upon in *Prest* (Supra) one of such cases is *Mubarak v. Mubarak*⁸. The Court held in that case

7 (2012) EWCA Civ. 1395

8 (2001) 1 FLR 673.

that the Family Division would lift the Corporate Veil not only where the company was a sham but “when it is just and necessary”. He has submitted that the judgment of the United Kingdom Supreme Court in *Prest* (supra) has been adopted by the Supreme Court in the recent judgment of *Arcelormittal India Private Ltd. vs. Satish Kumar Gupta & Ors.*⁹. He has submitted that the Supreme Court in *Arcelormittal* (supra) had adopted the principle stated in Gower’s Company that:-

“...there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group”.

45. He has submitted that the judgment of the United Kingdom, Supreme Court in *Prest* (supra) has also been followed in *Balwant Rai Saluja vs. Air India Ltd.*¹⁰ He has submitted that the principles laid down in *Prest* (supra) which includes the concealment principle are applicable in Indian Law and to the facts of the present case.

9 (2019) 2 SCC 1

10 (2014) 9 SCC 407

46. He has submitted that if this Court comes to the conclusion that a trial is required, it would be imperative in the interregnum to safeguard the assets in hands of the Additional Respondents and direct disclosure for the benefit of the Applicant / Award Holder. This is more so required in the facts and circumstances of the present case where the record reflects that despite numerous proceedings, the Applicant / Award Holder has been unable to recover monies in satisfaction of the Foreign Award as the Judgment Debtor has been made into a shell company.

47. He has relied upon the judgments of the Supreme Court in *Chintalapati Shrinivasa Raju v. SEBI*¹¹ which had been referred to in *Arcelormittal* (supra). The Supreme Court referred to the test laid down in *SEBI v. Kishore R Ajmera*¹² to consider who exercises “control” over a company. He has submitted that it is imperative in the present case that the Corporate Veil is lifted behind the Judgment Debtor and Additional Respondent Nos. 1 to 4 are the Jalalis who are in management and control of these companies. He has submitted that the relief sought for in Chamber Summons to be

¹¹ (2018) 7 SCC 443.

¹² (2016) 6 SCC 368.

granted and that the Applicant should not be compelled to file a separate Suit against each of the Additional Respondents and lead evidence knowing full well that the Applicant is a foreign party and has already spent 18 years in pursuing the Arbitration and proceedings before this Court. Further, that it is in the interest of justice that the Foreign Award should not be allowed to be defeated in this manner and the Applicant be permitted to bear the fruits of the Arbitral Award in its favour.

48. Mr. Rahul Narichania, the learned Senior Counsel for the Additional Respondent No.4 herein has submitted that the Award Holder has no right to proceed against the proposed Additional Respondent No.4 in execution. He has submitted that the proposed Additional Respondent No.4 was incorporated on 19th April, 2012 under the Indian Companies Act, 1956 i.e. after the passing of the Foreign Award on 2nd February, 2009. The Additional Respondent No.4 has three directors viz. Jamil Jalali, (proposed Additional Respondent No.6), Sadegh Jalali and Ali Jawad Jalali. The shareholding amongst directors as of today is Sadegh Jalali having 65.14%, Ali Jawad Jalali having 33.32% and Jamil Jalali (proposed Additional Respondent No.6) having 1.54% shareholding in the

proposed Additional Respondent No.4. Mr. Sadegh Jalali and Ali Jawad Jalali have no connection to the Judgment Debtor as well as no shareholding in the Judgment Debtor. They have not been sought to be joined as proposed Additional Respondents in the Execution Application. The proposed Additional Respondent No.6, who has a minuscule holding of 1.54% has no controlling interest in proposed Additional Respondent No.4 and is not concerned with the day to day functioning of proposed Additional Respondent No.4. The only commonality that exists between the other two directors viz. Mr. Sadegh Jalali and Ali Jawad Jalali is that Mr. Jamil Jalali who is sought to be joined as Additional Respondent in the Execution Proceedings is the father of Mr. Sadegh Jalali and uncle of Mr. Ali Jawad Jalali and the Managing Director of the Judgment Debtor. He has submitted that merely being a relative of a director or a director being a director in another Company at the same time does not make the two separate companies one and the same. The two majority shareholders viz. Mr. Sadegh Jalali and Mr. Ali Jawad Jalali hold between them over 98.46% shareholding in proposed Additional Respondent No.4 are not even been made parties to the instant Chamber Summons. This would be fatal to the maintainability of the Chamber Summons viz-a-vis. proposed Additional Respondent No.4.

49. He has submitted that the proposed Additional Respondent No.4 had been incorporated after the filing of the Arbitration Petition seeking enforcement of the Foreign Award against the Judgment Debtor before this Court. Thus, the proposed Additional Respondent No.4 could not have been a party to the arbitration agreement or the arbitration proceedings. He has relied upon Section 7 of the Arbitration and Conciliation Act, 1996 to contend that the said provision is mandatory and cannot be circumvented in any situation. He has relied upon the judgment of the Delhi High court in *K.K. Modi Investment and Financial Services Pvt. Ltd. Vs. Apollo International Inc. & Ors.*¹³ to contend that every company which is incorporated under the relevant law of a country is a separate legal entity. The Court cannot presume that all subsidiary companies and the holding or parent company shall be considered as one legal person and a contract with one company shall be considered as contract with every other company of that group. It is not the position under Company Law or any other law that a subsidiary company has no legal existence, it is only the main company that has legal existence. He has submitted that the Chamber Summons has been filed with a malicious intent to bring under the

13 (2009) 2 Arb. LR 499.

ambit of this Court's jurisdiction entities which altogether have never been privy to any agreement or contract either with the Judgment Creditor or Judgment Debtor. He has submitted that on a reading of Section 48 of the Arbitration and Conciliation Act, 1996, it is sufficient to conclude that in the absence of an arbitration agreement, the entity against whom the execution of the award is sought has never been party to the arbitration proceedings, execution of such an award cannot be sought without a proper opportunity for that entity to defend the allegations so levelled against it. He has in support of this contention relied upon a decision of this Court in *Tropic Shipping Co. Ltd., London Vs. Kothari Global Ltd., Mumbai*¹⁴ which held that under Sections 47 and 48 of the Arbitration and Conciliation Act, 1996, a party who has an award in his favour is required to file enforcement proceedings seeking a declaration that the award is enforceable against the party against whom the award is passed. It is only upon the Court accepting the contention that the Foreign Award is enforceable against that party, the Foreign Award will be given the characteristic of a decree of the Court. Considering that no award has been passed against the proposed Additional Respondent No.4, no action can be against the proposed Additional

14 2002 (2) Mh.L.J. 585.

