

Execution Application No. 1 of 2017

Custodian v. Mid East Engineering Co. (Bombay) Ltd.

2019 SCC OnLine Bom 156

In the High Court of Bombay[†]

(BEFORE A.K. MENON, J.)

Execution Application No. 1 of 2017

In

Garnishee Notice No. 1 of 2009

In

Miscellaneous Application No. 234 of 2005

In

Miscellaneous Petition No. 50 of 1999

Custodian Applicant;

v.

Mid East Engineering Co. (Bombay) Ltd. and Others
Respondents.

With

Execution Application No. 2 of 2017

In

Garnishee Notice No. 2 of 2009

In

Miscellaneous Application No. 234 of 2005

In

Miscellaneous Petition No. 50 of 1999

Custodian Applicant;

v.

ICD Kaushalya Marketing Pvt. Ltd. Respondents.

With

Miscellaneous Application No. 11 of 2017

In

Miscellaneous Application No. 234 of 2005

In

Miscellaneous Petition No. 50 of 1999

Custodian Applicant;

v.

Aishwarya Traders Pvt. Ltd. and Others Respondents.

Execution Application No. 1 of 2017, Garnishee Notice No. 1 of 2009,
Miscellaneous Application No. 234 of 2005, Miscellaneous Petition No. 50 of 1999,
Execution Application No. 2 of 2017, Garnishee Notice No. 2 of 2009 and
Miscellaneous Application No. 11 of 2017

Decided on January 18, 2019

Advocates who appeared in this case :

Mr. J. Chandran with Ms. Shilpa Bhate i/b Leena Adhvarvu Associates for the

Custodian.

Mr. Sagar Ghogare i/b Mr. Balu S. Dhattrak for the Respondent No. 1 in SPEX/1/2017 and SPEX/2/2017 and Respondent Nos. 4 to 9 in SPMA/11/2017.

Mr. Ajay Panicker i/b M/s. Ajay Law Associates for Respondent Nos. 1 to 3.

P.C.

A.K. MENON, J.:— By this common order the above applications are being disposed. In Execution Application No. 234 of 2005, the applicant is the Custodian appointed under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 ("Act"). Respondent No. 1 in the Execution Application is a company incorporated under the provisions of the Companies Act, 1956. Respondent Nos. 2, 3 and 5 were the Directors of the Respondent No. 1 at the relevant time. The said persons are no longer Directors of the Respondent no. 1 - company. Respondent No. 6 is a notified party on whose behalf the applicant had filed Miscellaneous Petition No. 50 of 1999 seeking an amount of Rs. 85,18,676.71/- together with further interest at the rate of 20% per annum.

2. Mr. Chandran the learned counsel for the Custodian submitted that vide order and decree dated 25th July, 2003 the Court directed Respondent No. 1 to pay to the applicant a sum of Rs. 34,85,000/- with interest at the rate of 15% per annum from 2nd July, 1992 till realisation. The applicant thereafter called upon Respondent No. 1 to comply with the order by paying the decretal amount. Further correspondence ensued but Respondent No. 1 failed and neglected to comply with the decree passed on 25th July 2003. Thereafter Execution Application No. 234 of 2005 came to be instituted. Pursuant to filing of the Execution Application, it transpires that Respondent No. 3, one of the directors at the material time filed an affidavit dated 27th July, 2005 purporting to disclose certain assets of the Respondent No. 1 but did not in fact disclose any immovable assets, save and except for some shares held by Respondent no. 1 in three companies.

3. Mr. Chandran submitted that vide order dated 5th August, 2005 this Court directed the Respondent No. 1 to disclose on affidavit the details of their directors at the relevant time and their addresses. According to the Applicant herein, the disclosure was required for facilitate lifting of corporate veil of the Respondent No. 1 and also seek disclosure of directors' assets and properties. It is in these circumstances, it was observed that the company had received a sum of Rs. 31,45,000/- from the notified party without any satisfactory explanation of the accounts.

4. Mr. Chandran contended in the Execution Application that the Directors, who were then parties to the Execution Application were holding posts of the Directors in other companies as well such as M/s. Aishwarya Traders Pvt. Ltd., M/s. Charulata Marketing Pvt. Ltd. and M/s. Rutuja Marketing Pvt. Ltd. In addition to Respondent No. 1, some of these companies are believed to have received large sum of monies by way of loans from the notified party. The Custodian has contended that similar affidavits of disclosure have been filed by Respondent No. 3 in respect of the judgment debtor companies as well and according to the Custodian the corporate veil is required to be lifted and the Directors are liable for payment of the decretal amount. It is in this background that the Custodian has prosecuted this Execution Application. On behalf of the Custodian Mr. Chandran had laid great emphasis on the decision of the Supreme Court in the case of *Delhi Development Authority v. Skipper Construction Company (P) Ltd.* and *Shivshankar Gurgar v. Dilip*¹. He therefore submitted that the reliefs prayed for in the execution applications 1 and 2 and M.A. No. 11 of 2017 be allowed.

5. The respondent, the garnishees and their directors have opposed the applications on the basis that in Execution Application No. 234 of 2005 Respondent No. 1 - M/s.

Aishwarya Traders Pvt. Ltd. had availed of short term loan from the notified party for the period of six months and had claimed interest from July 1992. It was contended that under Article 19 of the Limitation Act, the period of limitation for recovery of the loan amount would be three years from the date of the loan and that period expired on 1st February, 1995. It was only on 15th April, 1999 that Fairgrowth Financial Services Ltd. (FFSL) (notified party) filed Miscellaneous Petition No. 50 of 1999 against M/s. Aishwarya Traders Pvt. Ltd. seeking a decree in the sum of Rs. 85,18,676.71/- with interest at 20% per annum and the suit came to be decreed only to extent of Rs. 34,85,000/- with interest on 15% per annum from 27th July, 1992. Thereafter, the Custodian filed Execution Application No. 234 of 2005 against M/s. Aishwarya Traders Pvt. Ltd. directing it to disclose its assets and thereafter further proceedings as narrated above came to be filed and prosecuted.

