

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

**R.F.A.-COM No. 02 of 2021 (O&M)
Pronounced On: 28.09.2021**

Amit Katyal, New Delhi

..... Appellant

Versus

M/s. CHD Blueberry Realtech Pvt. Ltd.,
New Delhi and others

..... Respondents

**CORAM: HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE SANT PARKASH**

Present: Mr. Aashish Chopra, Senior Advocate, assisted by
Mr. Gagandeep Singh, Advocate
for the appellant.

*[The aforesaid presence is being recorded through video conferencing
since the proceedings are being conducted in virtual court]*

JASWANT SINGH, J.

CA-Misc. No. 9-RFCOM of 2021

The instant application has been filed by the appellant – Amit Katyal seeking **exemption from payment of Court fees** on the ground that since he was not a party before the Court below, therefore, no *ad valorem* Court fee is required to be paid by him.

Application is **allowed**, as prayed for. Exemption from payment of Court fees is granted.

MAIN CASE

The appellant-Amit Katyal is aggrieved of the order dated 05.03.2021 passed by Ld. Additional District & Sessions Judge-cum-Presiding Judge, Exclusive Commercial Court, Gurugram in Execution No.22 (Date of Institution : 17.10.2017) titled as *M/s CHD Blueberry*

[2] The brief facts of the instant case are that M/s CHD Blueberry Realtech Private Limited (hereinafter referred to as **“Blueberry”**) / respondent No.1 / Decree Holder initiated proceedings against M/s Iceberg Developers Private Limited (hereinafter referred to as **“Iceberg”**) / respondent No. 2 / Judgment Debtor under the provisions of Arbitration & Conciliation Act, 1996 (as amended upto date) (hereinafter referred to as **“Act, 1996”**) for adjudication of its claim. This led to passing of an Award dated 18.03.2016 in favour of Blueberry / Decree Holder and against Iceberg-Judgment Debtor. Decree Holder filed an execution petition, for recovery of the decretal amount being Rs. 82,05,34,944/- including interest calculated upto 20.01.2018, consequent upon failure of Judgment Debtor to remit the same within three (03) months.

[3] On issuance of notice in the execution petition Iceberg-Judgment Debtor (respondent No. 2) appeared, but did not make the payment. Blueberry-Decree Holder (respondent No. 1) moved an application seeking to restrain the Judgment Debtor from transferring its assets on 20.03.2018. An application under Order 21 Rule 41 CPC for seeking directions to Judgment Debtor to disclose the assets, was also moved on 21.03.2018. Reply of the same was filed by the Judgment Debtor / respondent No.2 on 16.04.2018. Consequently, a restraint order against the Iceberg-Judgment Debtor-Respondent No.2 was passed from transferring its assets on 29.05.2018.

[4] During the execution proceedings, Decree Holder – respondent No.1 came to know that as per the balance sheet of Judgment Debtor-respondent No.2 as on 31.03.2016, an amount of Rs. 22,51,64,435/- and Rs.

1,50,00,000/- had been transferred to Amit Katyal and Deepti Katyal respectively, which was yet to be repaid. Decree Holder – respondent No. 1, therefore, sought to implead the Appellant (Amit Katyal) and Deepti Katyal, in the capacity of garnishee, to recover the decretal amount on account of the aforesaid amounts liable to be repaid by the garnishees to respondent No. 2 / Judgment Debtor in terms of Order 21 Rule 46 CPC.

[5] The case set up by Blueberry / Decree-holder before the Court below was that M/s Iceberg Developers Private Limited / Judgment Debtor is owned by M/s Krrish Realtech Private Limited to the extent of 99%, and 100% shares of which are owned by the Amit Katyal-appellant herein and his family. It was urged by respondent No.1 that the appellant alongwith his wife Deepti Katyal were the Directors of the Judgment Debtor / respondent No. 2 at the time of entering into the Agreement in dispute with respondent No. 1 / Decree Holder. However, subsequently, realizing that arbitral Award is likely to be passed against Iceberg - respondent No.2, both Amit and Deepti Katyal resigned as Directors of respondent No.2-Company.

