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Neutral Citation Number: 2023:DHC:1902

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

% **Order reserved on: 10 March 2023**
Order pronounced on: 17 March 2023

\+ OMP (ENF.) (COMM.) 145/2021

DELHI AIRPORT METRO EXPRESS PRIVATE LIMITED
..... Decree Holder

Through: Mr. Kapil Sibal, Sr. Adv. with Mr. Mahesh Agarwal, Mr. Rishi Agarwal, Mr. Shri Venkatesh, Ms. Megha Mehta, Ms. Niyati Kohli, Mr. Pranjit Bhattacharya, Mr. Suhael Buttan, Mr. Vineet Kumar, Ms. Manavi Agarwal and Ms. Manisha Singh, Advs.

versus

DELHI METRO RAIL CORPORATION LTD.
..... Judgement Debtor

Through: Mr. Tarun Johri, Mr. Vishwajeeet Tyagi, Mr. Ankur Gupta, Advs. with Mr. Sanjay V. Kute, GM/Legal, DMRC.
Mr. Chetan Sharma, ASG with Mr. Apoorv Kurup, CGSC, Mr. Amit Gupta, Ms. Nidhi Mittal, Mr. Ojaswa Pathak, Mr. R.V. Prabhat, Mr. Vinay Yadav and Mr. Suresh Tripathi, Advs. for UOI.
Mr. Parag P. Tripathi, Sr. Adv. and Mr. Manish Vashisht, Sr. Adv. with Mr. Santosh Tripathi, SC with Mr. Udit Malik, ASC, Mr. Arun Panwar, Ms. Rachita Garg and Ms. Astha Gupta,

Advs. for GNCTD.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

EX.APPL.(OS) 2933/2022 in OMP (ENF.) (COMM.) 145/2021

1. The present execution petition relates to an award dated 11 May 2017. The challenge under Section 34 of the **Arbitration and Conciliation Act, 1996**[1] which was mounted by the **Delhi Metro Rail Corporation**[2] came to be dismissed on 06 March 2018. DMRC is thereafter stated to have preferred an intra-court appeal which came to be partly allowed by the Division Bench in terms of its judgement dated 15 January 2019.

2. Aggrieved by the aforesaid, the execution petitioner preferred a Special Leave Petition before the Supreme Court which was allowed in terms of the judgement rendered on 09 September 2021. The said decision stands reported as **Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corporation Ltd.**[3]. The review petition preferred by DMRC seeking review of the aforesaid order also came to be dismissed by the Supreme Court on 23 November 2021. The execution petition as well as the objections which had come to be preferred came up for substantive consideration before the Court thereafter.

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[1] The Act
[2] DMRC
[3] (2022)1 SCC 131

3. For the purposes of the present order, it would be pertinent to principally advert to the orders of 10 March 2022 and 20 June 2022 passed by this Court on the present petition. In terms of the order dated 10 March 2022, the Court by way of an elaborate order proceeded to rule on the question of interest as well as the liability of the DMRC to make payments in terms of the final Award that was rendered. The Court also decided the various objections which were raised by the DMRC with respect to computation of interest and the ambit of Section 89 of the **Metro Railways (Operation and Maintenance) Act, 2002**[4]. It would be apposite to extract the following parts of that decision: -

> "**31.** During pendency of these proceedings, the judgment debtor had also made payment of Rs.678 crores and Rs.1000 crores i.e. Rs.1678.42 crores. Even on the day orders in the present petition were reserved, learned senior counsel for judgment debtor had undertaken that the amount of Rs.600 crores shall be deposited in the ESCROW account. The judgment debtor has raised the contention that the payments made by the judgment debtor should have been adjusted from the due amount on the date of payment can not be accepted. The Constitution Bench of Hon'ble Supreme Court in ***Gurpreet Singh Vs. Union of India***, (2006) 8 SCC 45 has held that the payments made by the judgment debtor to decree holder has to be appropriated first towards the interest and costs and then towards the principal amount. Also, the Hon'ble Supreme Court in ***Bharat Heavy Electricals Ltd. Vs. R.S. Avtar Singh*** (2013) 1 SCC 243 has held that if the payment made by the judgment-debtor falls short of the decreetal amount, the decree-holder will be entitled to apply the general rule of appropriation by appropriating the amount deposited towards the interest, then towards costs and finally towards the principal amount due under the decree and observed as under:-
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> > *"31. From what has been stated in the said decision, the following principles emerge:*