6. Mr. Ghogare learned counsel for the garnishees contended that that Respondent No. 4 to 9 and its Directors contended that under Section 9-A of the Special Courts Act, the Court may exercise all such jurisdiction, powers and authority as were exercisable immediately prior to such commencement of the Act by any Civil Court and therefore, if the Civil Court did not have the authority to grant reliefs or if the authority of the Civil Court was barred, such consequence would apply to the Special Court as well. It was contended that in January 1992 when M/s. Aishwarya Traders Pvt. Ltd. took a short term loan from FFSL and interest was being claimed from 1992 under Article 19 of the Limitation Act, the period of limitation for recovery of loan amount was three years from the date of loan and that period expired on 1st February, 1995. After that date, the remedy to recover would have been barred and the authority of the Court to grant any relief with regard to recovery of the short term loan was barred under Section 3 of the Limitation Act and that the Court had no jurisdiction to entertain Miscellaneous Petition 50 of 1999. That the Special Court had applied provisions of the Limitation Act under Section 3 in proceeding for recovery of amount by parties under Section 9A of the Special Courts Act. That in Suit No. 6 of 1994 which was filed by Standard Chartered Bank against Andhra Bank Financial Services Ltd. the Special Court had dismissed Suit No. 6 of 1994 as barred by limitation. The matter was then carried in appeal to the Supreme Court and the Supreme Court also applied the provisions of the Limitation Act and considering applicability of Section 91(a) of the Limitation Act holding that the suit was not barred by limitation and decreed Suit No. 6 of 1994.

7. Mr. Ghogare relied upon the said judgment in support of his contention that the bar of limitation was indeed a fact in the present case and, therefore, there is no occasion to pursue present proceedings. He submitted that the Supreme Court had taken into consideration Section 3 of the Limitation Act and on applying the provisions of Article 91(a) of the Limitation Act found that the suit was not barred by the limitation. It is contended that the Special Court and the Supreme Court had applied the limitation Act to proceed to recover amounts and in the present case as well, the provisions of limitation Act would apply as a matter of public policy and to treat the limitation Act as inapplicable would be a departure. In this behalf he submitted that there is no specific provision for execution or non applicability of Limitation Act. It was urged before the Court that Section 9A(4) which categorically excludes applicability of the procedure laid down by the Code of Civil Procedure observed that the Special Court shall not be bound by the procedure laid down by the Civil Court but shall be guided by principles of natural justice and inter alia having power to regulate itself in procedure.

8. On the other hand the legislature has given power to the Special Court and these powers of the Special Court would also be limited to that of the Civil Courts. It was submitted that the Special Court did not have jurisdiction to pass a decree in the first

place, since the claim was barred by the limitation. Relying upon the decision of a Five Judge Bench of the Supreme Court in *Pandurang Dhondi Chougule v. Maruti Hari Jadhav*² it was submitted that a plea of limitation or a plea of res judicata is a point of law which concerns the jurisdiction of the Court which tries the proceedings and a finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court and so an erroneous decision on these pleas would fall within the purview of Section 115 of the Code. However, an erroneous decision on a question of law reached by the subordinate Court which has no relation to question of jurisdiction of that Court cannot be corrected by the High Court. It is indeed pertinent to mention at this stage that the Bombay High Court in case of *Foreshore Cooperative Housing Society Ltd. v. Praveen D. Desai*³ had held that the word "jurisdiction" is used in a wider sense under Section 9A and that would include the bar to maintainability of the suit. In other words, if the suit be barred by the limitation, the Court would have no jurisdiction to entertain it. The Court was duty bound to address this issue. A plea of jurisdiction would go to the root of the matter and therefore once it is found that the claim is barred by limitation, there is no necessity to enter into process of leading evidence. Furthermore, it was contended that considering the provisions of Section 9A as introduced by (Maharashtra Amendment) Act it was mandatory in nature and departure from the provisions of Order XIV Rule 2 of the Code of Civil Procedure that the issue of limitation is significant defence and when the decree is passed in violation of law of limitation, the decree is nullity. The exercise of the powers of the Court was barred by Section 9(A)(1) of the Special Courts Act read with section 3 of the Limitation Act. It was reiterated that the question of jurisdiction not having been canvassed and if the decree is passed, the same would be without jurisdiction and a nullity.

9. Mr. Ghogare invited my attention to the observation of the Supreme Court in *L.S. Synthetics v. Fairgrowth Financial Services Ltd.*⁴ wherein the Court observed that the provisions of Limitation Act would inter alia apply only when a suit is filed or a proceeding is initiated for recovery of an amount and no other property is required to be applied towards the claims pending before the Tribunal for the purpose of discharge of the liability of the notified party. It was also submitted that in *Fairgrowth Investments Ltd. v. Custodian*⁵ it was necessary to note that the Court had observed that the provisions of Limitation Act speak of application of the provisions in Sections 4 to 24 "only insofar as, and to the extent to which they are not expressly excluded by such special or local laws". According to the respondents the recovery proceedings instituted under the Special Courts Act would be subject to the provisions of Limitation Act. Thus, it was contended that the decree being nullity, the same was unenforceable and if decree was unenforceable the proceedings in execution could not be sustained. If and when the Court comes to that conclusion, the proceedings in Execution could not survive and lack of jurisdiction goes to the root of the matter. In this behalf learned counsel for the respondents relied upon the decision of the Supreme Court in the case of *Kiran Singh v. Chaman Paswan*⁶. It was therefore contended that the above applications are liable to be dismissed.