[6] Further, as per the balance sheet of Judgment Debtor / respondent No.2 as on 31.03.2016, an amount of Rs.22,51,64,435/- had been shown to have been transferred to Amit Katyal and Rs.1,50,00,000/- was transferred by the Judgment Debtor / respondent No.2-Company to Deepti Katyal as a debt. Decree Holder / respondent No.1 contended that the aforesaid debt, is liable to be attached under Order 21 Rule 46 CPC as appellant and Deepti Katyal, are garnishees and holding the moneys payable by them to the Judgment Debtor and therefore, the said amount is liable to be attached, directed to be deposited in Court and be utilized for the

purposes of satisfaction of decree.

[7] Pursuant to the aforesaid case set up by respondent No.1 / decree holder, the appellant contested the same, by contending that the appellant has already repaid the alleged debt to respondent No.2 / Judgment Debtor and there is no outstanding debt and as such, no order, as sought for, could be passed.

[8] Learned Executing Court, after hearing both the parties, framed the following issues for consideration :-

- (i) Whether the garnishees are liable to pay Rs. 22,51,64,435/- and Rs. 1,50,00,000/- as alleged? OP-DH.
- (ii) Whether the garnishees have already paid the debt of JD? OP-JD/garnishees.
- (iii) Relief.

[9] Issue Nos. 1 & 2 being interlinked were taken up together. The decree holder, after extensively referring to the evidence on record, finally relied upon the balance sheet of JD / respondent No.2 as on 31.03.2016 (Exhibit DH/9) which revealed a loan of Rs.22,51,64,435/- availed by appellant and another loan of Rs.1,50,00,000/- availed by Deepti Katyal. The said amount is found under the heading of "Short Term Loan & Advances" in the balance sheet for the year ending 31.03.2016. It also relied upon the balance sheet of JD / respondent No.2 for the year ending 31.03.2017 (Exhibit DH/10), which revealed a loan of Rs.29,98,25,935/- under the heading of "Short Term Loan & Advances" which included the loan due from the appellant as also his wife, sum totaling to Rs.24,01,64,435/-. The contention of Decree holder / respondent No.1,

therefore, was that the entire money which was initially paid by it to

Judgment Debtor / respondent No.1, has actually been siphoned off to the appellant and his wife, who were in controlling positions, in order to defraud Decree Holder / respondent No.1. He thus claimed that the appellant and his wife being garnishees, are liable to pay the aforesaid amount to respondent No.1 / decree holder.

[10] Respondent No.1 / Decree Holder further highlighted that respondent No.2 / Judgment Debtor had approached National Company Law Tribunal (in short “**NCLT**”) by filing petition U/s 10 of the Insolvency & Bankruptcy Code, 2016 (in short “**IBC**”), seeking to initiate Corporate Insolvency Resolution Process (in short “**CIRP**”) for default of Rs.28,59,70,100/-, but the same was dismissed vide order dated 06.05.2019 while imposing Rs.1 lakh as costs as respondent No.2 had filed documents which were incomplete and false and intended to initiate insolvency proceedings in order to defraud the creditors. He thus further contended that since the said amount has till date, not been returned by the appellant and his wife back to the Judgment Debtor Company, therefore, it is the said amount which is liable to be attached and is therefore, liable to be deposited before this Court under Order 21 Rule 46-B of CPC.

[11] In order to controvert the aforesaid case set up by respondent No.1, reply was filed by the appellant and to substantiate his version Yogendra Singh GW1-Accountant appeared in witness box. Initially, he tried to establish that no such debt was ever taken, but subsequently, chose to switch over to now establish that the debt alleged to be outstanding for the financial year 2014-15 and 2015-16, has been paid / settled / adjusted and two (02) set of properties i.e. Property bearing No.B-2101 located at

Monde De Provence, Gurugram measuring 10,000 sq. feet owned by Venta Realtech Private Limited (formerly known as Krrish Realtynirman Private Limited), has been allotted to respondent No.2 / Judgment Debtor. The said allotment is stated to be for a consideration of Rs. 10,76,55,900/-. Further, two plots/properties bearing No.A-010 and A-026, Brahma City, Sector-62/65, Gurugram, measuring 693.919 sq. yards and 267.509 sq. yards respectively owned by M/s Krrish Realtech Private Limited, have also been allotted to respondent No.2 / Judgment Debtor for consideration of Rs.6,15,32,396/-. Consequently, with the transfer of the aforesaid properties in favour of the Judgment Debtor, the amount payable by the appellant, stood squared off /settled.