[4] The 2002 Act

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31.1. The general rule of appropriation towards a decretal amount was that such an amount was to be adjusted strictly in accordance with the directions contained in the decree and in the absence of such directions adjustments be made firstly towards payment of interest and costs and thereafter towards payment of the principal amount subject, of course, to any agreement between the parties. 31.2. The legislative intent in enacting sub-rules (4) and (5) is a clear pointer that interest should cease to run on the deposit made by the judgment-debtor and notice given or on the amount being tendered outside the court in the manner provided in Order 21 Rule 1(1)(b).
31.3. If the payment made by the judgment-debtor falls short of the decreed amount, the decree-holder will be entitled to apply the general rule of appropriation by appropriating the amount deposited towards the interest, then towards costs and finally towards the principal amount due under the decree. 31.4. Thereafter, no further interest would run on the sum appropriated towards the principal. In other words if a part of the principal amount has been paid along with interest due thereon as on the date of issuance of notice of deposit interest on that part of the principal sum will cease to run thereafter. 31.5. In cases where there is a shortfall in deposit of the principal amount, the decree-holder would be entitled to adjust interest and costs first and the balance towards the principal and beyond that the decree-holder cannot seek to reopen the entire transaction and proceed to recalculate the interest on the whole of the principal amount and seek for reappropriation."

33. On the aspect as to whether the funds available with the DMRC under OMP (ENF.) (COMM.) 145/2021 different heads in terms of additional affidavit dated 21.12.2021can be attached barring provisions of Section 89 of the Metro Railways (Operation & Maintenance) Act, 2002 or Section 60 CPC, this Court has gone through the aforesaid provisions of law.

35. The afore-noted Section 89 of the Act mandates that without prior sanction of the Central Government, the property mentioned in sub-Section (1) of Section 89, cannot be attached in execution, however it does not fetter the authority of the Court to attach the earnings of the metro administration in execution of a decree or order.

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37. The afore-noted Section 60 CPC also mandates that properties belonging to the judgment debtor, which are under its disposing power, whether in its name or in the name of any other persons, profits/benefits of which shall accrue to the judgment debtor, are liable to be attached in execution proceedings.

40. According to the aforesaid affidavit, as on 14.02.2022, the total funds available with the judgment debtor under the head **Total DMRC Funds** is Rs.1,452.10 cores; under the head **Total Project Funds** is Rs.2681,29 and under the head **Total Other Funds** is Rs1,560/-. However, as per details of funds shown in Annexure-A in the affidavit dated 10.01.2022 filed on behalf of judgment debtor, a sum of Rs.514 crores is committed to the salary, medical and post retiral benefits of employees and Rs.114 crores is the portion of security deposit on smart cards which is refundable to the commuters. In the considered opinion of this Court, the said amount i.e. Rs.514+ Rs.114 crores has to be kept aside for the aforesaid purpose, however, from the remaining amount available in different bank accounts of judgment debtor as well as under other heads, the payments towards decreetal amount has to be made. The award dated 11.05.2017 has attained finality and cannot be allowed to remain as a paper award, therefore, the judgment debtor is duty bound to either divert its finds shown to be available in different heads mentioned in the affidavit of 14.02.2022 after seeking permission of the Central Government, if necessary, or raise loans to satisfy the award.

41. Accordingly, out of the funds available under the head **Total DMRC Funds** of Rs.1,452.10 cores, judgment debtor is directed to keep aside amount of Rs.628 crores (Rs.514+ Rs.114 crores) towards statutory expenses as mentioned herein above and from the remaining amount, part payment of decreetal amount be made within two weeks.

42. For the remaining outstanding amount judgment debtor is directed to make the payments in two equal instalments within two months. The first instalment shall be paid on or before 30.04.2022 and the second instalment shall be made on or before 31.05.2022.

43. With aforesaid directions, the present petition and pending applications are accordingly disposed of."

4. As would be evident from a reading of the aforesaid passages as appearing in the order of 10 March 2022, the Court after taking into

consideration the provisions of Section 89 of the 2002 Act as well as Section 60 of the **Code of Civil Procedure, 1908**[5] had proceeded to frame operative directions requiring the DMRC to liquidate the liability flowing from the Award from out of the "Total DMRC Funds", "Total Project Funds" and "Total Other Funds". The Court had additionally permitted DMRC to set apart a sum of Rs. 514+114 crores for the payment of salaries, medical and post-retirement benefits of employees and the security deposits retained by it in respect of smart cards which may have been issued.

5. The order of 10 March 2022 was assailed by DMRC only to the extent of the conclusions which came to be recorded by the Court and stood embodied in Para 30. It becomes pertinent to note that in Para 30, the Court had essentially answered the issues pertaining to computation of interest. The aforesaid challenge came to be negatived by the Supreme Court on 05 May 2022. DMRC is also stated to have moved a review petition in respect of the order of 10 March 2022 which also met a similar fate and came to be dismissed on 20 May 2022.

