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

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Date of Decision: 25.03.2025+ **C.R.P. 69/2018 & CM APPL. 13836/2018****SHUSHANT MUTTREJA & ANR**

.....Petitioners

Through: Mr. Anuj P. Agarwala, Advocate
(DHCLSC).

versus

RAM KUMAR RATHI & ANR.

.....Respondents

Through: Mr. Gulshan Sharma, Adv.

CORAM:**HON'BLE MS. JUSTICE TARA VITASTA GANJU****TARA VITASTA GANJU, J.: (Oral)**

1. The present Petition has been filed under Section 115 of the Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"] seeking to challenge the order dated 31.01.2018 [hereinafter referred to as "Impugned Order"] and order dated 17.03.2018 [hereinafter referred to as "Order in Review"] passed by the learned Additional District Judge, Tis Hazari, Delhi. By the Impugned Order, three Applications filed by the Defendants were decided, being Applications:

- (i) under Order VII Rule 11, CPC
- (ii) under Order VIII Rule 1, CPC
- (iii) under Order I Rule 10(2), CPC

2. A Coordinate Bench of this Court had by an order dated 10.04.2018 directed that the proceedings before the learned Trial Court shall remain stayed and that order has continued as is till today.

3. None appears on behalf of the Respondents despite service.



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4. Learned Counsel for the Petitioners submits that the proceedings before the learned Trial Court were stayed by this Court on 10.04.2018 and have been pending for the last 7 years and that the matter be heard. Accordingly, this Court has taken up this matter for hearing and disposal today.

5. It is the case of the Petitioners (who are the Defendants before the learned Trial Court) that the Impugned Order suffers from an infirmity.

6. Briefly the facts are that a suit for recovery was filed by the Respondents/Plaintiffs against a Company titled M/s Cosmic Structures Ltd. & Ors. [hereinafter referred to as "Company"] and its two directors, Shri Sushant Mutreja and Smt. Ravneet Mutreja (Defendant Nos.1 to 3 respectively before the learned Trial Court). It was the contention of the Respondents/Plaintiffs that the Company being a real estate developer, was engaged in the business of real estate development and infrastructure projects and had developed several projects on the Yamuna Expressway, Noida, Uttar Pradesh and Haryana.

6.1 The Respondent/Plaintiff booked an office space admeasuring 450 sq. ft. in the project Town Mega Mall on 5th Floor [hereinafter referred to as "Office"]. A sum of Rs 16,04,941/- was paid by the Respondents/Plaintiffs to the Company. It was the grievance of the Respondents/Plaintiffs that despite the payment, delivery and possession of the Office was not handed over. Subsequently, the Respondents/Plaintiffs found out that the Company and its directors had played a fraud on various investors. Eventually, the Respondents/Plaintiffs filed a suit seeking recovery of Rs. 16,04,941/- along with interest at the rate of 18% per annum against the Company and



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Petitioners.

6.2 The Respondents/Plaintiffs also filed a criminal complaint and initiated prosecution in respect of his grievances and an FIR was registered being FIR No.0047/2016 by the Economic Offences Wing, Delhi.

7. A written statement was filed by the Petitioners (Defendant Nos.1 and 2 before the learned Trial Court), wherein it was stated that pursuant to filing of a petition before the High Court by a creditor, being CO.PET.152/2016 captioned ***Rajni Anand v. Cosmic Structures Ltd.***, by an order dated 11.01.2017 [hereinafter referred to as "Company Petition"], the Official Liquidator has been appointed as the provisional liquidator of the Company. It was further stated by the Respondents/Plaintiffs that pursuant to various FIRs being registered in Delhi and Agra, the Petitioners are in judicial custody and all the records and documents of the Company are lying sealed in the custody of the Official Liquidator.