[12] Learned Court below, after examining the evidence in detail, noticed that the appellant and his wife Deepti Katyal chose not to appear in evidence before the Court. They also did not produce any documentary evidence to substantiate their plea, regarding the alleged transfer of properties in favour of the Judgment Debtor / respondent No. 2, to settle the amount payable by the appellant towards the Judgment Debtor. It also noticed that the solitary witness-GW1, admitted in cross-examination that he could not produce any document on record to show that the loan of respondent No.2 / Judgment Debtor had been paid by the appellant and his wife, though volunteered that the loan of Rs.23.50 crore has been paid back and Rs.59 lakhs is still outstanding. The learned Court below has also commented upon the conduct of the appellant which was misusing corporate veil to evade execution of the decree in favour of respondent No.1.

[13] After considering submissions advanced by both the sides, the learned trial Court concluded that the appellant is liable for a debt of Rs. 22,51,64,435/- payable to respondent No.2 / Judgment Debtor and ordered the same to be attached while holding the appellant as also Deepti Katyal as garnishees.

[14] The appellant is, therefore, aggrieved of the aforesaid order dated 05.03.2021 passed by the learned Court below, and has filed the instant Regular First Appeal (RFA). Alongwith the instant appeal, the appellant has filed an application bearing **CA Misc. No.10-RFCOM of 2021** under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure, 1908 seeking to lead additional evidence at the stage of appeal. In the said application, primarily, the appellant seeks to place on record certificate dated 26.07.2021 issued by Chartered Accountant, to substantiate that the debt owed by him towards respondent No.2 stood settled on account of transfer of the aforementioned two properties to JD / respondent No.2. Another application i.e. **CA. Misc. No.11-RFCOM of 2021**, has been filed under Order 41 Rule 5 CPC, seeking stay of the impugned order dated 05.03.2021.

[15] Learned counsel appearing for the appellant, has primarily argued that the findings of the Court below regarding holding him liable for Rs.22,51,64,435/- as garnishee, is unsustainable because the Bank statement of the appellant (Exhibit G/3), a copy of which has been attached as **Annexure A-5** alongwith the appeal, would reveal that the appellant has paid Rs.4 crore on 07.02.2018 and further paid Rs.3 crore on 08.02.2018 to Iceberg / Judgment Debtor / respondent No.2, which was formerly known as

Krrish Landscapers Private Limited. That apart, he contends that the aforesaid two properties had been transferred in favour of the Judgment Debtor / respondent No.2 and by virtue of the aforesaid transfer, the remaining debt stood settled and therefore, the Court below erred in holding the appellant to be garnishee. He has also argued that the Court below exceeded its jurisdiction while passing the impugned order, as it is beyond the scope of Order 21 Rule 46& 46-A CPC. He has also argued that the Court below, did not correctly appreciate the evidence on record and also wrongly made observations regarding the conduct of the appellant. He, thus, prays for setting aside of the impugned order.

[16] We have heard the learned Senior Counsel for the appellant, and have carefully gone through the record with his able assistance.

[17] The first argument raised by the learned Senior Counsel for the appellant, is that his application for additional evidence is required to be allowed, as an important piece of evidence i.e. the certificate dated 26.07.2021 issued by the Chartered Accountant (**Annexure A-1**), is required to be brought on record to establish that the aforesaid two properties have already been transferred in favour of respondent No.2 / Judgment Debtor, with which the total debt, stood satisfied / adjusted.

[18] Having heard the learned Senior Counsel for the appellant, we express our inability to accept the aforesaid submissions. It is too well settled that additional evidence could be adduced in any one of the three situations namely;

(a) Where the Trial Court has illegally refused the evidence although it ought to have been permitted?

(b) Where the evidence sought to adduce by party, was not available to it despite the exercise of due diligence?

(c) Where additional evidence was necessary in order to enable the Appellant Court to pronounce the Judgment or any other substantial cause of similar nature?