Respondent No.4.

50. He has submitted that to enable the Court to pierce the Corporate Veil the Judgment Creditor must satisfy the criteria laid down in ***Balwant Saluja*** (Supra) case. He has submitted that the allegations of siphoning off monies from the Judgment Debtor to the proposed Additional Respondent No.4 has no merit. He has placed reliance upon the Affidavit in Reply to the Chamber Summons which has dealt with the allegations of the Award Holder that proposed Additional Respondent No.4 had siphoned off Rs.4 Lakhs. He has submitted that money of Rs.4 Lakhs was actually advance monies paid by the Additional Respondent No. 4 for a service to be availed from the Judgment Debtor and the Judgment Debtor being unable to provide such service due to certain circumstances refunded the same to proposed Additional Respondent No.4. He has submitted that it is evident that no monies were paid by the Judgment Debtor to the proposed Additional Respondent No.4 as alleged. He has further submitted that the Judgment Creditor has attempted to create an impression that since the Judgment Debtor and proposed Additional Respondent No.4 shared the same office for a brief period, they are controlled by the same entity and are in fact a

facade and sham company. He has relied upon the invoices at TAB 17 to TAB 21 which do not bear the common address of the branch office which is evidence enough to show that the common branch office was utilized only for a brief period until the business of proposed Additional Respondent No.4 was settled.

51. He has submitted that the Judgment Creditor has attempted to create impression that the Judgment Creditor is a river in which monies originally vested and that the proposed Additional Respondents have been created to make tributaries of this river in attempting to siphon monies. The Judgment Creditor in fact has failed to establish and / or prove siphoning off funds and/or that funds have been siphoned from the Judgment Debtor itself to the other entities. He has submitted that, there is no substance in the allegations made by the Judgment Creditor that the proposed Additional Respondent No.4 and Judgment Debtor conduct the same business. Merely because the proposed Additional Respondent No.4 and Judgment Debtor conduct business in the field of Ocean Transport does not mean that they conduct the same business. Ocean Transport being an umbrella over many smaller yet largely significant business which are vastly different from each other. Ocean Transport

involves, shipments, charterers, barge owners, ships agents, protective agents, M.T.O.'s, Logistic providers, Container Transporters, Cargo Carriers, etc. He has submitted that the proposed Additional Respondent No.4 and the Judgment Debtor do not have same business. He has submitted that the allegations made by the Judgment Creditor that the proposed Additional Respondent No.2 owns trucks and so does the proposed Additional Respondent No.4, there is a chance that only one company owns trucks or has in fact, bought the trucks which is enough to establish that the two companies are one and the same has no substance.

52. He has relied upon the judgment in the case of *Indowind Energy Ltd. vs. Wescare (India) Ltd. & Anr.*¹⁵ to contend that each company is a separate and distinct legal entity and the mere fact that the two companies have common shareholders or common Board of Directors will not make the two companies one and the same. Nor will the existence of the common shareholders and common Board of Directors make the two Companies one and the same. He has relied upon the judgment of this Court in the case of *Oil and Natural Gas Corporation Ltd. vs. M/s. Discovery*

15 (2010) 5 SCC 306.

Enterprises Pvt. Ltd. & Anr.¹⁶ to contend that merely because in that case son and daughter-in-law of the Managing Director of JDIL were the Directors of the Discovery Enterprises Pvt. Ltd., the same cannot take ONGC's claim any further to pin down JDIL in respect of the contractual obligations between DEPL and ONGC. He has submitted that it is thus clear from these cases that mere commonality of directors, shareholdings, offices and email addresses does not establish a case where the Corporate Veil ought to be lifted. He has also relied upon Judgment of this Court in the case of ***Siva Bulk Vs. M.V. Aadabao & Anr.***¹⁷ to contend that Corporate Veil cannot be lifted unless a compelling case is made out by the Applicant, since the doctrine of piercing the Corporate Veil stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders. Merely, because the directors and shareholders of two companies are common, it does not make them one and the same. The doctrine should be sparingly and only in appropriate cases where the facts and circumstances so warranted. He has relied upon the judgment of the Supreme Court in ***Balwant Saluja*** (Supra). The principle of piercing of Corporate Veil was applied only in scenarios

16 Decided on 27th June, 2012 Arbitration Petition No.814 of 2011 (Bom. H.C.).

17 2016(4) Bom. C.R. 251.

wherein it is evident that the company was a mere camouflage or sham deliberately created by persons exercising real control over the said company for the purpose of avoiding a liability. The intent of piercing the Corporate Veil must be such that to do so would seek to remedy a wrong done by the persons controlling the company. The Supreme Court then crystallized the guidelines which need to be followed before lifting a Corporate Veil over the alleged companies. The principles were laid down referring to the Judgment of ***Ben Hashem Vs. Ali Shayif***¹⁸ and ***Prest*** (Supra) of the Supreme Court of United Kingdom. The principles laid down by the Supreme Court are as follows:-

- “a. Ownership and control of a company were not enough to justify piercing the Corporate Veil;*
- b. The Court cannot pierce the Corporate Veil even in the absence of third party interests merely because it is thought to be in the interests of justice;*
- c. Corporate Veil can be pierced only if there is some impropriety;*
- d. The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;*

18 2016 (4) Bom C.R. 251.