7.1 The Petitioners also raised a preliminary objection that the suit is liable to be dismissed as being barred by the provisions of Section 446 of the Companies Act, 1956 [hereinafter referred to as "Companies Act"]. It was contended that in view of the pendency of the Company Petition and since the matter is subjudice before the Company Court, no proceedings can be continued unless the requisite permission of the Company Court/Tribunal is sought. Several other objections were taken by the Petitioners which included that the agreement between the parties contains an arbitration clause and that the suit has been wrongly instituted in Delhi since the entire cause of action took place at Noida.

8. By the Impugned Order, the learned Trial Court gave the following



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findings:

(i) On the Application under Order VIII Rule 1, CPC, the grounds seeking extension of time to file the written statement could not be substantiated by the documents in view of the fact that the records of the Company which were sealed, had thereafter been de-sealed. The Application was accordingly dismissed.

(ii) So far as concerns the Application for deletion of the name of Petitioner No.2 as a non-working Director, the learned Trial Court found that all Directors have to be held liable. It is apposite to extract Paragraphs 39 and 40 of the Impugned Order in this behalf:

“... 39. In view of these serious allegations, can it be even contended by any stretch of imagination that, no cause of action is disclosed against the defendant directors in their individual capacity, and can it be said that any company if found liable, its directors be not held liable individually to the extent of their share.

40. Court is of the considered view that infact, the defendant herein seems to have indulged in sheer abuse of process of law by moving frivolous application one after another, and only intends to somehow delay the proceedings to no end. This matter which was filed way back in February 2017, inspite of expiring of almost nearing one long year, the defendant has seen to do that, the same shall struck only in the above said application, with the result that the matter has still remained at the initial stage without there being any Written Statement in the main case...”

[Emphasis supplied]

(iii) In relation to the Application under Order VII Rule 11, CPC, the learned Trial Court has found that based on the judgment of the Supreme Court in ***Hariharnath v. State Bank of India***¹ if the Directors were arrayed as parties, “*the proceedings can very well continue*”. It is apposite to extract Paragraphs 27 and 28 of the Impugned Order in this behalf which is below:

¹ 2006 (4) SCC 457



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“27.As regards bar created by Section 446 of the Companies Act or the corresponding sections in the amended Act, Ld counsel for the plaintiff has countered that, where in the proceedings directors are also party, the said bar would not apply, and those civil proceedings can very well continue. Reliance in this regard was placed by Ld counsel on the judgment of the Hon'ble Supreme Court in case of Harihar Nath & Ors v. State Bank of India & Ors, (2006) 4 SCC 457, as per which, if the directors were also arrayed as party, proceeding can very well continue.”

28.It was urged on behalf of the defendants that, in that case also, the plaintiff would have to approach the Hon'ble High Court concerned, and would have to seek the permission and not otherwise. However, later on, this argument was not pressed. Ld counsel conceded that, the proceedings should continue as they were.”

[Emphasis supplied]

9. Learned Counsel for the Petitioners submit that the entire transaction took place with the Company and not its directors. It is further stated that the plaint does not set out any allegations against the Directors, the Petitioners herein.

9.1 Learned Counsel for the Petitioners has further submitted that the interpretation given by the learned Trial Court to the judgment of the Supreme Court in the *Hariharnath* case suffers from a fallacy. The Supreme Court has held that once an order initiating winding up proceedings is passed, suit and other legal proceedings cannot continue unless appropriate permission is sought from the Court in terms of provisions of Section 446 of the Companies Act.

9.2 Learned Counsel for the Petitioners submits that the findings that the case would continue against the Directors in the *Hariharnath* case, was in that context of that particular case and is not applicable to the facts of the present case where a simple suit for recovery was filed against the Company with Directors as parties to the present suit.