It is equally well settled that additional evidence cannot be permitted to be adduced so as to fill in lacuna or to patch up the weak points in the case (refer to Para 11 of the Judgment of Hon'ble Supreme Court in the case of *Malayalam Plantations Limited Versus State of Kerala* 2010(13) SCC 487).

[19] Now, let us examine the application filed by the appellant. **Firstly**, nowhere has the appellant contended that the evidence which it now intends to lead, was refused to be admitted by the learned Court below. In fact, it is to be noticed that the learned Court below, has observed in Para No.95 of the judgment that the execution petition was filed in the year 2017 and the application under Order 21 Rule 46 CPC was filed on 23.02.2018. It took almost three (03) years in deciding the said application and enough opportunity was given to both the sides, to lead ample evidence as would be relevant to the case. It is not the case of the appellant that the Court below did not grant enough opportunity to lead evidence. Therefore, the appellant has failed to satisfy the first ingredient in the instant case.

[20] As regards the **second** aspect is concerned as to whether the evidence sought to be adduced by the appellant was not available to it despite exercise of due diligence, it is to be seen that **no such averment** finds mention in the application. Further, the appellant seeks to place on

record by way of additional evidence, certificate of Chartered Accountant to prove setting off the debt on account of transfer of the properties. The said certificate, was available with the appellant at the time when evidence was being led before the Court below. No justification has been advanced as to why a piece of evidence already available with the appellant, was not led into evidence while the proceedings were pending before the learned Court below. The appellant was fully alive to the issues which were being considered by the court below. It is not the case of the appellant that such evidence was not available with it at that point of time. This therefore shows that the appellant is now trying to patch up the lacunas of the Trial, in an appeal. Therefore, even the second situation would not be attracted to the instant case.

[21] As regards the **third** situation is concerned, i.e. the necessity of additional evidence to enable the Appellant Court to pronounce the Judgment, the same is also not attracted to the present case. Apart from the fact that no such aspect has been pleaded in the application, we find that the certificate of the Chartered Accountant is not material to establish the said aspect of the matter. The point sought to be established is that the transfer of properties to Iceberg-Judgment debtor - respondent No. 2 satisfied the debt of the appellant / Amit Katyal. Transfer of property, its sale consideration, the purposes of transfer etc. cannot be established by way of such certificates, especially when transfer of immovable properties are all governed by registered instruments. No such registered sale deed or conveyance deed has been placed on record either before the trial Court or before this Court, even while seeking to lead additional evidence. All other

aspects i.e. sale consideration, reason of transfer, purpose of transfer etc. are subsequent, after transfer is proved which cannot be done without leading in evidence a registered instrument in view of Section 17(1) of the Registration Act, 1908. We do not find that such certificate, as is sought to be placed on record, in any way, would assist us to come down to any such conclusion as is sought to be established by the appellant. The third ingredient is also not applicable to the present case.

[22] That apart, we find that the application is completely inappropriate and does not even remotely give reasons as to why the appellant was not able to lead the evidence as sought to be led in an appeal before the Court below. Moreso, when the learned Court below has repeatedly noticed the conduct of the appellant as also the fact that the appellant himself never chose to step into the witness box, which would have been the most crucial witness. The said application does not even contain the basic elements of what an application of such nature ought to have been. Resultantly, the said application is dismissed.

[23] Learned Senior Counsel next contends that the Court below erred in holding the appellant to be garnishee, inspite of the fact that it had already repaid Rs.7 crore to respondent No.2 / Judgment Debtor on 07.02.2018/08.02.2018 which is evident from the Bank Statement (Exhibit G/3). He further contends that as regards the remaining amount, since the two set of properties had already been transferred, the debt had already been satisfied and he could not longer be treated to be a garnishee.