10. On the aspect of the jurisdiction, the respondents contended that the Special Courts Act has not provided for ouster of jurisdiction of the Civil Courts and prior to exercising the jurisdiction, the Special Court is required to ascertain a few facts in order to ensure that the claim made before it falls within the provisions of the Act. Firstly, the claim should relate to property which stands attached under sub-section (3) of Section 3 of the Act. Secondly, the claim should arise out of transactions in securities entered into after 1st April, 1991 and upto 6th June, 1992 both dates inclusive and thirdly, in these transaction one of the parties notified under section 3(2) would have to be involved as party, broker and intermediary or in any other manner.

11. Thus, unless a notified party was so involved and in relation to transaction in securities the claim would not constitute claim under subsection (3) of Section 3 of the Special Court. It is only if the aforesaid requirements are satisfied that the Special Court would exercise its jurisdiction. Furthermore, it was submitted that properties of three entities with which we are now concerned, namely, M/s. Aishwarya Traders (P) Ltd. -original respondent no. 1 in Execution Application No. 234 of M/s. Mid East Engineering Company (Bombay) Ltd. Garnishee and the respondent in Execution Application No. 1 of 2017 and M/s. ICD Kaushalya Marketing Pvt. Ltd., respondent in Execution Application No. 2 of 2017 have not been attached under the provisions of the Special Court. None of these three parties are notified parties. So also their Directors are not notified parties and have no connection with the present proceedings and therefore it was contended that no action could have been taken against them under the provisions of the Special Court Act. Furthermore, it is case of the respondents, that the Custodian has not pleaded anything in relation to jurisdictional aspect and failed to establish existence of jurisdiction. For the aforesaid reasons the Special Court has no jurisdiction to initiate proceedings in execution. This submission is made within umbrella submissions that the decree is a nullity.

12. Reliance was placed upon a decision of the Supreme Court in *Arun Kumar v. Union of India*⁷ and Halsbury's Laws of England inasmuch as it is sought to be contended that the existence of a jurisdictional fact is sine qua non for the exercise of power by a Court of limited jurisdiction and applying this to the facts of the present case, it is contended that a jurisdictional fact as to existence or non existence of the jurisdiction in the Court has not been made out in the present case.

13. Mr. Ghogare sought to make distinction between power of the ordinary civil courts which would contemplate two appellate stages, namely, initially to the High Court and thereafter to the Supreme Court. Whereas in the present case, the Act itself provides that a decree is an order of the Special Court would only be subject to statutory appeal. In this view of the matter it was submitted by learned counsel that the very jurisdiction of the Court to pass a decree and therefore proceedings and execution including Garnishee notices and the application for lifting veil are not competent. M/s. Aishwarya Traders Pvt. Ltd. was believed to have paid monies to M/s. ICD Kaushalya Marketing Pvt. Ltd. in the year 1992. Similarly, M/s. Aishwarya Traders Pvt. Ltd. made remittances to M/s. Mid East Engineering Co. (Bombay) Ltd. in the year 2005. The period of limitation being three years from the date of advance from 1992, the right to recover this amount stand barred by the law of Limitation. It was submitted that the Custodian, does not get a higher right than that of the judgment debtor M/s. Aishwarya Traders Pvt. Ltd. The counsel for the respondents has pressed into service decision of the Full Bench in the case of *Government of the United State of Travancore and Cochin v. Bank of Cochin Ltd.*⁸ which supported a view that merely by virtue of adopting proceedings for attachment, the attaching creditor cannot acquire a better or larger right than that the judgment-debtor had in respect of the attached debt. In this view of the matter, it was submitted that the ratio of the said case fairly applied in the present case and the proceedings against Garnishee would not be competent since the decree passed against M/s. Aishwarya Traders Pvt. Ltd. itself could not be executed. More so in the case of two Garnishees, the remedy for recovery was lost by efflux of time.

14. Reliance was placed on the decision of *T.R. Rajakumari v. Tax Recovery Commissioner, Madras-1*⁹ and which quotes on Halsbury's Laws, to the effect that "the debt must be one which the judgment-debtor could himself enforce within the jurisdiction for his own benefit, for the that the creditor acquires no larger rights than those of the debtor". Reliance was also placed on Order 21 Rule 46-A to 46-I and it was submitted that the words used in Order 21 Rule 46-A(1) are that the attachment

shall be made by written order prohibiting "in case of a debt". The creditor from recovering a debt and debtor from making payment thereof until further orders of the Court. Similarly, to the extent it relates to Garnishee the words used are "in case of a debt" and the words "garnishee liable to pay such debt" indicate that the amounts are actually due and in the present case such a fact had to be established before making any application thereunder. Similarly, Order 21 Rule 46-B the words used are "amount due from him" and Order 21 Rule 46-C, the words used are "determination of liability" and in Order 21 Rule 46-D the words used are "debt belongs to some third person". The use of these words in particular "amount due", "debt due" all indicate that these amounts in question or debt in question must be legally recoverable and that if the debt recovery is barred by the law of limitation it could not be subjected to Garnishee proceedings and successfully attached. In this behalf learned counsel for the respondents invited my attention to the provisions of Section 9A of the Special Court Act which does not contain any provisions for grant of relief in Garnishee proceedings in cases where the claim would otherwise be barred by the Law of Limitation. The rights of the Custodian and FFSL (notified party) being barred by the law of limitation cannot be enforced by taking recourse to Garnishee proceedings.

15. In this behalf learned counsel placed reliance on the observations of the Supreme Court in the matter of *New Delhi Municipal Committee v. Kalu Ram*¹⁰ which had occasion to deal with the word "payable" observing that "probably" generally means that which should be paid and if the amount, recovery of which is barred by the law of limitation, it is difficult to hold that the Estate Officer could still insist that the said amount was payable. Similarly, the Court had occasion to consider the expression "any money due" in section 186 of the Indian Companies Act, 1913 and the Privy Council in that case had considered the meaning of the word "payable" in Section 7 of that Act and concluded that the context in which the word was used entailed that the amount would be legally recoverable and not otherwise. In these circumstances, it was contended that the claim in the present case was not maintainable.