- e. *To justify piercing the Corporate Veil, there must be both control of the company by the wrong doer and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrong doings; and*
- f. *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 far as is necessary to provide a remedy for the particular wrong done by the company.”*

53. He has submitted that the Applicant in order to pierce the Corporate Veil must satisfy the above criteria. He has submitted that it was further held in the above decision that for piercing the veil of a Company, it should be evidenced that the impropriety and the real control over the company together has caused legal injury to the complainant. In the present case the Judgment Creditor has not pleaded any impropriety as against the proposed Additional Respondent No.4. Nor is there any evidence produced to even remotely established that the Judgment Debtor has been instrumental in creating proposed Additional Respondent No. 4.

He has submitted that the criteria laid down in ***Balwant Saluja***

(supra) for lifting of the Corporate Veil clearly not satisfied in the present case.

54. He has submitted that the case of **Bhatia** (supra), is clearly distinguishable from the present case. The Applicant Creditor in that case was not seeking to make another Company viz. 'B' liable to pay the amounts under the decree payable by 'A'. It was affecting the properties of another Company 'B' in execution of a decree against Company 'A'. It was when the company 'B' sought to vacate the attachment it was contended that both companies 'A' and 'B' are in effect the same and therefore, the attachment was in effect of the properties of company 'A'. He has submitted a factual comparison of the facts as transpired in the **Bhatia** (supra) case and in the present case, which evidences the fact that the *ratio decendi* in **Bhatia** (supra) case cannot be followed and applied to the present case. He has submitted that there is no legal precedent in 111 years old history of the CPC, to justify the relief sought for by the Applicant in the present Chamber Summons. He has submitted that when the matter in **Bhatia** (supra) travelled to the Supreme Court, the SLP was dismissed however the question of law has not been crystallized by the Supreme Court and is expressly kept open.

55. He has submitted that the *Prest* case relied upon by the Award Holder is clearly distinguishable on facts from the present case. In that case there was a trial where evidence of witnesses were recorded to test the evidentiary value of the case propounded. There the wife had in divorce proceedings sought an order for the transfer of ownership of eight residential property (including the matrimonial home), legal title which were vested in two companies registered in the Isle of Man to her name towards her share in the estate of her husband. These assets stood in the names of various companies which were otherwise owned and controlled by the husband. The case related to the concealment of assets of companies and not companies. The concealment principle laid down by the United Kingdom Supreme Court in *Prest* (supra) cannot apply in the factual situation of the present case where the Judgment Creditor is attempting to foist liability on several other companies besides the Judgment Debtor. In the *Prest* case the Court did hold the other companies liable. It only proceeded against assets standing in the name of the companies which were being ring fenced by the real owner i.e. the husband. He has submitted that the Evasion Principle is the real instance of piercing the veil which has been recognized by the Courts in India. It is in the context of this principle that the *Prest*

(Supra) had been followed in India. The Concealment Principle has not been recognized by our Courts whilst referring to the ***Prest*** case. The Supreme Court in ***Balwant Saluja*** (supra) only refers to the Evasion Principle and not the Concealment Principle. He has submitted that the decision of the Supreme Court in ***Arcelormittal*** (Supra) which refers to ***Prest*** (Supra) is a case which had been decided under the Insolvency and Bankruptcy Code, 2016 (for short “IBC”) where there is a statutory requirement of disregarding the corporate cloak whilst considering a situation when resolution plans need to be filed so that the same defaulter does not come around in another avatar to take over the insolvent Company. He has submitted that the Judgment of the Supreme Court in ***Arcelormittal*** (Supra) has in paragraph 37 clearly held that the Court will disregard the veil in cases where it is either the point of public interest, or where the statute mandates it or where there is evasion of a legal imposition. In the instant case, the Judgment Creditor has failed to establish any of the above and therefore. Section 29A of the IBC is enacted to prevent abuse. The statute itself demands the disregarding of the Corporate Veil to protect the creditors of the Defaulting Company.

56. He has submitted that the Judgments relied upon

by the Award Holder viz. ***Sai Sounds*** (Supra) or ***Formosa Plastic*** (Supra) are not applicable in the facts of the present case. In the ***Sai Sounds*** (Supra) the director of the Company (against whom the decree was passed) was held personally liable to satisfy the decree because he had given an undertaking to pay the amount. In the case of ***Formosa Plastic*** (supra) the action was commenced to restrain the wife, son, brother of the Judgment Debtor from transferring assets belonging to the Judgment Debtor though acquired in the name of his wife, son and brother. He has submitted that in the context of the case laws and precedents to apply, the Supreme Court in ***State of Orissa Vs. Md. Illiyas***¹⁹ has held as under :-

“A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their Judgments are not to be read as if they are words in Act of Parliament. In Quinn v. Leathem (1901) AC 495 (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts

19 2006 (1) SCC 275

of the case in which such expressions are found and a case is only an authority for what it actually decides.”

57. He has submitted that the relief sought for in the instant Chamber Summons ought not to be allowed as in doing so it would impose a liability upon third parties who have never been parties to the transactions/arbitration agreements from the very inception thereby prejudicing their rights to propagate as a separate legal entity.

58. Mr. Sanjay Jain, the learned Counsel appearing for the Respondent and Additional Respondent Nos.1 to 3 and 5 to 8 has relied upon various provisions of the CPC and contended that the Additional Respondents are neither representatives nor legal representatives within the meaning of the provisions in the CPC. He has submitted that the CPC is a complete code in itself and execution of a decree can be only against a Judgment Debtor defined in Section 2(10) of the CPC. Further, that legal representatives can be sued only to the extent of the estate of the Judgment Debtor which have come in their hands, Legal Representative is defined under Section 2(11) of the CPC. He has submitted that a representative when taken with

reference to a Judgment Debtor does not mean only its legal representative but would include its representative in interest as well as a purchaser in interest, who so far as its interest is concerned is bound by the decree. Representative is to be determined under Section 47 of the CPC. He has relied upon various case laws on the provisions of the CPC concerning representative and legal representative in support of his contention that the Additional Respondents do not come within those provisions. These case laws are not material to refer to as the position in law with regard to these provisions is well settled. He has submitted that the allegations of fraud is required to be both pleaded and proved. He has submitted that in the present case the Applicant has except bare assertions, allegations, surmises and conjectures failed to produce any concrete evidence of fraud warranting lifting of the Corporate Veil. In any event, the Applicant under the garb of lifting of the Corporate Veil, is seeking to make the unconnected Additional Respondents liable under the award.