[24] We have considered the submission of the appellant which emanates from Para No. 4 of the grounds of appeal. As regards the first limb

of argument that the appellant had already paid Rs.4 crore to respondent No.2 / Judgment Debtor on 07.02.2018 and another Rs.3 crore on 08.02.2018, we find that no such argument was ever raised before the Court below. No doubt, the statement of account, was led in evidence as Exhibit G/3, but the appellant never raised this issue of having paid the amount to respondent No.2. Moreover, merely by contending that amounts were transferred, does not mean that it would be sufficient to prove that the amounts so borrowed, stood paid back and the debt got satisfied. The facts of the case show that appellant has been substantially in control of respondent No.2 by various means. As noticed before, 90% shares of respondent No.2 are owned by M/s Krrish Realtech Private Limited, which is stated to be belonging to the appellant and his family. Previously also, the appellant has been the Director of respondent No.2-Company. There has been various transactions in and out between the appellant and respondent No.2. For what purpose, the said amounts were transferred by the appellant to respondent No.2, would have required explanation which would have given an equal right of cross-examination to respondent No.1 / Decree Holder. When the appellant has been so closely associated with respondent No.2, it cannot be presumed that such transfers were only for the purposes of satisfaction of the existing debt, moreso, when no such argument was ever raised by the appellant before the learned trial Court. In such circumstances, any such payment made by the appellant to respondent No. 2 cannot *ipso facto* be treated to be sufficient proof of satisfaction of the pending debt. Without having led any evidence to this effect, it cannot be proved that the purpose of said deposit was to clear off the debt. Merely

because the statement of account has been exhibited cannot be treated to have discharged the onus of proving discharge of debt.

[25] Further, it is equally possible that such payments, could be for some other purpose which are now sought to be camouflaged to be satisfaction of debt. These disputed questions of facts could be proved only in case, if appellant would have stepped into the witness box, and would have recorded his statement to this effect, which he chose not to do so. The decree-holder never got a chance to cross examine the appellant on this issue. The learned Court below had given ample opportunities to the appellant to prove the stand taken by it. We **find** that either the appellant was casual in dealing with the matter pending before the Court below or intentionally did not ever intend to step into witness box. He was aware of the pivotal issue before the Court below, i.e. to establish whether the debt has been paid off or not. He chose to let his Accountant alone to have stepped into witness box as DW1. Even the said Accountant did not lead the case in such direction. Appellant throughout had been closely watching the proceedings but remained satisfied with no such contention as is now sought to be raised, having been pleaded or established before the Court. To now take such a factual plea, seems to be an afterthought. In the aforesaid circumstances, we are not inclined accept the aforesaid submissions of the appellant.

[26] The next submission on behalf of the appellant, is that two (02) set of properties were transferred in favour of respondent No.2, which had adjusted and settled the debt of the appellant. While referring to Para No.4 of the grounds of appeal, learned Senior Counsel for the appellant contends

that property being No.B-2101 located at Monde De Provence, Gurugram, measuring 10,000 sq. feet owned by Venta Realtech Private Limited (formerly known as Krrish Realtynirman Private Limited), has been allotted to respondent No.2 – M/s. Iceberg Developers Private Limited for a total consideration of Rs. 10,76,55,900/-, against which an amount of Rs.8,82,98,900/- payable by appellant to the Judgment Debtor has been adjusted.

[27] Similar is the contention regarding the next set of properties i.e. properties bearing A-010 and A-026, both in Brahma City, Sector-62/65, Gurugram owned by M/s Krrish Realtech Pvt. Ltd. has been allotted to the Judgment Debtor for Rs. 6,15,32,396/-, which amount was adjusted against the balance amount payable by the appellant.

[28] The said argument is liable to be rejected for more than one reasons. Firstly, there is no evidence led by the appellant to establish that the properties in question have actually been transferred to respondent No. 2 / Judgment Debtor. To prove such transfers, it was incumbent to place on record, registered sale or conveyance deeds. As per Section 17 of the Registration Act, 1908, title of an immovable property gets transferred only on execution of a registered instrument evidencing sale and / or transfer. No such document has been led in evidence before the Court below. No such document could be referred to by the learned Senior Counsel for the appellant during the course of argument before this Court. Though, reliance was sought to be placed on certificates issued by Chartered Accountant as additional evidence, but such an application has been found to be without merit, for the reasons stated aforesaid. Even otherwise, a certificate by a

Chartered Accountant cannot be considered as a substitute to the requirement of law. Thus, we find that the learned Court below rightly held that the appellant has failed to prove this fact.