16. Having thus dealt with the aspects pertaining to the decree and the bar of limitation it was contended that the present proceedings were not maintainable against four individuals who were Directors, namely, respondent nos. 2 and 3 being Directors of M/s. Aishwarya Traders Pvt. Ltd., respondent nos. 3 and 5 being the Directors of M/s. Mid East Engineering Co. (Bombay) Ltd. and respondent nos. 5 and 9 being the Directors of M/s. ICD Kaushalya Marketing Pvt. Ltd. In view of the fact that the Special Court is not a Civil Court and although it has same jurisdiction as that of the Civil Court in execution proceedings, the Special Court is also bound to consider the provisions of Section 47 of the Code of Civil Procedure that in view thereof the Execution proceedings are only maintainable against the parties to the suit of the proceedings and the Executing Court will decide the question relating to the execution, discharge and satisfaction of own and nothing beyond. Thus, it is contended that the directors of the companies in particular M/s. Aishwarya Traders Pvt. Ltd., M/s. Mid East Engineering Co. (Bombay) Ltd. and M/s. ICD Kaushalya Marketing Pvt. Ltd. are not parties to Miscellaneous Petition No. 50 of 1990. No decree has been passed against any of them nor are they parties to the execution application and hence it was not question of executing a decree passed in favour of the notified parties against these persons.

17. Even assuming that the corporate veil can be lifted, in that sense Mr. Ghogare submitted that they are not Garnishees and since they did not owe amount to the judgment debtor. Furthermore, it was contended that the Executing Court cannot go beyond a decree and that the allegations made by the Custodian does not reveal any nexus in the context of justification of lifting the corporate veil. In other words, the decree does not contemplate lifting of veil and this Court does not have jurisdiction to consider these applications. Thus. the aforesaid Directors of the M/s. Aishwarva

Traders Pvt. Ltd., M/s. Mid East Engineering Co. (Bombay) Ltd. and M/s. ICD Kaushalya Marketing Pvt. Ltd. cannot be treated as persons against whom execution proceedings can be launched or continued and no questions contemplated under Section 47 of the Code of Civil Procedure could be considered in the context of these persons. For this reason as well, it was contended that the present applications are liable to be dismissed.

18. The next submission urged by the respondents is that the Custodian has failed to discharge his burden under Section 101 of the Evidence Act by omitting to lead positive evidence especially with regard to application for lifting of corporate veil. The allegations made by the Custodian in the applications have been disputed on the factual basis, therefore, it is contended that the Custodian was required to lead evidence to prove this as facts and analysis thus was done. The Custodian is deemed to have failed to discharge burden placed upon him under Section 101 of the Evidence Act on the aspect of lifting of corporate veil. It was submitted that reliefs sought in these applications were premised on the allegations of fraud. In this behalf, Mr. Ghogare placed reliance upon averments contained in paragraphs 15 and 16 from Miscellaneous Application No. 11 of 2017 to submit that the averments are devoid of material particulars and cannot form basis of lifting the corporate veil.

19. Reliance was placed on the observations of the Supreme Court in the case of *Bishundeo Narain v. Seogeni Rai and Jagernath*¹¹ inasmuch as in that case the Court observed that in cases involving fraud the party pleading it must set forth full particulars and case can be decided on the particulars provided and that no departure can be made from that requirement. General allegations are not sufficient and in the present case the pleadings contain no particulars which will justify an application for lifting of veil. It is submitted that the Custodian has not even established any fraudulent conduct and without doing so lifting of corporate veil cannot be sought. It is contended that the concept of lifting of corporate veil necessarily would involve establishment of fraudulent acts and unless this basic requirement was fulfilled no application for lifting of veil could be sustained. At best, the allegations can be stated to be vague and lacking in particulars and, therefore, calls for rejection of the applications. Reliance was placed on the case of *Salomon v. Salomon and Co. Ltd.*¹² in which it came to be held that the company complying with the requirement relating to incorporation was a separate legal entity and distinct from its individual members and that the company once incorporated must be treated as a separate individual person with rights and liabilities appropriate to itself, and the motives of promoters are not relevant in that behalf and a company is not agent of the shareholder to carry on business for them nor is it trustee of their property.

20. The Respondent placed reliance on the principles of lifting veil as considered by the Supreme Court in *Balwinder Rai Saluja v. Air India*¹³ in which the Court observed in paragraph 70 to 74 that "piercing the corporate veil" is an exception to the principle that a company is a separate legal entity status and distinct from its shareholders. Reliance was placed on six principles which the Court considered are as follows:

- "(i) ownership and control of a company were not enough to justify piercing the corporate veil;*
- (ii) the Court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice;*
- (iii) the corporate veil can be pierced only if there is some impropriety;*
- (iv) the impropriety in question must be linked to the use of the company structure to avoid or conceal liability;*
- (v) to justify piercing the corporate veil, there must be both control of the company*

by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

(vi) the company may be a 'façade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The Court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done."

21. It was submitted that the Court should not be hasty in the matter of lifting the corporate veil and the principles must be applied in a restrictive manner and only when the company was a mere camouflage or sham deliberately created by the persons controlling the company. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons in control of the company. In the context of the present application made by the Custodian, it was submitted that none of these relevant facts have been pleaded much less established and that merely because the three companies Aishwarya, Mid East and Kaushalya share common addresses and common directors is no ground for piercing the corporate veil. In this behalf reliance was placed on the decision of this Court in *Polestar Maritime Ltd. v. M.V. QI Lin Men*¹⁴ and *Lufeng Shipping Company Ltd. v. M.V. Rainbow Ace*¹⁵ in support of the contention that merely because shareholders are common or their holding in two different companies are identical would not make two companies one and the same entity. The first judgment was in context of a Admiralty Suit where the issues pertaining to ownership of the defendant's vessel were considered. Applying the principles from these decisions it was sought to be contended that it is not the case of the *Custodian* that the companies had been created only for the purpose of defeating an attempt to recover dues to the Custodian a/c Notified Party from Aishwarya and that the companies in the instant case had no connection whatsoever with the notified parties nor were their assets subject to any attachment.