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9.3 Learned Counsel for the Petitioner has relied upon an order dated 11.01.2017 passed by the Company Court where the Official Liquidator has been appointed initiating winding up proceedings and appointing the Official Liquidator as the Provisional Liquidator is set out below:

*“...Consequently, in my view, the petitioner has been able to establish that **the respondent-company in unable to pay its debts**, within the meaning of the stipulation under in the provisions of Section 433(1)(e) of the said Act.*

***Consequently, this Court has no hesitation in admitting the instant winding up petition and appointing the Official Liquidator attached to this Court as the Provisional Liquidator of the respondent-company.** The Provisional Liquidator is directed to take over all the assets, books of accounts and records of the respondent-company forthwith. The citations be published in the Delhi editions of the newspapers ‘Statesman’ (English) and ‘Veer Arjun’ (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing...”*

[Emphasis supplied]

10. A Reply to the Petition was filed by the Respondents/Plaintiffs before this Court. In view of the fact that there was no presence on behalf of the Respondents, this Court deemed it apposite to examine the same. It is contended therein that the contentions of the Petitioner and all defences taken by the Company and the directors are with a view to escape their liability to the Respondents. It is further stated that the fact that the records of the Company were lying sealed in the Official Liquidator's office is of no consequence, since the Delhi High Court has already given directions for de-sealing the records. In addition, it is stated that this is not a case where the amounts are disputed by the Company, since, the payment by the Respondents/Plaintiffs is acknowledged, no further evidence is required.

10.1 The Reply also sets out that in a suit wherein the Directors of a company are also a party to the proceedings along with such company, the



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bar under Section 446 of the Companies Act would not apply and the civil proceedings can continue as against the Directors of such company even after an order for winding up of the company has been passed.

10.2 It has further been contended that the Company had fraudulently induced the Respondents into investing in a fake project and for this project, Rs.16,04,941/- was paid to the Company on 18.12.2015 and the money must be returned to the Respondents.

11. The principle challenge by the Petitioners is that the suit was not maintainable in view of Section 446 of the Companies Act.

12. Sub-Section (1) of Section 446 of the Companies Act states that when a winding up order has been made or the Official Liquidator is appointed as a provisional Liquidator, no suit or legal proceeding shall be commenced or if pending as on the date of the winding up order, shall be continued. Sub-Section (2) of Section 446 of the Companies Act is a non-obstante clause and states that only the Company Court/Tribunal shall have the jurisdiction to entertain or dispose of any proceeding by or against the Company, in claims or other Applications. Sub-Section (2) of Section 441 of the Companies Act sets out that the winding up of a Company shall be deemed to commence at the time of presentation of the Petition for winding up. The relevant extracts of Section 446 and 441(2) of the Companies Act are reproduced below:

“446. SUITS STAYED ON WINDING UP ORDER

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] may impose.



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(2) **The [Tribunal] shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of—**

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made under section 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) [***]

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a high Court."

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441. COMMENCEMENT OF WINDING UP BY TRIBUNAL

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(2) **In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the winding up."**

[Emphasis Supplied]

12.1 A plain reading of the aforesaid provisions reflects that as soon as a Petition is presented for winding up of a Company, the winding up shall be deemed to have commenced and once the Official Liquidator has been appointed, no suit or legal proceeding shall continue against the Company except with the permission of the Court/Tribunal.

13. As stated above, the provisions of Section 446 of the Companies Act provide for a bar of proceedings, once an order for winding up has been



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made or the Official Liquidator has been appointed as a provisional liquidator by the Court. It is not disputed that by an order dated 11.01.2017 as passed in the Company Petition, an order winding up the Company was passed by a Coordinate Bench of this Court and the Official Liquidator was appointed as a provisional Liquidator of the Company. The civil suit was filed thereafter, on 02.02.2017. It is also not disputed that no Application seeking leave to file the suit or to proceed with the filing of the suit as is envisaged in Section 446(1) or (2) was filed by the Respondents/Plaintiffs.

13.1 It is however the contention of the Respondents/Plaintiffs that there is no bar on filing a suit against the Directors, under Section 446 of the Companies Act, hence the suit can continue.

14. The challenge in the present Review Petition is against the Impugned Order and the Order in Review. The Impugned Order while acknowledging the provisions of Section 446 of the Companies Act and making note of the fact that the remedy of the Respondents/Plaintiffs lies with the Official Liquidator and that the Petitioners/Defendant Nos.2 and 3 have been wrongly arrayed in their individual capacity, despite the fact that there was no privity of contract between the Petitioners and the Respondents/Plaintiffs, gave a finding that given the fact that the records of the Company were de-sealed, subsequently, the Petitioners/Defendants could file pleadings and proceed with the matter.

