10949/19

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

\+ W.P.(C) 10949/2019

RAJESH JHUNJHUNWALA AND ORS. ..... Petitioners

versus

THE JAMMU AND KASHMIR BANK LIMITED AND ORS. ..... Respondents

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\+ W.P.(C) 10952/2019

RAJESH JHUNJHUNWALA AND ORS. ..... Petitioners

versus

THE JAMMU AND KASHMIR BANK LIMITED AND ORS. ..... Respondents

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\+ W.P.(C) 10975/2019

RAJESH JHUNJHUNWALA AND ORS. ..... Petitioners

versus

THE JAMMU AND KASHMIR BANK LIMITED AND ORS. ..... Respondents

MEMO OF APPEARANCE

For Petitioners:

Mr. Rajiv Nayyar, Sr. Adv. and Mr. Rajeeve Mehra, Sr. Adv. with Mr.Vikas Mehta and Mr.Bhaskar Nayak, Advs.

For Respondents:

Mr. Pallav Saxena, Mr. Syed Arsalan Abid, Mr. Prateek Khaitan, Mr.Mohd. Nausheen Samar and Mr. Ravi Khanna, Advs. for R-1/ Jammu & Kashmir Bank.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

% **15.11.2021**

1. These three writ petitions have been preferred by the same set of petitioners, namely, Mr. Rajesh Jhunjhunwala, Mr. Navin Jhunjhunwala and Mr. Sajjan Kumar Jhunjhunwala. These three writ petitions stem out of three different final orders passed by the Debt Recovery Tribunal-I, Delhi in O.A. Nos. 500/2017 (subject of matter of W.P. (C) 10949/2019), 501/2017 (subject matter of W.P. (C) 10952/2019) and 502/2017 (subject matter of W.P. (C) 10975/2019), all dated 24.06.2019.

2. What is challenged in all these petitions are the orders passed by the DRT-I in three Original Applications, and the DRAT, Delhi in the appeals arising therefrom i.e. Appeal No. 344/2019, (arising out of O.A. No. 500/2017 (subject matter of W.P. (C) 10949/2019)), 346/2019 (arising out of O.A. No. 502 (subject matter of W.P. (C) 10952/2019)) and 345/2019, (arising out of O.A. No. 501/2017 (subject matter of W.P. (C) 10975)). The three petitioners before us were arrayed as defendant Nos. 8 (Rajesh Jhunjhunwala), 4 (Navin Jhunjhunwala), and 7 (Sajjan Kumar Jhunjhunwala) in the aforesaid three original applications.

3. By the identical impugned orders passed by the learned DRAT on 24.09.2019 in each case, the DRAT directed the petitioners to make a pre-deposit of 50% of the outstanding amount within a period of 4 weeks for entertainment of the aforesaid appeals under Section 21 of the Recovery of Debts and Bankruptcy Act, 1993.

4. Faced with the judgment passed by the Supreme Court in ***Kotak Mahindera Bank Pvt. Ltd. vs Ambuj A. Kasliwal & Ors.*** [2021 (3) SCC

549], Mr. Rajiv Nayar, learned Senior Counsel for the petitioner submits that the said decision would not be applicable in the facts of the present cases. He points out that the recovery proceedings were initiated by the respondent-bank i.e. the Jammu and Kashmir Bank Limited, in respect of loans advanced to respondent No. 2 i.e. REI Agro Limited. He submits that so far as the present petitioners are concerned, the position was that the petitioner Mr. Rajesh Jhunjhunwala had resigned from the Board of Directors of the said company on 18.03.1995. The other two petitioners, namely, Mr. Navin Jhunjhunwala and Mr. Sajjan Kumar Jhunjhunwala were never the members of the Board of Directors of the petitioner company, and were mere shareholders. It is further pointed out that all three had ceased to be even the shareholders of the said company in the year 1995, when the said company came out with a public issue, and they had, absolutely, no concern or interest left in the said company. It is also their case that they had not executed any loan document for obtainment of loan by the said company, and they had not offered their personal guarantees to secure the said loans. The loan transactions were undertaken by the said company with the Respondent bank only in the year 2010 and thereafter.

5. It is pointed out that when the petitioners came to know of the pendency of the proceedings before the DRT-I, they had also moved applications under Order I Rule X CPC and under Order VII Rule XI CPC for their deletion from the array of defendants, and for rejection of the plaint of the respondent-bank against them. However, those applications were never decided, and DRT proceeded to pass the final order on 24.06.2019 in all the three original applications on a completely untenable premise. The only reason why the petitioners have been made liable in respect of the

outstanding amounts of loan advanced to the aforesaid company is that the petitioners were amongst the original shareholders of the said company, and formed part of the same family. In this regard, our attention has been drawn to the following paragraphs in the final order passed by the Tribunal, which reads as follows:

> *"e) The main thrust of the defense by the defendants Nos. 2 to 8 in the instant OA, is that there is no privity of contract between them and the applicant bank. Admittedly defendant No. 2 was the Chairman and Managing Director at the time of its incorporation of defendant No. 1 and defendant No. 3 to 8 along with defendant No. 2 are the founders and promoters of the defendant No. 1 company. Record reveals that defendant Nos. 2 and 3 are the sons of defendant No. 6 and* ***defendant No. 4 and 8 are the son of defendant No.*** *7 and also defendant No. 6 and 7 are brothers, defendant No. 5 is wife of defendant No. 3, therefore,* ***all these defendants are members of a closely knit family.*** *It is also matter of record that defendant No. 2 has signed all documents pertaining to the facilities on behalf of defendant No. 1 and defendant No. 3 is also one of the persons to substantially manage the day to day affair of defendant No.1. Record reveals that these defendants have also obtained facilities from other banks including foreign banks and financial institutions and the same modus operandi was adopted by them, as has been done in the present matter i.e. they have created shell companies on the basis of the fixed commission and through a group of brokers, created false invoices, documents of money transfer for non existence transactions. Record further reveals that the answering defendants have also played a fraud in similar manner with a consortium of fourteen banks led by UCO Bank.*
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> *(l) Record reveals that defendant No. 1 through its Directors/ Founders/ Shareholders viz. defendant No. 2 to 8 had fraudulently induced the applicant bank to sanction and allow the line' of credit in the form of credit facility of Short Term Loan, Bill Discounting Facility and Crop loans. However, the*

defendants fraudulently misappropriated the funds of these facilities. The Bill Discounting Facility was misused by these defendants by availing the same against manipulated bills of exchanges 'drawn by the suppliers. Further the companies manager was falsely certifying to the bank that supplies have been received from the JLGs and the payment be made to them. Also End-User Certificate in respect of Crop Loans to the effect that the same have been transferred to the individuals JLGs members (farmers) was also fraudulently issued.

(t) ***So far as defendant Nos. 4, 7 & 8 are concerned, they are also the founding members and then shareholders of the defendant No. 1 company and the investigation of the CBI as well as the ED clearly established that the defendant No.1 company was established in furtherance to the fraudulent activities of its founders. According to defendant Nos. 4, 7 & 8 since defendant No. 8 has already been retired before the sanction of the loan by the applicant herein and also now defendant Nos. 4 & 7 are not the shareholder of the company therefore, they are not liable for the claim of the applicant bank and for the said submission Ld. Counsel for the defendant Nos. 4, 7 & 8 have relied upon the judgments of Hon'ble Delhi High Court in the matter of Indian Overseas Bank Vs. R. M. Marketing Services Pvt. Ltd.*** *[AIR 2002 Delhi 344],* ***Mukesh Hans &Ors. Vs. Smt. Uma Bhasin &Ors.*** *[RFA 14/2010 and CM No. 495/2010]* ***Ranbeer Kumar Gugneja Vs. M/s Continental Engines Ltd. & Ors;*** *[CS(OS) No. 24/2005];* ***M/s Raj Cylinder & Containers Pvt. Ltd. Vs. Mis Hindustan General Industries and Ors.*** *[RFA(OS) 5/1999], Judgment of Hon'ble Punjab & Haryana High Court in the matter of* ***L. Shiv Dayal Kapoor & Ors. Vs. Union of India.*** *[AIR 1963 P H 538] and judgment of Hon'ble DRAT, Delhi in the matter of* ***Parneet Bhardwaj Vs. Punjab National Bank & Anr.*** *[Misc. Application No. 692/18 arising out of OA No. 3024/2016 (DRT-I, Chandigarh)].*

(u) ***I have given my thoughtful consideration on the contentions of defendant Nos. 4, 7 & 8. However, looking to the***

fact that the defendant No. 1 was incorporated with a malafide intention and which was perpetuated with the passage of time therefore, the founders who were instrumental in establishing the said company are also liable for the fraud committed by the company. It is also important to note here that the defendant No. 1 company is a privately held company by the family members only. Therefore, now the defendant Nos. 4, 7 & 8 cannot be exonerated for their liabilities. Hon'ble Delhi High Court in the matter of Saurabh Exports Vs. Blaze Finlease and Credits Pvt. Ltd. *[129 (2006) DLT 429], while dealing the matter of personal liability of the amount claimed in the plaint has held that:-*

"16. Learned counsel emphasised the fact that defendant No. 1 company was in the nature of a family company and, thus, where the actual nature of transaction was a loan or deposit with all the defendants, the cloak of defendant No. 1 should not be used to defeat the claim of the plaintiff and in this behalf referred to the observations of the Supreme Court in ***Subhra Mukheriee and Anr. v. Bharat Coking Coal Ltd. and Ors.*** *where in para 11, it was observed as under:*

> *11. Mr. Srivastava submitted that undue emphasis was given to the fact that the Directors of the Company were brothers and the appellants are their wives. He argued that the Company is a separate legal entity which is independent of its Directors and shareholders and repeatedly referred to the quoted decision in Salomon v. Salomon. The principle laid down in Salomon case more than a century ago in 1897 by the House of Lords that the company is at law a different person altogether from the subscribers who have limited liability, is the foundation of joint stock company and a basic incidence of incorporation both under English law and Indian law. Lifting the veil of incorporation under statutes and decisions of the courts is an equally settled position of law. This is more readily done under American law. To look at the realities of the situation and to know the real state of affairs behind the facade of the principle of the corporate*

personality, the courts have pierced the veil of incorporation. Where a transaction of sale of its immovable property by a company in favor of the wives of the Directors is alleged to be sham and collusive, as in the instant case, the court will be justified in piercing the veil of incorporation to ascertain the true nature of the transaction as to who were the real parties to the sale and whether it was genuine and bona fide or whether it was between the husbands and the wives behind the facade of separate entity of the company. That is what was done by the High Court in this case.