59. He has submitted that the present Chamber Summons is based on facts already known to the Judgment Creditor and is nothing but a mere amplification of the earlier allegations

made by the Judgment Creditor in earlier Chamber Summons No.292 of 2014, wherein most of the allegations have been dealt with by the Judgment Debtor in its Affidavits of Disclosure. He has submitted that Judgment Creditor has suppressed various orders of this Court in the Execution Proceedings and also tendered incomplete documents so as to cause prejudice against the Additional Respondents. He has accordingly submitted that the Judgment Creditor as a result thereof is not entitled to any relief much less an equitable and discretionary relief. He has reproduced the preliminary grounds of challenge which have been raised in the Affidavit in Reply to the Chamber Summons viz. limitation, delay and laches, that the Executing Court cannot go behind the decree and allegations of fraud which is required to be both pleaded and proved. In the context of limitation, he has submitted that the Chamber Summons is nothing but in the form of a Suit against the Additional Respondents and the limitation period of 12 years is only qua the Judgment Debtor and would not apply to the Additional Respondents on whom the liability is being thrustured without an opportunity of trial. He has submitted that the Chamber Summons is nothing but a tracing action to trace monies in the hands of the Additional Respondents which cannot be permitted in an Execution proceeding as tracing action can only be permitted by way

of a Suit. He has submitted that there is gross delay and latches in filing the present Chamber Summons as the documents which form the basis of the Chamber Summons was available with the Award Holder between September 2014 to September 2015 as part of the Disclosure Affidavits despite which the present Chamber Summons has been filed only on 21st January, 2019. He has submitted that the Executing Court cannot go behind the decree or beyond the decree. By seeking execution against the Additional Respondents, the Judgment Creditor is in fact going both behind and beyond the Foreign Award which was passed against the Judgment Debtor. He has submitted that in the case of Additional Respondent No.1 (Ornate), the Judgment Creditor has taken out garnishee proceedings and filed Execution Proceedings, thereby acknowledging that the Additional Respondent No.1 is a separate legal entity and not one and the same as the Judgment Debtor.

60. He has submitted that under Section 48 of the Arbitration and Conciliation Act, 1996, the parties applying for enforcement of the Award have to first invoke that Section and then an opportunity is to be provided to the party against whom the Foreign Award is being enforced as to why it should not be enforced.

The present Chamber Summons is nothing but an attempt to short-circuit the said provisions and thereby add parties who were neither parties to the arbitration agreement nor participant to the Foreign Award. The Foreign Award was made enforceable only against the Judgment Debtor and not against any of the Additional Respondents who are now sought to be made parties in the Execution Proceedings. He has thereafter made submissions dealing with the lifting of the Corporate Veil.

61. He has submitted that the Judgment Creditor by the present Application seeks to make all Additional Respondents liable for the Foreign Award which is only passed against the Judgment Debtor. Such imposition of the Foreign Award against Additional Respondents is even beyond the concept of lifting of Corporate Veil. He has submitted that in all the judgments relied upon by the parties, it is clear that the Courts whenever they have proceeded against a particular asset have on lifting of the Corporate Veil come to the conclusion whether or not the assets belonging to the person who is liable. The Judgment Debtor has not cited a single case where the Courts have imposed liabilities of a Company on other entities including Directors in their personal capacity. He has

submitted that the judgment of the Division Bench of this Court in ***Bhatia Industries And Infrastructure Ltd.*** (supra) is in an entirely different context and is not applicable to the facts of the present case. He has submitted that the case of ***Bhatia Industries And Infrastructure Ltd.*** (supra) was not a case where third parties were sought to be impleaded in the Execution proceedings. The Court did not impose the liability of the Judgment Debtor (Bhatia Industries Ltd.-BIL) on the other entity (Bhatia Industries And Infrastructure Ltd.-BILL). It is the case where the Court come to the conclusion that the assets (i.e. coal) is an asset of BIL. This finding had been arrived at by the learned Single Judge when Bhatia Industries And Infrastructure Ltd. approached the Court seeking lifting of the precept issued against the coal. He has submitted that the judgments relied upon by the Division Bench of this Court in ***Bhatia Industries And Infrastructure Ltd.*** (supra) which includes the Delhi High Court judgment in ***Formosa Plastic Corporation Ltd.*** (supra) contemplated leading of evidence. He has submitted that the judgment in ***Bhatia Industries And Infrastructure Ltd.*** (supra) has no application to the facts of the present case as there has been no transfer of assets between the Additional Respondents and the Judgment Debtor. There is also no financial dependency of the Additional Respondents on the

Judgment Debtor or the Additional Respondents inter se. Each entity has a different business. The present case is also not a case where the asset of the other entity is sought to be claimed that it belongs to the Judgment Debtor. Here the Judgment Creditor is imposing the entire decretal liability amount on the Additional Respondents without proving that they are the Judgment Debtor. The transactions between the Judgment Debtor and the Additional Respondents cannot amount to a steering influence exerted by the Judgment Debtor on the Additional Respondents. In the case of Bhatia; BIL had a steering influence on the management and business affairs of BILL. The present case unlike the case in Bhatia is not a case where the Judgment Debtor and the other entities are carrying out the same business and dealing with the same product and same business activity. The Judgment Debtor is merely a shipping agent since inception and the Additional Respondents have carried out the business that are connected to the Shipping industry but are not the same and/or similar with the business of the Judgment Debtor. He has further submitted that the Additional Respondents are not inextricably interlinked with the Judgment Debtor, because they all deal in different business than the Judgment Debtor. He has submitted that merely having common directors and common

shareholders cannot be a ground to consider that the companies are inextricably interlinked. In the present case, the Judgment Debtor is not exercising influence and dominating the Associate Companies to be considered as the Companies being inextricably interlinked. In the case of Bhatia; BIL and BIIL were held to be inextricably interlinked after considering the documents on record and moreover, after considering the dealings between the Companies. He has submitted that the present case is thus, distinguishable from the ***Bhatia Industries And Infrastructure Ltd.*** (supra). He has submitted that the Supreme Court whilst dismissing the Special Leave application in Bhatia International has left the question of law open.