14.1 In addition, with respect to the bar under Section 446 of the Companies Act, the learned Trial Court has relied on the judgment of the Supreme Court in the *Hariharnath* case to hold that the proceedings can continue against the directors. The learned Trial Court has also given a



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finding that in view of the serious allegations against the directors, the directors can be held "*liable individually to the extent of their share*". The Applications filed by the Petitioners were disposed of with these findings.

14.2 The learned Trial Court relied on the judgment in the ***Hariharnath*** case to hold that if directors were arrayed as parties in a suit or proceeding, the proceedings can continue as against the Directors notwithstanding the provisions of Section 446 of the Companies Act.

15. The facts in the ***Hariharnath*** case however were entirely different. Credit facilities were obtained from a Bank by the Appellants and these loans were secured by the mortgage of assets of the Company. The repayment of loans was guaranteed by the Directors of the Company. The Bank filed an Application stating that there was no bar for proceedings against the directors of the Company who were also arrayed as parties (Appellants) by the Bank. The suit was stayed by the learned Trial Court against the Company and the directors. Subsequently, after a lapse of time, an Application under Section 446(1) of the Companies Act was filed by the Bank seeking leave of the Court to proceed with the suit. Since the Application was filed belatedly, an Application seeking extension of time (to file the Section 446 Application) was also filed.

15.1 The principle question that arose in the ***Hariharnath*** case was whether grant of leave under Section 446(1) of the Companies Act was governed by Article 137 of the Limitation Act, 1963 [hereinafter referred to as "Limitation Act"] which prescribes a period of three years from the date when the right to sue accrues. In addition, a contention was raised that if leave to defend was granted, there was no justification that the decretal



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amount should be recovered from the guarantors and only if there was any deficit, should be recovered from the Company.

15.2 It was in this context that the Supreme Court in the ***Hariharnath*** case held that Article 137 of the Limitation Act would not be applicable to proceedings under Section 446 of the Companies Act. It was further clarified by the Supreme Court that the object of this provision is not to nullify a claim against the Company but to ensure that all suits and proceedings proceed only with the discretion of the Company Court and that all affairs pertaining to Company in liquidation, including suits and proceedings are within the control and supervision of the Winding up Court. It was further held by the Supreme Court that if a suit is continued in spite of obtaining leave under Section 446(1) of the Companies Act, the decretal amount is voidable at the instance of the Liquidator.

15.3 Given the fact that loans were secured by personal guarantees of the Directors, the Supreme Court in the ***Hariharnath*** case further held that since the suit was filed against the directors being guarantors in their personal capacity, the suit could have proceeded against the directors. It is apposite to set out the relevant extract of the ***Hariharnath*** case below:

*" 2. Nalanda Ceramic and Industries Ltd. (the second respondent herein, referred to as "the Company") was a company incorporated under the Companies Act, 1956 (for short "the Act"). Appellants 1 to 3 were its Directors. **The Company had obtained certain credit facilities from State Bank of India (the first respondent herein and referred to as "the Bank"). The loans were secured by mortgage of the assets of the Company. The repayment of the amounts advanced to the Company was guaranteed by the appellants.** On 28-11-1988, the Bank filed a suit (Title Mortgage Suit No. 150 of 1988 on the file of the Special Subordinate Judge, Ranchi) against the Company (Defendant 1), the appellants (Defendants 2 to 4), and four others, namely, the State of Bihar, the Bihar State Financial Corporation, IFCI and IDBI (Defendants 5 to 8). In the said suit, the Bank sought a*



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decree for Rs 5,95,98,258.31 against Defendants 1 to 4 (the Company and the appellants) with interest thereon and several ancillary and consequential reliefs.