17. I am in agreement with the submission of learned counsel for the plaintiff insofar as the liability of defendant No. 2 is concerned. Defendant No. 2 was extremely evasive during his cross-examination. Defendant No. 2 as DW-2 stated that the building, namely. Sunder Plaza where defendant No. 1 Company had its office was demolished by the MCD in the year 1997. He further stated that after demolition, there was no registered office of defendant Page 1061 No. 1 and the company was not functional for about the last two years. He even denied the knowledge about filing of returns or signing balance-sheets though he admitted to signing the acknowledgment of deposits as Director of defendant No. 1 Company. The witness also did not remember whether any permission from the Reserve Bank of India was sought for seeking deposits. He admitted to Mr. Virendra Uppal being a family friend who had approached him for the deposit.

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20. I am, thus, of the considered view that the principles laid in the judgments referred to aforesaid for lifting of the corporate veil are satisfied in the present case. It has already been observed that the concept of corporate entity was evolved to encourage and promote trade and commerce, but not to defraud people. The present case is one where clearly the plaintiff is sought to be defraud of the amount of Rs. 15 lakhs under the cloak of a corporate entity of defendant No. 1 company and, thus, such a *corporate veil must be lifted especially taking into consideration that defendant No. 1 company was only a family arrangement of the remaining defendants".* (emphasis supplied)

6. Mr. Saxena who appears for the respondent-bank is not in a position to claim that there is any valid legal basis for fastening any liability on the three petitioners in so far as the claim of the respondent-bank is concerned. It was not the case of the respondent bank, and that does not appear to be the basis of the impugned order passed by the DRT *qua* three petitioners/defendants (who were defendant Nos. 8, 4 and 7 respectively) that these defendants were party to, or beneficiaries of the siphoning of the funds of the said company. In the aforesaid circumstances, we are shocked to read the final order passed by the DRT-I dated 24.06.2019 *qua* the three petitioners. The same demonstrates complete lack of knowledge and understanding on the part of the Presiding Officer with regard to the concepts of limited liability of shareholders and Directors of a corporate entity, as codified in the Companies Act, 2013. Merely, because the three petitioners may have been promoter members of the aforesaid company i.e. REI Agro Limited, would not, in any event, make them liable in respect of loans advanced to the said company decades later, by when they had ceased to be not only directors, but even simple shareholders of the said company. Admittedly, they did not stand guarantee and did not execute any loan documents. They were not in the management of the said company at any point of time, especially between the period when the loans were applied for, granted and utilized, or even when the loans were defaulted. As aforesaid, they had ceased to be the shareholders of the said company much prior to

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the loan transactions entered into between the said company and the respondent-bank and other lenders.

7. The order passed by the DRT-I, *qua* the petitioners, suffers from complete non-application of mind and lack of understanding and appreciation of the facts of the law. This Court exercises the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction under Article 227 of the Constitution of India. When an order of this kind, as passed by the DRT-I in the present cases is placed before us, and brought to our notice, in our view, we would be failing in our duty if we do not examine and deal with the same, particularly when it appears to us that the said order is completely perverse and unsustainable, and its continuation on the file seriously infringes the valuable rights of the petitioner. It is clear to us that the DRT-I while passing the said final orders has failed to exercise the jurisdiction vested in it. The DRT-I did not address the issues raised by the petitioners as their applications under Order I Rule X CPC and under Order VII Rule XI CPC, which remained unactioned while the Tribunal proceeded to pass the final orders dated 24.06.2019. At the same time it is purported to exercise its jurisdiction most irregularly, by not examining the pleas of the Petitioners in the context of the law, and it proceeded to fix the liability of the Petitioners on considerations unknown to law.

8. In exercise of powers under Article 227 of the Constitution of India, we, therefore, quash the said final orders dated 24.06.2019 passed by the DRT-I, Delhi in O.A. Nos. 500/2017, 501/2017 and 502/2017, *qua* the

petitioners only. Consequential proceedings arising from the said final orders *qua* the petitioners also stand quashed.

9. However, we make it clear that we have not examined, or set aside the said orders *qua* the other defendants in the original applications.

10. Since the said final orders stand set aside *qua* the petitioners, their appeals preferred before the DRAT become infructuous, and the same also stands disposed of.

VIPIN SANGHI, J

JASMEET SINGH, J

NOVEMBER 15, 2021
Sahil Sharma