62. He has submitted that the Judgment Creditor has failed to establish any impropriety i.e. the misuse of a company by the wrongdoers as a device or facade to conceal their wrongdoers. He has submitted that looking into the peculiar facts of the present case, the Additional Respondent Nos. 1 to 4 are companies, each one carrying on a different business and are not a mere camouflage or sham deliberately created by the persons exercising control over the said company (which as per the Award Holder are the Directors being Additional Respondent Nos. 5 to 8) for the purpose of avoiding

liability. He has distinguished the judgment of the Punjab and Haryana High Court in ***Sai Sounds Pvt. Ltd.*** (supra). He has further submitted that the said judgment had relied upon the judgment of the Delhi High Court in ***Jawahar Lal Nehru Hockey Tournament Society Vs. Radiant Sports Management Pvt.Ltd.*** (supra), which was overruled by the Division Bench of the Delhi High Court and the orders of the Single Judge was reversed. Therefore, he has submitted that this judgment cannot be relied upon for the law it lays down as the basis on which the said law is laid down is itself set aside in appeal. In any event, the facts and circumstances in ***Sai Sounds Pvt. Ltd.*** (supra) are entirely different. In the present case, there is no undertaking for payment of liability by the Judgment Debtor and/or the Additional Respondents and/or the Directors of the Judgment Debtor as they existed in that case where the Managing Director of the company had admitted the liabilities and given an undertaking to pay the decretal liability.

63. He has placed reliance upon the judgment of the Supreme Court in ***Jayant Verma & Ors. Vs. Union of India***²⁰ which specifically specifies what a *ratio decidendi* is and what is a *per*

²⁰ (2018) 4 SCC 743

incuriam judgment. He has gone to the extent of submitting that the Division Bench judgment in ***Bhatia Industries And Infrastructure Ltd.*** (supra) is a *per incuriam* judgment which does not lay down the principle of lifting of Corporate Veil in Execution proceedings. He has submitted that the Single Judge judgment goes on to hold that the property belonged to the Judgment Debtor and the attachment is in respect of the property of the Judgment Debtor. He has submitted that in any case, the Supreme Court has kept the question of law open which mean that the Supreme Court doubted the proposition laid down in the Division Bench judgment in ***Bhatia Industries And Infrastructure Ltd.*** (supra).

64. He has placed reliance upon the judgment of the ***Delhi High Court in V.K. Uppal Vs. M/s. Akhay International Pvt.Ltd.***²¹ which expressly states that the judgment in ***Jawahar Lal Nehru Hockey Tournament Society*** (supra) has been overruled and that the Division Bench in the case of ***V.K. Uppal*** (supra) refrains from commenting authoritatively on the aspect of lifting of the Corporate Veil in execution and the same would not come to the rescue on the Decree-holder. He has further placed reliance on the decision in

21 2010 SCC Online Del 538

Anirban Roy & Anr. Vs. Ram Kishan Gupta & Anr.²² which judgment considers the judgment of ***V.K. Uppal*** (supra) and ***Jawahar Lal Nehru Hockey Tournament Society*** (supra) and submitted that this decision has arrived at important findings, which are, that the Executing Court cannot go behind the decree and can execute the decree as per its form only; and if the decree is against the company, the Executing Court cannot execute the decree against anyone other than the Judgment Debtor company or against the assets and properties of anyone other than the Judgment Debtor company and that the identity of a director or a shareholder of a company is distinct from that of the company which is the very genesis of the company or a corporate identity or juristic person. He has submitted that the Chamber Summons has sought for the Executing Court to do precisely what is impermissible as held in the above decision. He has thus, submitted that the Chamber Summons is absolutely perverse and without any merit and is required to be dismissed at the outset with costs.

65. Having considered the rival submissions, it appears from the relief sought for in the Chamber Summons, that

22 CM (M) 559/2017 & CM No. 19057/2016

there is a desperate attempt on the part of the Award Holder to enjoy the fruits of the Foreign Award passed in its favour by going against entities which were neither parties to the arbitration agreement nor to the Foreign Award. The Award Holder has stated that the Foreign Award had been passed in Japan way back on 2nd February 2009 in its favour and which was accepted as a decree of this Court by order dated 28th January 2014. The Award Holder had sought to execute the award by taking out various proceedings in execution. However, out of the awarded amount, Rs. 66,26,84,888.95 mentioned in the Execution Application filed in the year 2014, the Award Holder is stated to have been able to satisfy the award only to the extent of approximately Rs. 2 Crores. In the present Chamber Summons in order to make the proposed Additional Respondents personally liable for satisfying the Foreign Award which is deemed to be a decree of this Court, the Award Holder has applied for the Corporate Veil of the Judgment Debtor to be lifted to try and reach out to what is alleged to be the real persons behind the Judgment Debtor who are claimed to be the Jalalis as well as the Associate Companies of the Judgment Debtor. Various facts have been adverted to by the Award Holder and which have been set out herein above in order to attempt to satisfy this Court that the Judgment Debtor has sought to defeat and delay

the execution of the Foreign Award by various means including by siphoning off funds to the Associate Companies which are also in the hands of the Jalalis. Various financial statements have been relied upon by the Award Holder with an attempt to show that the assets of the Judgment Debtor were being depleted, both by satisfying the loans which had been granted to the Associate Companies by the Judgment Debtor as well as benefiting the Jalalis who were controlling the Judgment Debtor as well as Associate Companies by paying out large sums from these companies to the Jalalis as managerial remuneration/employees benefit expenses. This has been referred to in paragraph 26 of the said Affidavit in Support of the Chamber Summons which has been referred to above. This has been termed as regular siphoning off structured by the Jalalis of the Respondent's monies and gradual reduction of the Respondent's assets by methods and devices which have been set out in the said paragraph.