[29] Secondly, even assuming that the appellant has been able to prove the transfer, still it would not advance the case of the appellant. Rather, we find this argument to be completely contrary to the basic and well settled principle of law, that a company is a separate legal and juristic entity; and is distinct from its Directors and Shareholders. Section 9 of the Companies Act, 2013 provides that after incorporation of a Company, it is entitled to itself hold, acquire and dispose off a property. A property in the name of the company represents the assets of the company and not its Directors or shareholders. Such properties are to be used for the benefit and for furtherance of the objects and interest of the Company. The Directors of a Company are required to act in the best interest of the company. The properties of the Company are to be utilized for beneficial interest of the Company. The purported sale of property bearing No.B-2101 located at Monde De Provence, Gurugram, measuring 10,000 sq. feet owned by Venta Realtech Private Limited (formerly known as Krrish Realtynirman Private Limited), to respondent No.2 – M/s. Iceberg Developers Private Limited for a total consideration of Rs. 10,76,55,900/- and the second transfer i.e. property bearing A-010 and A-026, both in Brahma City, Sector-62/65, Gurugram owned by M/s Krrish Realtech Pvt. Ltd. alleged to be allotted to Judgment Debtor/Respondent No. 2 for Rs.6,15,32,396/-, cannot be accepted to have adjusted the debt owed by appellant Amit Katyal to Iceberg/Judgment Debtor. No matter whatever may be the status of Amit

Katyal in M/s Venta Realtech Private Limited and M/s Krrish Realtech Private Limited but purported transfer of the said property of the said companies cannot be treated to have settled his individual debt as he is not the owner of the said properties.

[30] Let us examine the consequences of such purported transfer of the properties of the companies in favor of respondent No. 2 to settle the debt of Amit Katyal assuming for sake of arguments, that such transfer has been proved on record.

Once it is evident that a Company is a separate juristic person, it is entitled to hold the property in its own name. The utilization of the said property has to be for the benefit of the said company itself and the Directors of the Company are responsible for protecting the interest of the Company. Merely because the owner of the property i.e. the Company happens to be a non living but an entity recognized by a statute, does not mean that the property of the Company can be used for settling the debt of individuals, which does not bring about any benefit to the Company. **Section 328** of the Companies Act, 2013 deals with a situation where the company gives preference to a person putting him at an advantageous situation than what he would have otherwise been in case, of liquidation of company and to the disadvantage of other creditors, on account of such transfer of property. The said provision reads as under :-

*“ **328. Fraudulent preference.** - (1) Where a company has given preference to a person who is one of the creditors of the company or a surety or guarantor for any of the debts or other liabilities of the company, and the company does anything or suffers anything done which **has the effect of putting that person into a position which, in the event of the company***

going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

(2) If the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

329. Transfers not in good faith to be void. - Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by the Tribunal under this Act shall be void against the Company Liquidator. ”

Applying the rationale of the aforesaid provision, to the facts of the instant case, it would be evident that the purported act of M/s. Venta Realtech Private Limited and M/s Krrish Realtech Pvt. Ltd. to settle the individual debt of Amit Katyal would amount to undue and uncalled for preference given to an individual by the company, thereby putting other creditors in a disadvantageous position. This would bring such transfer within the mischief of Sections 328 and 329 of the Companies Act, 2013 and hence cannot be recognized by law.

[30.1] Hon’ble Supreme Court in *Anuj Jain Versus Axis Bank Ltd.*

claimed that the assets mortgaged by a company to raise a debt and then transferred the said amount to another company be treated as preferential transaction and hence not recognized by law. The said plea of the Resolution Professional was accepted and it was held as under:-

“ 17.3. Coming now to the corporate personalities, it is elementary that by the very nature and legal implications of incorporation, ordinarily, several individuals and entities are involved in the affairs of a corporate person; and impact of the activities of a corporate person reaches far and wide, with the creditors being one of the important set of stakeholders. If the corporate person is in crisis, where either insolvency resolution is to take place or liquidation is imminent; and the transactions by such corporate person are under scanner, any such transaction, which has an adverse bearing on the financial health of the distressed corporate person or turns the scales in favour of one or a few of its creditors or third parties, at the cost of the other stakeholders, has always been viewed with considerable disfavor [34*].