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9. The Company Court by order dated 17-9-1996 granted leave to proceed with the suit. The Company Court was of the view that though Article 137 of the Limitation Act was applicable to an application under Section 446(1) of the Act, the provision relating to limitation should be construed liberally and the period could be extended in exercise of judicial discretion even suo motu. It condoned the delay in filing the application for leave, being satisfied that there were sufficient causes for the delay, first being the stay of winding up between 16-7-1990 and 16-12-1994 (in view of the inquiry under Section 16 of the SIC Act) and the second being the prosecution of the revision petition (CRP No. 388 of 1990) from 1990 till its withdrawal on 4-4-1995. The grant of leave was, however, made subject to the condition that even if a decree was granted in the suit, jointly and severally against various defendants, the Bank should proceed to get the decree satisfied from the other defendants, and if the decree was not fully satisfied, then the matter may be brought to its notice for proceeding against the Company for realisation of residuary decretal dues. Feeling aggrieved by the said order granting leave, the appellants herein filed LPA No. 259 of 1996. A Division Bench of the High Court dismissed the appeal by order dated 1-9-1997. The said order is challenged in this appeal by special leave.

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"18. The object of Section 446 of the Act is not to cancel, nullify or abate any claim against the company. Its object is to save the company which has been ordered to be wound up, from unnecessary litigation and from multiplicity of proceedings and protect the assets for equitable distribution among its creditors and shareholders. This object is achieved by compelling the creditors and others to come to the court which is winding up the company and prove their claims in the winding up. For this purpose, all suits and proceedings pending against the company are also stayed subject to the discretion of the winding-up court to allow such suits and proceedings to proceed. When a winding-up order is passed, the effect is that all the affairs pertaining to the company in liquidation, including all suits/proceedings by or against the company, come within the control and supervision of the winding-up court. The winding-up court has to decide whether it will let the suit/proceeding to continue in the court where it is pending, or it will itself adjudicate the suit/proceeding. Thus, under Section 446(1), the winding-up court only decides about the forum where the suit has to be tried and



disposed of. The Limitation Act which prescribes the periods within which a party can approach a court seeking remedies for various causes of action, is not attracted to such applications under Section 446(1) of the Act. However, as elaborate arguments were advanced on this issue, we will deal with them in some more detail.

20. It is now well settled that if any winding-up order is passed during the pendency of a suit against the company, and if the suit is continued without obtaining leave in spite of that bar contained in Section 446(1), the decree passed is only voidable at the instance of the liquidator, and not void ab initio. In fact, where such decree has been passed against the company and others, the only person who can avoid the decree on the ground of non-compliance with Section 446(1) of the Act, is the Official Liquidator of the company and not the other defendants. A suit/proceeding filed against a company, prior to the order of its winding up, does not come to an end on the passing of an order of winding up. The order of winding up merely stays further proceedings in the suit/proceeding. The suit/proceeding becomes dormant. Various alternatives are possible when a suit gets so stayed. The plaintiff in the suit can move an application under Section 446(1) of the Act, and when leave is granted, proceed with the suit. If the leave is refused, the suit may be transferred to the Company Court for being tried and disposed of under Section 446(2)(a) of the Act. The plaintiff may also file an application for transfer of the suit to the Company Court for disposal under Section 446(2)(a). Alternatively, the plaintiff may get the suit dismissed with liberty to make a claim under Section 446(2)(b) of the Act. Even if the suit is proceeded with, without obtaining leave of the Company Court, either not being aware of the order of winding up or ignoring the provisions of Section 446(1), the resultant decree will not be void, but only be voidable at the instance and option of the Official Liquidator of the company. It is also possible that the court passing the winding-up order may at any time, on the application either of the liquidator or of any creditor or contributory, make an order staying the winding up either altogether or for a limited time on such terms and conditions as the court deems fit, under Section 466 of the Act. When the winding up is so stayed, a suit against the company (filed before the winding-up order) which stood stayed under Section 446(1) could be proceeded with, even though leave had not been obtained to proceed with the suit. **We have referred to these alternative possibilities to show that having regard to the nature of an application under Section 446(1) of the Act, it does not attract Article 137.**