66. The Award Holder has also referred in this context to the *status quo* order dated 4th February 2010 passed in favour of the Award Holder in respect of three properties of the Judgment Debtor. It is stated that although the Award Holder was reasonably

certain of recovering a substantial part of the award from the sale of these properties, it was not aware when this *status quo* order was passed that these properties had already been disposed of. This fact was not brought to the attention of the Applicant or to this Court by the Judgment Debtor till the year 2015 when the execution proceedings commenced. These properties were sold to clear the debts of the Additional Respondent No. 1 (Ornate). It appears that steps were taken by the Award Holder against Ornate in separate garnishee proceedings in order to recover the sum of Rs. 21 Crores which had been lent by the Award Holder to the Ornate. This sum had been attached in the said garnishee proceedings by adopting such proceedings. It is clear that the Award Holder had at least treated Ornate to be a separate legal entity and not one and the same as the Judgment Debtor.

67. The Award Holder has drawn attention to the fact that the Additional Respondents had filed its Reply by only opposing the objections to the application without dealing with the application on merits. This despite the Court granting an opportunity to the Respondent and Additional Respondents to file their Affidavit in Reply on merits. The Award Holder has contended that in view of the

large number of averments pleaded by the Award Holder in the Chamber Summons viz. that the Respondent and Additional Respondents are one entity and this not having been denied by the Respondent and Additional Respondents established the pleadings by the Applicant that they are indeed one entity. The Award Holder has in support of his pleadings relied upon several volumes of compilation of documents. However, before considering whether it is necessary to deal with the various facts as averred to by the Award Holder in the Affidavit in Support of the Chamber Summons, it would be appropriate to consider whether the preliminary objections raised by the Respondent and Additional Respondents are to be upheld. It would also be necessary to consider whether in the present case, it would be necessary to lift the Corporate Veil in execution of a Foreign Award where the Additional Respondents were never parties to the arbitration proceedings and/or the Foreign Award was not passed against them.

68. The preliminary objection as to the limitation has been raised by the Respondent as well as the Additional Respondents by contending that although the period of limitation is 12 years for execution, the present Chamber Summons will not be maintainable,

as the stipulated period of limitation is only qua the Judgment Debtor and not the Additional Respondents on whom personal liability has been thrust. As the Additional Respondents are not the Judgment Debtors, the period of limitation of 12 years would not be applicable. This preliminary objection would be sustainable once this Court arrives at a conclusion that the Corporate Veil of the Judgment Debtor is not to be lifted, as the Judgment Debtor and the Associate Companies are not a single entity. There appears to be some merit in the contention of the Additional Respondents that in order to determine as to whether the Corporate Veil is to be lifted would be a matter of trial and cannot be done in the manner sought to be done i.e. by the present Chamber Summons seeking to join the Additional Respondents as parties to the Execution Application and making them personally liable.

69. The Chamber Summons appears on the face of it to be an attempt on the part of the Award Holder to trace monies in the hands of the Additional Respondents, particularly, since the Additional Respondents were not parties to the arbitration proceedings and/or the Foreign Award. Such personal liability sought to be imposed upon the Additional Respondents can only be

determined in a substantial suit being filed by the Award Holder against the Additional Respondents. By allowing the Award Holder to execute the Foreign Award against the Additional Respondents by making them personally liable, the Executing Court would indeed be proceeding behind and/or beyond the decree.

70. There has also been gross delay and laches in filing of the present Chamber Summons, as the present Chamber Summons has adverted to various facts which would be in the knowledge of the Award Holder in the year 2014-15. This is apparent from the Disclosure Affidavits which have been filed by the Respondent as well as the Jalalis who in order to make proper disclosure filed as many as eight Disclosure Affidavits. These Disclosure Affidavits are part of the seven volumes which have been produced by the Award Holder in support of the Chamber Summons. These Disclosures contain various financial statements, balance sheet and other documents on the basis of which the Applicant/Judgment Debtor has filed the present Application. Despite having access to this information, the Award Holder waited for over four years to take out the present Chamber Summons on 21st January 2019.

71. Considering that this is a Foreign Award of which the execution has been sought by the Award Holder, it would be necessary to consider the relevant provision of the Arbitration and Conciliation Act, 1996 viz. Section 48 thereof. Section 48 of the said Act reads thus:-

*“48. Conditions for enforcement of Foreign Awards. –
(1) Enforcement of a Foreign Award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that- (a) The parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

- (2) Enforcement of an arbitral award may also be refused if the court finds that- (a) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or (b) The enforcement of the award would be contrary to the public policy of India.*

Explanation. - Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

- (3) If an application for the setting aside or suspension*

of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”

72. It is clear from this provision that the party against whom the Foreign Award is to be enforced, is required to be given an opportunity as to why the Foreign Award should not be enforced against it. The provision also contemplates a case where the enforcement of the Foreign Award may be refused by the Court and which includes where the subject matter of the difference is not capable of settlement by arbitration under the law of India or the enforcement of the Award is contrary to the public policy of India. The Additional Respondents not being parties to the foreign arbitration proceedings and/or the Foreign Award, the Chamber Summons appears to evade this provision. The Additional Respondents have not been given an opportunity to show cause as to why the Foreign Award should not be enforced against them, as they were not parties as envisaged under Section 48 of the said Act. The

Foreign Award was enforceable only against the Judgment Debtor who was the party to the arbitration agreement and against whom the Foreign Award was passed. The Foreign Award cannot be enforced against the Additional Respondents who are neither parties to the arbitration agreement nor to the Award.