22. The Respondent also placed reliance on the observation of the Supreme Court in *K.K. Modi Investment and Financial Services Ltd. v. Apollo International Inc.*¹⁶ and contended that the petitioner had entered into contract with subsidiary company on the basis of agreement which two respondents had between them inter se and the fact that the petitioner had entered into contract with the subsidiary company would not mean that the holding company would be liable. Mr. Ghogare also relied upon the observations of the Supreme Court in paragraphs 27, 42, 47 and 48 in the decision of *Oil and Natural Gas Company Ltd. v. Jindal Drilling and Industries Ltd.*¹⁷ in support of his contention that no case is made out for lifting of corporate veil and considering the judgment of the Supreme Court in *Balwant Rai Saluja v. Seogeni Rai and Jagernath*¹⁸ and the principles culled out in the said judgment and as reproduced in this order, no case was made for lifting the corporate veil. With reference to the particular involvement of four individuals who are Directors in these three companies, reliance was placed on different dates on which they became directors in the said three entities. No specific allegations, it was submitted were made against three companies or against the directors concerned and in absence of any such allegations in the pleadings no case was made out for lifting the veil. Furthermore, this submission was urged in the backdrop of the principal submission on behalf of the respondents that the Custodian was engaged in fishing and probing inquiry.

23. Mr. Ghogare submitted that his clients cannot be liable for any debts incurred by the companies in which they are directors and in particular four persons involved did not have any connection with the amount sought to be recovered. It was further submitted by Mr. Ghogare that Mid-East - respondent no. 4 in the main Execution Application No. 11 of 2017 in affidavit in reply submits that Aishwarya Traders had sold the 88,200 shares held by them in M/s. Prag Bosimi Synthetics Limited for Rs.

4,41,000/- to the said Mid-East under a debit note dated 17th March, 2005. However, these shares are said to have been returned and upon their return nothing whatsoever was payable from Mid-East to Aishwarya. In view of this it was submitted that proceeding against Mid-East was liable to be dismissed. That apart it was contended that the Custodian has not acted diligently inasmuch as the decree against Aishwarya was dated 25th July, 2003, the parent Execution Application no. 234 of 2005 was filed on 25th May, 2005. Common proceedings were then adopted against Mid-East and Kaushalya. All information pertaining to Aishwarya, Mid-East and Kaushalya is stated to be in the public domain. Accordingly, it was contended that the applications were barred due to delay and laches.

24. On behalf of respondent no. 1 Aishwarya in the Execution Application Mr. Panicker had relied upon decision of the Supreme Court in case of *Sushil Kumar Mehta v. Gobind Ram Bohra*¹⁹ which had occasion to consider the effect of a decree and observed that after adjudication on merits of the rights of the parties it would operate as res judicata in separate proceedings and would bind the parties and that in the case of decree a passed by the Court without jurisdiction over the subject matter it would be coram non jure since it lacked inherent jurisdiction to pass a decree. In other words he supported the contention of Mr. Ghogare that the decree was a nullity and therefore not capable of execution. Mr. Panicker also relied on the judgment in *The Custodian v. CIFCO Properties Pvt. Ltd.*²⁰.

25. Reliance was also placed on the decision of the Special Court dated 5th December, 2014 in Miscellaneous Application No. 182 of 2011 in Miscellaneous Application No. 30 of 1995 where the Special Court had occasion to consider the decision in *L.S. Synthetics* (supra) and the Court observed that in cases where statute does not prescribe period of limitation, then application should be filed within a reasonable period of time. The respondents therefore contended that the applications be rejected.

26. I have heard learned counsel for the parties at length and with their assistance have perused the record. The first order of the disclosure was passed on 5th August, 2005. Thereafter further directions were issued on 28th April, 2006. On 11th July, 2008 once again Respondent Nos. 2, 3 and 4 were directed to provide information of the debtors of the Respondent No. 1. Notices were directed to be issued. On 19th September, 2008 pursuant to an affidavit filed by Mr. Pranav B. Pandya, who was then Director of the Respondent No. 1. it came to the light that Respondent No. 1 had advanced a sum of Rs. 23,00,000/- to M/s. Kaushalya Marketing (P) Ltd. as Inter Corporate Deposit and out of the said amount, M/s. Kaushalya Marketing (P) Ltd. had repaid only an amount of Rs. 40,000/- leaving balance of Rs. 22,60,000/- Similarly, the Respondent No. 1 had sold about 88,200 shares of M/s. Prag Bosimi Synthetics Ltd. for Rs. 4,41,000/- to one M/s Mid East Engineering Company (Bombay) Ltd.- Garnishee No. 2. That amount was yet to be received by the Respondent No. 1. The Custodian had sought directions for attachment of the said debts recoverable from Garnishee Nos. 1 and 2 along with interest. Thereafter Garnishee notices came to be issued. It appears that after Garnishee notices were issued, no further steps were taken by the Custodian and the matter was adjourned from time to time. Notices were issued to the notified party as well. Its Directors after initially failing to respond, appeared on 22nd January, 2010 and sought time to file a reply. Thereafter an affidavit came to be filed on 28th January, 2010. The affidavit only records that the notified party conveyed its no objection for withdrawal of the matter with liberty to file fresh proceedings in the event any assets being located to satisfy the decretal amount. Based on this the Custodian continued to wait for further disclosures.

27. Thereafter on 21st February, 2014, after passage of almost six years the Special Court found that no steps have been taken by the Custodian for the purpose of execution of the decree and adjourned the matter sine die with liberty to apply after the relevant material was brought on record. Pendency of this Miscellaneous Application came to the noticed in 2016, when the matter came to be listed for directions and on 15th July, 2016, the Court recorded that even as on that date the Custodian was unable to produce relevant material to proceed with the application. Garnishee notices were then pending.