34* In relation to the corporate personalities, the concept of 'fraudulent preference', earlier embodied in section 531 of the Companies Act, 1956 now occurs in its modified form in sections 328 and 329 of the Companies Act, 2013. Tersely put, fraudulent preference means parting with assets of the corporate person in favour of one or a few of its creditors, which has the effect of defeating the claim of other creditors. Per Section 329 of the Act of 2013, any transfer of property by a company, other than that in the ordinary course of business, if made within a period of one year before presentation of a petition for winding up by the Tribunal and not in good faith and for valuable consideration, is regarded as void against the liquidator. Per Section 328 of the Act of 2013, if a company has given preference to one of its creditors or a surety or a guarantor for any of the

debts or other liabilities and the company does or suffers anything which has the effect of putting that person in a better position in the event of company going into liquidation than the position he would have been in but for such preference prior to six months of making winding up application, the Tribunal, on being satisfied that the transaction was of a fraudulent preference, may order for restoring the position to what it would have been if the preference had not been given. More particularly, as regards transfer of property, it is provided in sub-section (2) of Section 328 that if the transaction is made six months before winding up application, the Tribunal may declare such transaction invalid and restore the position.]

17.4. *Noteworthy distinctive features, in the scheme of the Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016, as regards preferences in relation to the corporate personalities, are that while Section 328 of the Act of 2013 deals with fraudulent preference and Section 329 thereof deals with transfers not in good faith but, on the other hand, in the Code, separate provisions are made as regards the transactions intended at defrauding the creditors (Section 49 IBC) as also for fraudulent trading or wrongful trading (Section 66 IBC). **The provisions contained in Section 43 of the Code, however, indicate the intention of legislature that when a transaction falls within the coordinates defined therein, the same shall be deemed to be a preference given at a relevant time and shall not be countenanced.** Therefore, intent may not be of a defence or support of any preferential transaction that falls within the ambit of Section 43 of the Code.”*

[Emphasis supplied]

The aforesaid position of law clearly reflects that the properties

of the Companies cannot be used to give unfair advantage to an individual

or its Directors/Promoters. Such transfers cannot be treated to be in good faith, rather indicates of having given uncalled for preference to an individual over and above the other creditors. These properties belong to two different Companies namely M/s Venta Realtech Private Limited (formerly known as Krrish Realtynirman Private Limited) and M/s Krrish Realtech Pvt. Ltd. It is surprising to witness an argument that the properties of these companies are being used to satisfy the debt of the appellant - Amit Katyal. There is no justification forthcoming from the pleadings or evidence of the learned Court below nor in the present appeal, as to how properties of two separate companies could be used to satisfy the debt of an individual i.e. the appellant. The appellant has nowhere been able to justify or explain circumstances and reasons for which these companies have agreed to transfer their own properties to satisfy the debt of an individual. It would also require to be seen whether such an act would amount to siphoning off and diverting the properties of the Company for personal benefit of an individual. We thus find that purported transfer (since not proved on record) of the properties by two aforesaid Companies to respondent No.2 / JD to set off a debt payable by appellant – Amit Katyal cannot be recognized in law.

[30.2] Moreover, there is no evidence or pleadings or any material placed on record, to show as to what are the *inter se* arrangements and transactions between the appellant and the transferor Companies, which intended to lead to such benefit to the appellant. We are, therefore, not inclined to accept this submission of the appellant.

[31] The next submission of the appellant is that the learned Court below exceeded its jurisdiction, as conferred under Order 21 Rule 46 & 46-

A of the Code of Civil Procedure (CPC) as it could only attach a debt by a written order, prohibiting the Judgment Debtor from recovering the debt and could not have proceeded to hold the appellant as garnishee or direct deposit of the said amount with the Court.

[32] The jurisdiction of the Executing Court, while seeking to attach a debt and other property not in possession of the Judgment Debtor, is provided under Order 21 **Rule 46, 46-A, 46-B and 46-C** CPC. The said provisions read as under :-

“46. Attachment of debt, share and other property not in possession of Judgment-debtor . - (1) In the case of-

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other movable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, the attachment shall be made by a written order prohibiting,-

(i) in the case of the debt, the credit or from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court-house, and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation and, in the case of the other movable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment

shall discharge him as effectually as payment to the party entitled to receive the same.