73. Various allegations of fraud have been averred in the Chamber Summons which are nothing but bare assertions, allegations, surmises and conjectures and hence, it would not be necessary for this Court to go into the same, without the same being established. These allegations have been made in support of the Applicant's contention that the Corporate Veil is required to be lifted to execute the Foreign Award against the Additional Respondents albeit they are not parties to the Foreign Award and/or the Foreign Award not having been passed against them. Since various submissions have been made with regard to lifting of the Corporate Veil, it would be necessary to deal with these submissions in order to consider whether the Executing Court can at all lift the Corporate Veil by making parties personally liable to satisfy the decree in execution, when the decree/Foreign Award (in the present case) was not passed against them.

74. The Award Holder has not been able to produce a Single judgment where, as in the present case, the Additional Respondents are to be made personally liable to satisfy the decree passed against the Respondent/Judgment Debtor. In fact, the judgment relied upon by the Award Holder viz. ***Bhatia Industries And Infrastructure Ltd.*** (supra) is entirely distinguishable on facts as in that case, the attachment was alleged to be made in respect of coal which belonged to BIIL and not the Judgment Debtor (BIL). It was when the said BIIL sought to vacate the attachment, the Division Bench of this Court concluded that both BIL and BIIL are in fact, one and the same and therefore, the attachment was in effect of the properties of BIL the Judgment Debtor. In fact, it appears from the decision of the Single Judge in case of ***Bhatia Industries And Infrastructure Ltd.*** (supra) that, the claim made by the BIIL that the coal belonging to it, could not be attached as BIIL is not the Judgment Debtor was held to be false and a finding was arrived at that the coal in fact belonging to BIL who was the Judgment Debtor. In the present case, the Award Holder is not going against the Associate Companies who are the Additional Respondent Nos. 1 to 4 in respect of particular assets claiming that they belong to the Judgment Debtor, but is in fact, making the Additional Respondents

personally liable in respect of the Foreign Award passed against the Judgment Debtor. Hence, the judgment in ***Bhatia Industries And Infrastructure Ltd.*** (supra) will have no application in the facts and circumstances of the present case. In any event, the Supreme Court in case of ***Bhatia Industries And Infrastructure Ltd.*** (supra) has kept the question of law open. Considering that the *ratio decidendi* arrived at in the case of ***Bhatia Industries And Infrastructure Ltd.*** (supra) does not apply to the present case, the precedent relied upon by the Award Holder cannot apply in the facts and circumstances of the present case.

75. I further find that the judgments relied upon in the case of ***Bhatia Industries And Infrastructure Ltd.*** (supra) viz. ***Formosa Plastic Corporation Ltd.*** (supra) and ***Sai Sounds Pvt. Ltd.*** (supra) also do not apply in the facts and circumstances of the present case. The case of ***Formosa Plastic Corporation Ltd.*** (supra) was a case where an action had been commenced to restrain the wife, son, brother of the Judgment Debtor from transferring the assets, belonging to the Judgment Debtor though created in the name of his wife, son and brother so as to defeat the execution of the decree. This was not a case where the Court considered the

Judgment Debtor's wife, son and brother to be personally liable to satisfy the decree. In case of ***Sai Sounds Pvt. Ltd.*** (supra), the Managing Director of the company had personally undertaken to satisfy the decree and it was in the facts and circumstances of the case that the Managing Director of the company was held personally liable. In the present case, there is no such undertaking given by the Additional Respondents to satisfy the decree so as to make them personally liable.

76. The judgment of the Supreme Court in ***Balwant Rai Saluja*** (supra) has laid down the law with regard to the doctrine of piercing the Corporate Veil, which stands as an exception to the principle that a company being a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It is made clear from this decision that the doctrine would apply in a restrictive manner and would apply only when it is evident that the company was a camouflage or a sham deliberately created by the persons exercising real control over the said company for the purposes of avoiding a liability. It has been held in the said decision at paragraphs 69 to 72 and 74 as under :-

“69. *Vodafone case further made reference to a decision of the US Supreme Court in United States v. Bestfoods 141 L Ed 2d 43: 524 US 51 (1998). In that case, the US Supreme Court explained that as a general principle of corporate law a parent corporation is not liable for the acts of its subsidiary. The US Supreme Court went on to explain that Corporate Veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, only if it is shown that the corporal form is misused to accomplish certain wrongful purposes, and further that the parent company is directly a participant in the wrong complained of. Mere ownership, parental control, management, etc. of a subsidiary was held not to be sufficient to pierce the status of their relationship and, to hold parent company liable.*

70. *The doctrine of “piercing the Corporate Veil” stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. A Salomon & Co Ltd., [1897] AC 22 : (1895-99) All ER Rep 33 (HL). Lord Halsbury LC,*

negating the applicability of this doctrine to the facts of the case, stated that:

“[a company] must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself whatever may have been the ideas or schemes of those who brought it into existence.”

Most of the cases subsequent to Salomon case (supra), attributed the doctrine of piercing the veil to the fact that the company was a “sham” or a “facade”. However, there was yet to be any clarity on applicability of the said doctrine.

71. *In recent times, the law has been crystallised around the six principles formulated by Munby, J. in Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam). 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 far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.*

72. *The principles laid down by Ben Hashem case (supra) have been reiterated by the UK Supreme Court by Lord Neuberger in Prest v. Petrodel Resources Ltd. (2013) UKSC 34, at para 64. Lord Sumption, in Prest case (supra), finally observed as follows:*

“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, and only for the purpose, of depriving the company or its 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.

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.”

77. It is to be noted that in this decision although the judgment of United Kingdom Supreme Court in ***Prest*** (supra) has been relied upon, it has been relied upon for what is popularly described as the evasion principle where the Court would pierce the Corporate Veil for the purpose and only for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality. In fact, heavy reliance has been placed upon the decision of the United Kingdom Supreme Court in ***Prest*** (supra) by the Award Holder in contending that our Court’s have recognized the principles laid down in the ***Prest*** (supra) viz. the concealment principle as well as the evasion principle. In the decision of ***Prest*** (supra) the United Kingdom Supreme Court had in paragraph 28 held as under :-

“28. The difficulty is to identify what is a relevant wrongdoing. References to a “facade” or “sham” beg too many questions to provide a satisfactory answer.