28. Learned counsel appearing for Respondent Nos. 1, 3 and 5 as on that date also was unaware of further developments and changes, if any, due to efflux of time he was then directed to disclose correct addresses of the Garnishees, namely, M/s. ICD Kaushalya Marketing (P) Ltd. and M/s. Mid East Engineering Company (Bombay) Ltd. in order to ascertain whether any remittances had been made to Respondent No. 1 or any of its Directors or any other group companies.

29. The affidavit of one Subramonia Iyer came to be filed disclosing that as far as Garnishees are concerned, neither the Garnishee had made any remittances to the Respondent Nos. 2 and 3 or any of its Directors. The addresses of Garnishees available with the respondent no. 1 have been provided. On 2nd September, 2016 this Court recorded that Garnishee notices had remained unserved and that the notice came to be published in two newspapers on or about 24th August, 2016. On 14th October, 2016 the counsel for the Custodian mentioned that upon verification it was found that the respondent company could not be served at any of known address disclosed in the record of the Registrar of the Companies and as regards garnishees the postal packets sent had been returned with the remark "not found".

30. In the circumstances the Advocate for the Respondent nos. 1, 3 and 5 was once again directed to provide current registered office of respondent no. 1 and all available addresses of the Garnishees. In addition, the affidavits were to incorporate an undertaking intimating change of address of registered office promptly upon such change taking effect. After granting extension of time, it was observed that no compliance was forthcoming.

31. In the meantime the Custodian filed Execution Application No. 1 of 2017 against M/s. Mid East Engineering Company (Bombay) Ltd. on or about 2nd February, 2017. The second Execution Application bearing No. 2 of 2017 also came to be filed against M/s. ICD Kaushalya Marketing (P) Ltd. In these applications respondent no. 1 were respective Garnishees along with Aishwarya Traders Pvt. Ltd. - respondent no. 2 and M/s. Fairgrowth Financial Services Ltd. - respondent no. 3, notified party in both execution applications. The custodian sought relief by way of disclosure of properties belonging to said Garnishees as are sufficient to satisfy the decree and in the meantime an injunction restraining them from selling, transferring, alienating or in any manner dealing with or disposing of or encumbering or parting with possession of their properties. After these applications were filed the Custodian also filed Miscellaneous Application No. 11 of 2017 in which the Custodian sought similar relief of lifting the corporate veil, this time, in relation to M/s. Aishwarya Traders Pvt. Ltd., M/s. Mid East Engineering Co. (Bombay) Ltd. and M/s. Kaushalya Marketing Pvt. Ltd. The Custodian also sought directions for disclosure of bank accounts of the Directors of the said companies.

32. On 1st July, 2017 upon service of these applications the directors of these companies entered appearance and contested the matter. The Court came to the prima facie view that the respondents concerned had taken up common defence and that there was no legally enforceable debt and the amounts payable, if any, have been duly squared off. It was found necessary to probe the bonafides of the contentions

since it was defence that the companies were now defunct. However, the affidavits filed in the proceedings reveal that the new directors had come on board between March 2016 and June 2016 and the companies have resisted the garnishee notices mainly on the basis that the claims are barred by the law of limitation. Although contentions of adjustments were taken up, no documents were filed by which the Court could evaluate the contentions. In these circumstances, the Court came to the conclusion that the companies would be directed to disclose their assets and liabilities and that this disclosure would reveal and help determine whether that the companies are defunct or as contended in the affidavit in the words of the Custodian as "front companies".

33. The Court came to the conclusion that the defences raised do not inspire confidence and they tend to mislead. In the circumstances vide ad-interim order dated 7th July, 2017 M/s. Mid East Engineering Co. (Bombay) Ltd. and M/s. ICD Kaushalya Marketing Pvt. Ltd. were directed to disclose all assets and liabilities along with Income Tax returns and balance sheets for the preceding three years. Affidavits were directed to be filed jointly by the Directors of the said companies. These directions were thereafter complied and the Custodian filed an affidavit in rejoinder. The main applications were thereafter taken up for hearing.

34. Having considered all these aspects it is necessary to observe that the respondent in Execution Applications no. 1 of 2017 were Mid East, Aishwarya and notified party. The Custodian sought an order directing disclosure on oath of properties belonging to respondents. This Court directed disclosure of properties. An affidavit was filed by one Hemant B. Vyas dated 10th March, 2017 in which deponent has stated that he had become director of Mid-East on 28th December, 2015 and continues to be director of the company. He has contested maintainability of the application on the basis that there was no enforceable debt. He has contended that Mid-East was not party to Miscellaneous Petition No. 50 of 1999 filed against Aishwarya and resulted in the decree and there was no debtor-creditor relationship between Mid-East and Aishwarya Traders.

35. It is further contended that Aishwarya traders had sold 88,200 shares held by them in one M/s. Prag Bosimi Synthetics Limited for a sum of Rs. 4,41,000/- to Mid-East under a debit note dated 17th March, 2005 and thereafter the shares were demanded back and returned, although the affidavit contained erroneous statement that Aishwarya had demanded shares from Mid-East. This is stated to be erroneous as pointed out by Mr. Ghogare during his submissions. Although it was mentioned that Mid-East had demanded the shares back, it was in fact Aishwarya which had demanded the shares back and which was accordingly returned. In support of his contentions reliance was also placed in affidavit of disclosure of Mid-East pursuant to an order passed by this Court on 7th July, 2017 which annexed copy of the balance sheet and profit and loss account for the financial year ended 31st March, 2014, 31st March, 2015 and 31st March, 2016 which discloses a limited cash balance. It is therefore submitted that nothing whatsoever is due and payable by Mid-East to Aishwarya and in any event the claim if any stood time barred in March, 2008 and no Garnishee proceedings are maintainable. Although reliance is placed on debit note copy of the the debit note which has not been annexed to the affidavit. However this is not significant in view of what I have held.