46A. Notice to garnishee. - (1) *The Court may in the case of a debt (other than a debt secured by a mortgage or a charge) which has been attached under rule 46, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt, calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.*

(2) *An application under sub-rule (1) shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent, the garnishee is indebted to the judgment-debtor.*

(3) *Where the garnishee pays in the Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of the execution, the Court may direct that the amount may be paid to the decree-holder towards satisfaction of the decree and costs of the execution.*

46B . Order against garnishee. - *Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution, and does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order, execution may issue as though such order were a decree against him.*

46C. Trial of disputed questions. - *Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the*

determination of such issue shall make such order or orders as it deems fit:

Provided that if the debt in respect of which the application under rule 46A is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge shall deal with it in the same manner as if the case had been originally instituted in that Court.

A conjoint reading of the aforesaid reproduced provisions of Order 21 Rule 46, 46A, 46B and 46C of CPC would establish that it empowers the learned Executing Court to attach a property not in possession of the Judgment Debtor including a debt and consequently, the Judgment Debtor would be restrained from recovering the said debt until further orders of the Court. However, the said aspect does not end here. As per Order 21 Rule 46-A CPC, the Executing Court is empowered to proceed after having attached the property to issue notice to garnishee liable to pay such debt, calling upon him to pay into the Court the debt due from him to the Judgment Debtor or so much thereof as may be sufficient to satisfy the decree. In case if the garnishee, fails to pay the said amount, the Executing Court is empowered to order the garnishee to comply with the terms of such notice and on such order may proceed against such garnishee as if such order was a decree against him. Not only this, the disputed issues regarding the defense set up by the garnishee regarding its liability to pay, are also required to be determined by the same Executing Court as if it was an issue

in a Suit and upon such determination, is empowered to make such orders as

it may deem fit. The intent of the aforesaid provisions are that a decree-holder may not be left waiting endlessly to enjoy the fruits of the decree while the Judgment Debtor conveniently enjoys the benefit of such assets i.e. the amount to be recovered. Moreover, the amount to be recovered is since treated to be an asset in the hands of Judgment Debtor, the same is capable of being attached and recovered for the benefit of decree holder. It is needless to mention that Order 21 Rule 46-C empowers the Court below, to not only attach the debt, but hold the appellant as a garnishee and further direct him to deposit the amount, for the purposes of satisfaction of the decree. In these circumstances, we hold that the Court below was vested with sufficient jurisdiction to pass impugned order and the submission of the appellant is unsustainable and hence rejected.

[33] The appellant has next contended that the learned Court below erred in holding his wife Ms. Deepti Katyal also liable for the debt amount even though, it has come on record that she had already repaid Rs.1.50 crore back to respondent No.2. He further states that copy of the decree sheet dated 27.05.2016, as appended by him as **Annexure A-7**, reveals that both the appellant and Ms. Deepti Katyal have separated on account of dissolution of their marriage on account of having granted decree of divorce by mutual consent U/s 13-B (2) of the Hindu Marriage Act, 1955.

[34] Though, we have noticed that the amount of Rs. 1.50 Crore has been returned back to the Judgment Debtor / respondent No. 2, but we find that Deepti Katyal has already preferred separate **RFA-COM-1-2021**, titled **“Deepti Katyal Versus M/s CHD Blueberry Realtech Private Limited & others”**, in which notice of motion and notice regarding stay has already

been issued vide order dated 09.04.2021 and is pending before this Court.
These issues shall be examined in the said petition.

[35] No other argument or contention was raised.

[36] Resultantly, the instant **appeal** fails and is accordingly **dismissed**. Impugned order dated 05.03.2021 passed by the learned Executing Court below is upheld.

No order as to costs.

Since the main appeal itself has been decided / dismissed, no orders are required to be passed in the pending applications, and the same stand disposed of.

(JASWANT SINGH)
JUDGE

September 28th, 2021
'dk kamra'

(SANT PARKASH)
JUDGE

Whether Speaking/reasoned	Yes
Whether Reportable	Yes