It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the Corporate Veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the “facade”, but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the Court may disregard the Corporate Veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical.”

78. It is clear from the decision in ***Prest*** (supra), that the concealment principle does not involve piercing the Corporate

Veil at all. It applies where there is interposition of a company or perhaps several companies so as to conceal the identity of the real actors. This will not deter the courts from identifying them, assuming that their identity is legally relevant. It has been held that the Court is not disregarding the “facade”, but only looking behind it to discover the facts which the corporate structure is concealing. This is in counter distinction with the evasion principle. The learned Senior Counsel appearing for the Award Holder has upon placing reliance on the judgment in *Prest* (supra), relied upon the decision of the Supreme Court in *Arcelormittal India Private Ltd.* (supra).

79. However, it is to be noted that the decision in *Prest* (supra) was not a case of an execution of a decree / Foreign Award as in the present case. It was an application filed by the wife in the divorce proceedings for the transfer of ownership of eight residential properties (including the matrimonial home), legal title of which vested in two companies registered in the Isle of Man to her name towards her share in the estate of her husband. It was her contention that the assets stood in the names of various companies which were otherwise owned and controlled by her husband. The application was opposed by the Companies contending that the assets

were owned by the companies which were separate and distinct entities and consequently, they could not be proceeded against. It was in this contest that the decision of ***Prest*** (supra) was passed naming the two principles viz. concealment principle and the evasion principle, which were recognized by the Court. The case in ***Prest*** (supra) relating to the concealment principle cannot apply in the facts of the present case where the Judgment Creditor is attempting to foist a personal liability on the Additional Respondents by seeking to execute the Foreign Award against them despite their not being parties to the Foreign Award. In the case of ***Prest*** (supra), the Court did not hold the companies personally liable. It only proceeded against assets standing in the name of companies which were being ring fenced by the real owner viz. the husband.

80. It is clear from the decision of the Supreme Court in ***Balwant Saluja*** (Supra) that the Courts will not lift the Corporate Veil unless it is satisfied that the principles laid down by the English Court ***Ben Hashem*** (Supra) are satisfied. Therefore, to justify the piercing of the Corporate Veil, the Courts will be required to be satisfied that there is some impropriety in question and there must be both control of the company by the wrongdoer(s) and impropriety

that is use and misuse by the Company by them as a device or facade to conceal their wrongdoings.

81. In *Arcelormittal* (Supra), the Supreme Court was concerned with the Insolvency and Bankruptcy Code and in particular Section 29 A thereof. Although that case had referred to the Prest case, it is clear from the decision in *Arcelormittal* (Supra) that there is a statutory requirement under Section 29A of the Code i.e. disregarding the Corporate Veil in considering a situation where a resolution plan required to be filed so that the same defaulter does not come around in another avatar to take over the company. It would be necessary to refer to Paragraph 37 of that decision which reads as follows:-

“37. It is thus clear that, where a statute itself lifts the Corporate Veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the Corporate Veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole.”

82. It is thus clear that the context of that decision was in respect of the statute which itself required the Corporate Veil to be lifted. The principles have been set out in above paragraph for lifting of the Corporate Veil, which would arise where statute lifts the Corporate Veil or where protection of public interest is of paramount importance or where company has been formed to evade obligations imposed by the law, then the Court will disregard the Corporate Veil. The Judgment Creditor in the present case has not satisfied any of these principles and accordingly, the lifting of the Corporate Veil is not at all justified in the facts and circumstances of the present case. This finding is without prejudice to the earlier finding that in the present case the lifting of the Corporate Veil cannot at all arise as the Additional Respondents are neither the parties to the Foreign Arbitration Agreement nor parties to the Foreign Award and as such cannot be proceeded against in execution of the Foreign Award. Further, the Additional Respondents are neither legal representatives nor representatives of the Judgment Debtor within the meaning of the provisions of the CPC which is a complete code in itself.

83. Considering that I am satisfied with the preliminary objections raised by the Respondent and Additional

Respondents, it is immaterial that the factual allegations raised by the Award Holder in the Chamber Summons have not been dealt with by the Respondent and the Additional Respondents. In any event, these factual allegations are in the form of mere assertions, allegations, surmises and conjectures and cannot be accepted without the same being established in trial. However, since I have found that there is no merit in the Chamber Summons to claim execution of the Foreign Award against the Additional Respondents in their personal capacity, there is no question of allowing a trial.

84. In the case of Ornate, Additional Respondent No.1, there are already garnishee proceedings instituted by the Award Holder and Execution Proceedings have been taken out for execution of the decree in the garnishee proceedings and hence the Award Holder has itself considered Ornate to be a separate legal entity. Further, in the case of Fulcrum, Additional Respondent No.4, the major shareholders who are also two out of the three Directors of the Company are not even sought to be made Additional Respondents. These are Mr. Sadegh Jalali and Mr. Ali Jawad Jalali who between themselves hold over 98.46% shareholding in Fulcrum.

Thus, the Chamber Summons is clearly not maintainable against the Additional Respondent No.4. The other two Companies viz. IKM Ltd. and Pan Orient, Additional Respondent Nos.2 and 3 as in case of Additional Respondent Nos.1 and 4 are separate legal entities and cannot be proceeded against and / or made personally liable for execution of the Foreign Award when they were neither parties to the Foreign Award nor parties to the Arbitration Agreement. This would apply even in respect of the Jalalis, Additional Respondent Nos.5 to 8. Hence, they too cannot be made personally liable as sought to be done in the present Chamber Summons. I accordingly, hold that the relief sought for in the present Chamber Summons being in circumvention of the provisions of the Arbitration and Conciliation Act, 1996 viz. Section 48 cannot be granted.

85. Having considered the purport of the Chamber Summons which is taken out in execution of the Foreign Award, it would be appropriate to dismiss the Chamber Summons which as mentioned has been only taken out in desperation by the Award Holder who has otherwise not been able to enjoy the fruits of the Foreign Award in its favour.

86. The Chamber Summons is accordingly, disposed of with no order as to costs.

[R.I. CHAGLA J.]