36. In Execution Application No. 2 of 2017 filed against Kaushalya, Aishwarya and M/s. Fairgrowth Financial Services Ltd. the custodian has filed a rejoinder dated 10th November, 2017. Apart from a bare denial of the contents nothing of consequence is revealed. This brings us to consideration of the order passed in Garnishee Notice Nos. 1 and 2 of 2009. Garnishee Notice No. 1 of 2009 was disposed of vide order dated 2nd

September, 2016 in which Mid-East was respondent no. 2. Mid-East did not appear to contest Garnishee Notice No. 1 of 2009 despite being served. No doubt service was effected by substituted service pursuant to order of the Court since they were not available at the last known address. However it is material to note that Mr. Subramonia Iyer who was director of Aishwarya traders at the time of hearing of Garnishee Notice no. 1 of 2009 was admittedly director of Mid-East as well at around the same time. In affidavit so filed by said Mr. Subramonia Iyer in his capacity as director of Aishwarya traders it is stated that Aishwarya Traders had not received any amounts from Mid-East or Kaushalya. As regards Kaushalya it was contended by the deponent that the claim was barred by limitation and therefore no steps were taken by Aishwarya and as far as Mid-East is concerned also the claim being barred by limitation Aishwarya did not take any steps for recovery thereof.

37. In this light it has been submitted that execution of the decree cannot occasion whether it be the decree passed against Aishwarya in the year 2003 and the orders dated 2nd September, 2016 by which the Garnishee Notice No. 1 and 2 were made absolute. Garnishee Notice no. 1 of 2009 sought an order against Mid-East attaching a sum of Rs. 4,41,000/- standing to the credit of Aishwarya Traders and interest thereon @ 24% in accordance with decree dated 25th July, 2003. Similarly in the case of Garnishee Notice No. 2 of 2009 an affidavit came to be filed by the same deponent. The affidavit is filed by said Mr. Subramonia Iyer was relied upon and in that proceeding similar order was passed against Kaushalya in terms of prayer clause (1) (a) attaching the sum of Rs. 22,60,000/- standing to the credit of Aishwarya in the hands of Kaushalya.

38. Thus it is evident that pursuant to the decree dated 25th July, 2003 the Custodian has proceeded against Kaushalya and Mid-East on the basis that they were holding and retaining funds owed by them to respondent no. 1 in the Execution Application i.e. Aishwarya. The contention of the Custodian that there were three decrees and that the recovery of the amounts due under these three decrees could not be barred by law of limitation in view of the decision in *L.S. Synthetics* (supra) does not appear to be correct in view of the fact that decree is only one and that is dated 25th July, 2003 in execution of that decree that the Custodian had sought attachments against Kaushalya and Mid-East in their capacity as Garnishees believed to be holding and retaining sums of Rs. 22,60,000/- and Rs. 4,41,000/-. It is pursuant to these Garnishee Notices being made absolute that the Execution Application has been taken out. It may be appropriate to mention that the orders dated 2nd September, 2016 in which the Garnishee Notices have not been challenged by the said Mid-East or Kaushalya.

39. Mr. Ghogare had contended that the decision in *Skipper Construction* (supra) was one rendered in the contempt jurisdiction of the Supreme Court and under the Article 142 of the Constitution of India which power this Court cannot exercise, since orders under article 142 is in the exclusive domain of the Supreme Court. While it is not possible to accept Mr. Ghogare's contention that the exercise of power of lifting the corporate veil was only available under Article 142, I find reliance on *Skipper Construction* (supra) by the Custodian was misplaced. In *Skipper Construction* (supra) the Supreme Court was faced with devious methods adopted by that respondent in relation to a plot of land allotted by Delhi Development Authority ("DDA"). Skipper had resorted to various methods of avoiding its obligation DDA and in blatant violation of the orders of the Court had continued to alienate properties as a result of which it had indulged in acts for which the Supreme Court had held Skipper and its directors in contempt. In that case the veil was lifted and two of its directors were sentenced under the Contempt of Courts Act. It was a clear case of fraud being played upon DDA and upon innocent purchasers who were affected by the machinations of Skipper. In

my view the decision in *Skipper Construction* (supra) which occasioned lifting of the veil, as also punishing the directors for contempt would not apply to the facts of this case in view of the facts being drastically different. That having been said, it is not as if this Court is powerless to lift the corporate veil, but what one has to see is whether there has been any fraudulent conduct on the part of the respondents. In the instant case the Custodian has alleged fraudulent conduct and my attention was invited to paragraph 14. It is further stated that fictitious and non existent address of respondent no. 4 and 7 namely Mid-East and Kaushalya were given. In paragraph 16 of the Custodian application MA/11/2017 the Custodian states thus:

"16. The Applicant submits that in the present matter, Respondents nos. 1, 4 and 7 are sister concerns/front companies controlled by Respondent nos. 2 and 3 who are the directors of Respondent no. 1. The Applicant submits that Respondents Nos. 1, 4 and 7 have been set up to defraud its creditors including this Hon'ble Court which is recovering attached assets. Respondents Nos. 1, 4 & 7 were deliberately not giving their correct addresses in order to comply the above mentioned order and decree dated 25th July 2003 passed by this Hon'ble Court. Hence, it is imperative that this Hon'ble Court lift the corporate veil of Respondent Nos. 1, 4 and 7 and hold that they are the front companies of Respondents Nos. 2, 3, 5, 6, 8 and 9 as per the law settled on the said issue and enunciated by the Hon'ble Supreme Court of India in the case of Delhi Development Authority v. Skipper Construction Company (P) Ltd. [1996 AIR 2005; (1996) 4 SCC 622]"

40. In addition to these averments the Custodian in the rejoinder affidavit filed on behalf of the Custodian dated 17th April, 2017 the deponent states that the registered address of the respondent companies therein were updated only in November 2016 after this Court directed respondent nos. 1, 4 and 7 to file an affidavit of the directors to provide the current address. It was therefore submitted that the said respondent was attempting to suppress information from this Court and disclosed the correct address only upon being compelled by this Court to do so and alluding to the intention of defrauding its creditors and this Court. A further averment is made that it is imperative for this Court to lift the veil in respect of respondent nos. 1, 4 and 7 and hold that they are front companies of respondent nos. 2, 3, 5, 6, 8 and 9. Save and except these averments the Custodian has not made any other factual assertion which indicates fraudulent conduct with the intention of depriving its creditors of the said respondent. It does appear that the respondents initially did attempt to avoid disclosure of the correct addresses but wiser counsel may have prevailed. Skirting such disclosure alone cannot be held to be justification for lifting the veil.