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23. Learned counsel for the appellant submitted that there was no justification for the court to direct that the decretal amount should be



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recovered from the guarantors first and only if there was any deficit it should be recovered from the Company in liquidation. Learned counsel for the Bank and the Official Liquidator fairly conceded that there was no reason or justification for imposing such a condition, having regard to the legal position that the liability of the principal debtor and guarantors is joint or several. There is no question of directing the amount to be first recovered from the guarantors. The creditor has the option of recovering the amount in the manner it deems fit. Though the Company Court has the power while granting leave, to impose conditions, such conditions can be imposed only for good and valid reasons. The terms imposed cannot affect the rights of third parties nor impose an obligation contrary to law. Therefore, the condition imposed while granting leave is deleted.

24. In the present case, the suit was against the Company as well as its Directors being guarantors in their personal capacity. The suit could have in any case proceeded against the guarantors. It was stayed by the trial court apparently under Section 446(1) even though there was no such prayer to that effect. The only prayer before the court at the instance of the first defendant in the suit was for stay of suit under Section 22 of the SIC Act which was not granted. The object of the appellants in filing an application for stay was to drag on the suit. They have succeeded in their effort to stall the suit for more than 16 years on a virtually non-existent ground. The trial court will, therefore, have to proceed with the suit with all expedition."

[Emphasis Supplied]

16. As can be seen from the foregoing narration, the facts in the ***Hariharnath*** case, the Directors had guaranteed re-payment of the loan advanced to the Company. The terms of the loan were that the liability of the principal debtor and the guarantors is joint and several. It is in this context that the suit which was filed against the Company as well as its Directors in their personal capacity, the Supreme Court directed that the suit could proceed against the guarantors/Directors.

17. The facts in the present case are however, entirely different. The suit filed before the learned Trial Court is a suit for recovery of monies paid to the Company. The Application filed by the Petitioners was dismissed by the learned Trial Court relying on a wrongful interpretation of the ***Hariharnath***



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case that the directors of the Company (Petitioner Nos. 1 and 2) would be personally held as liable for the debts of the Company. Thus, in order to ascertain personal liability, the plaint and the averments as set out in the plaint, were required to be looked into. There is no finding by the learned Trial Court of the personal liability of the Directors.

18. A perusal of the plaint shows that the allegations in the plaint are primarily only against the Company. The Petitioners have contended that there is no personal liability of the Directors. It is further contended that even as per the plaint, the money was only paid to the Company. The learned Trial Court would have to examine all these contentions as well.

18.1. In the case of *Mukesh Hans v. Uma Bhasin*², a Coordinate Bench of this Court has held that the Directors are not personally liable for the acts of the Company and owe no contractual duty qua a third party. There are only two exceptions to this Rule viz. (a) if there is a personal guarantee, indemnity etc. and (b) if Director induces third party to act to his detriment by advancing loan to the Company and third party proves fraudulent misrepresentation. The relevant extract is reproduced below:

10. The short question which arises for consideration in the present appeal is as to whether the appellants as erstwhile Directors of the Company, M/s. Dawson Leasing Limited (In Liquidation) can be made liable in a suit for recovery of money when the Directors have not made themselves personally liable by extending any guarantee, indemnity, etc.

11. Indubitably, a company incorporated under the Companies Act, whether as a private limited company or a public limited company, is a juristic entity. The decisions of the Company are taken by the Board of Directors of a Company. The Company acts through its Board of Directors, and an individual Director cannot don the mantle of the Company by acting on its behalf, unless he is so

² 2010 SCC OnLine Del 2776



authorized to act by a special resolution passed by the Board or unless the Articles of Association so warrant. It is equally well settled that a Director of a Company though he owes a fiduciary duty to the Company, he owes no contractual duty qua third parties. There are, however, two exceptions to this rule. The first is where the Director or Directors make themselves personally liable, i.e., by execution of personal guarantees, indemnities, etc. The second is where a Director induces a third party to act to his detriment by advancing a loan or money to the Company. On the third party proving such fraudulent misrepresentation, a Director may be held personally liable to the said third party. It is, however, well settled that this liability would not flow from a contract, but would flow in an action at tort, the tort being of misrepresentation and of inducing the third party to act to his detriment and to part with money.