41. On behalf of the Custodian, it was contended that there was no merit in the respondents' contention that there was no basis for filing the present proceedings and even the Miscellaneous Petition was without jurisdiction. Considering this aspect of the matter, it was submitted that the Special Court Act specifically ousts the jurisdiction of the Civil Courts and in that sense seeks to only exercise jurisdiction within frame work of the Act. It was sought to be contended that the Rules and Regulations had to be strictly followed since the Special Court was Code in itself and the Code was not bound by the provisions of the Code of Civil Procedure.

42. In the course of submissions my attention was invited to the decision of the Supreme Court in the case of *ONGC v. Jindal Drilling* (supra) in which Supreme Court had occasion to consider the decision in *Indowind Energy Limited v. Wescare (India) Limited* (2010) 5 SCC 306 wherein the Court observed that each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common board of directors will not make the two companies a single entity nor will existence of common shareholders or directors lead to inference that one company will be bound by the acts of the other. It is also observed in paragraph

17 of *Indowind Energy Ltd.* (supra) as under:

17. It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that two companies have common share holders or common Board of Directors, will not make the two companies a single entity. Nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind."

43. In that case the Court was considering an application before the arbitral tribunal which sought an order lifting the corporate veil to ascertain whether the respondent formed part of the Jindal Group of Companies and were one and the same entities. The Court categorically stated that the tribunal had not ordered lifting of the Corporate veil. This need not be emphasized since it is evident that the Court alone can lift the corporate veil of a company in an appropriate case.

44. Thus having considered the position of Mid-East and Kaushalya Marketing, I am of the view that the claims against them would be barred by the law of limitation. In *Fairgrowth Investment* (supra) the Supreme Court had occasion to consider the decision of that Court in *L.S. Synthetics* (supra) and observed that Special Court Act had no provision for any period of limitation. The Court in *Fairgrowth Investment* (supra) concurred in the final conclusion reached by the Court in *L.S. Synthetics* (supra) to the extent that the provision in the Limitation Act, 1963 have no application in relation to a petition under Section 4(2) of that Act. Section 4(2) provides as under:

"(2) Any person aggrieved by a notification issued under sub-section (2) of section 3 or any cancellation made under sub-section (1) of section 4 or any other order made by the Custodian in exercise of the powers conferred on him under section 3 or 4 may file a petition objecting to the same within thirty days of the assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President before the Special Court where such notification, cancellation or order has been issued before the date of assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President and where such notification, cancellation or order has been issued on or after that date, within thirty days of the issuance of such notification, cancellation or order, as the case may be; and the Special Court after hearing the parties, may make such order as it deems fit".

45. In my view in the peculiar facts and circumstances of this case and the Custodian not having taken steps within reasonable time, the decision in *L.S. Synthetics* (supra) and *Fairgrowth* (supra) are of no avail. Accordingly Execution Applications nos. 1 and 2 must fail. Apropos the allegation of fraud, I find that these are only superficial. The question which falls for consideration is whether in the instant case there is any justification in directing lifting of the corporate veil. There is no substance in the allegation of fraud and nothing has been shown to me which will amount to fraudulent conduct. There is substance in Mr. Ghogare argument that save and except for Shri Balakrishna Tribhovandas Rajgor all other directors have come on board several years after the transaction in question. It is not possible to attribute to them fraudulent conduct. Miscellaneous Application no. 11 of 2017 must also fail.

46. It is made clear that this Court has not gone into the question of jurisdiction of the Special Court to pass decree execution of which is being sought nor has it held that the claims were time barred at the material time when Miscellaneous Application

No. 50 of 1999 was filed. This Court has also not considered the submission that the Special Court could not exercise jurisdiction of the respondents because no notified party was involved.

47. In the result I pass the following order:

- (a) Execution Application Nos. 1 of 2017 and 2 of 2017 are dismissed.
- (b) Miscellaneous Application No. 11 of 2017 is also dismissed.
- (c) List Execution Application No. 234 of 2005 for directions.
- (d) No costs.

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[†] In the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 at Bombay

¹ (2014) 2 SCC 465 : AIR 2014 SC 1182

² AIR 1966 SC 153

³ 2009 (2) Mh.L.J. 28

⁴ (2004) 11 SCC 456

⁵ (2004) 11 SCC 472

⁶ AIR 1954 SC 340

⁷ (2007) 1 SCC 732

⁸ AIR TRA-CO 243

⁹ 1979 Income Tax Returns (Vo1.116) 306

¹⁰ (1976) 3 SCC 407 : AIR 1976 SC 1637

¹¹ AIR 1951 SC 280

¹² H.L. All England Law Reports 33

¹³ (2014) 9 SCC 407

¹⁴ Adm. Suit (L) 3547 of 2008 dated 22.12.2008

¹⁵ Appeal (L) No. 228 of 2013 dated 2.7.2013

¹⁶ 2009 SCC OnLine Del 1595

¹⁷ 2015 SCC OnLine Bom 1707

¹⁸ (2014) 9 SCC 407

¹⁹ (1990) 1 SCC 193

²⁰ MA/182/2011 in MA/30/1995 Special Court

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