[Emphasis Supplied]

18.2 On the aspect of whether the corporate veil can be lifted, it was further held in the *Mukesh Hans* case that:

"12. This is the settled position ever since 1897 when the House of Lords decided the case of *Salomon v. Salomon & Co. Ltd.* 1897 AC 22, and Lord Macnaghten, observed as under: -

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

13. However, with the passage of time inroads have been made into the aforesaid legal principle that the company is a legal entity distinct from its shareholders and directors and certain exceptions have been carved out. One such inroad is commonly described as lifting or piercing of the corporate veil. This has been succinctly put by the Supreme Court in *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar* [1964]6SCR885 as follows:

"24. The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The Corporation in law is equal to a natural person and has a legal entity of its own. The entity of the Corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its



own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the Corporation. This position has been well established ever since the decision in the case of *Salomon v. Salomon and Co.* was pronounced in 1897; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the Corporation or a Company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the Corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the Corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.”

14. Similar observations were made by the Supreme Court in the case of *New Horizons Ltd. v. Union of India*: (1995) 1 SCC 478 :

“27. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of *Salomon v. Salomon & Co.* Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, commonly described as “lifting the veil”, the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favor of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. (See : *Gower's Principles of Modern Company Law*, 4th Edn., p.112.) This concept, which is described as “piercing the veil” in the United States, has been



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thus put by Sanborn, J. in *US v. Milwaukee Refrigerator Transit Co.*4:

‘When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.’”

15. The question therefore in the instant case is - Can the corporate veil be lifted in the present case to reveal the identity of the person or persons behind it? The respondents in their plaint have not made out any such case to justify the piercing of the corporate veil. Therefore, this matter is not required to be dwelt upon by this Court any longer.”

[Emphasis Supplied]

19. In view of the fact that the suit was filed after the passing of the order dated 11.01.2017 passed in the Company Petition directing winding up of the Company, in terms of Section 446 of the Companies Act, the suit cannot proceed against the Company without taking leave of the Company Court/Tribunal and subject to such terms as may be imposed. The Court is informed that the Company Petition is still pending adjudication before this Court and is next listed on 16.05.2025.

19.1 In addition, given that the dispute in the present proceedings appears to be a builder-buyer dispute, the learned Trial Court shall examine the provisions of Section 79 of the Real Estate (Regulatory and Development) Act, 2016 [hereinafter referred to as “RERA Act”] which expressly bars the jurisdiction of Civil Courts in respect of disputes between builders and buyers, which fall under the RERA Act.

20. Accordingly and for the reasons as stated above, the Impugned Order and the Order in Review are set aside.

21. The learned Trial Court is directed to examine the Application under Order VII Rule 11, CPC afresh as against the Petitioners/Directors of the



Company. So far as concerns, Application under Order VIII Rule 1 and Order I Rule 10 (2) of the CPC which were also dismissed by the learned Trial Court by the Impugned Order/Order in Review, the learned Trial Court is directed to examine these Applications afresh given the findings of this Court.

22. The Petition and all pending Applications are allowed in the foregoing terms. So far as concerns, Application under Order VII Rule 1 and Order I Rule 10(2) of the CPC which were also dismissed by the learned Trial Court by the Impugned Order/Order in Review, the learned Trial is directed to examine these Applications afresh in light of the finding given by this Court.

23. The parties shall act based on a digitally signed copy of the order.

TARA VITASTA GANJU, J

MARCH 25, 2025/pa

[Click here to check corrigendum, if any](#)

After the dictation of this order was completed, the learned Counsel for the Respondents has appeared through video conferencing *albeit* without his video being switched on, and requested that his presence be marked.

TARA VITASTA GANJU, J

MARCH 25, 2025/pa/r