6. The matter thereafter came to be substantively reviewed by the Court and the issues which were canvassed on behalf of the DMRC were again adjudicated upon by the order of 20 June 2022. It becomes pertinent to note that while by this time the DMRC had proceeded to make certain payments, the Court found that even on that date, the Award remained unsatisfied. A reading of the said order would indicate that the bar of Section 89 was again raised and urged in

[5] Code

opposition to the execution proceeding as drawn as well as the liability of DMRC to liquidate the same from out of the Total DMRC Funds, Total Project Funds and Total Other Funds.

7. The Court in its order of 20 June 2022 observed as follows: -

> "**25.** Despite the Execution Judgment dated March 10, 2022, not having been challenged by DMRC, which directed payment of the outstanding decretal amount in two equal instalments by April 30, 2022 and May 31, 2022, respectively, and the Execution Judgment being in operation, DMRC has now submitted that time may be given to DMRC to arrange bank loans to pay the decretal amount.
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> **30.** The submission of DMRC regarding the deficiency of resources to satisfy the awarded amount, also goes contrary to the records available, as its total revenue for the financial year 2019-2020 was approximately Rs.7015 crores. Other bank balances (deposits) amounted to Rs.10,280 crores. DMRC being a completely sovereign entity having total assets of Rs.78,439 crores, will have no difficulty in raising debts for this purpose. Therefore, the conduct of DMRC shows that it has no intention to comply with the Execution Judgment. That apart, Mr. Sethi has also contested the averment of DMRC that its operations could be affected if its accounts were to be attached. Merely because the Judgment debtor is a sovereign entity, it cannot claim any differential treatment and refuse to honour a decree, more so, when the Supreme Court has upheld the Arbitral Award. In this regard he has referred to the Judgment in the case of ***Pam Developments Pvt. Ltd. v. State of West Bengal*, *(2019) 8 SCC 112***.
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> **32.** Considering the fact that the daily interest on the decretal amount is Rs.1.15 crores and the incremental interest from September 10, 2021 to May 31, 2022, is Rs.287.06 crores, it is in the interest of both the parties that the Supreme Court *vide* order January 24, 2022, in SLP (Civil) No. 770/2022 directed as follows:
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> > *"We request the High Court to take up the matter at the earliest and dispose of the Execution Application without any further delay, as consequences of the pendency of the said application are detrimental to the interest of the petitioner as well as the respondent".*
>
> **34.** Mr. Sethi has prayed, that DMRC not be granted any further time and be directed to immediately make full payment towards the

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balance decretal sums of Rs.4451.63 crores as on May 31, 2022, along with further interest up to the date of actual payment, for which the bank accounts and amounts lying in the credit of such bank accounts of DMRC along with all its fixed deposits, other financial investments and daily revenue / earnings be attached towards satisfaction of the decretal amount.

35. Mr. Parag P. Tripathi, learned Senior Counsel appearing for the DMRC/Judgment debtor has stated the instant application filed by the DAMEPL praying for an order of attachment of bank accounts of the DMRC including the fixed assets to the extent of Rs.4427.41 crores, i.e., the amount which is calculated as payable by DMRC under the Arbitral Award up to May 10, 2022. Admittedly, Rs.2444.87 crores have already been paid in the escrow account of the decree holder, and the remaining amount to be paid is Rs.2652.17 crores. He has admitted that this Court *vide* order dated March 10, 2022, had directed DMRC to either divert the funds shown to be available under different heads mentioned in the affidavit of February 14, 2022, after seeking permission of the Central Government, if necessary or raise loans to satisfy the Award. It was further directed to keep aside a sum of Rs.628 crores from the amount of Rs.1452 crores available under the head of DMRC Funds and from the remaining amount, make part payment of the decretal amount within two weeks.

45. <u>It is a fact that the execution petition was disposed of on March 10, 2022, the directions of which have already been reproduced in paragraph 1 above. It is also a fact that the order dated March 10, 2022, was the subject matter of a challenge in Civil Appeal No.3657/2022 to the extent of Paragraph 30 of the order dated March 10, 2022. The appeal was dismissed by the Supreme Court on May 05, 2022. The review petition filed by the Judgment debtor seeking review of the order dated March 10, 2022, has been dismissed by this Court vide order dated May 20, 2022</u>.

46. The submission of Mr. Sethi is that, after the directions given in the order dated March 10, 2022, only an amount of Rs.166.44 crores has been paid to the decree-holder on March 14, 2022. The DMRC has not paid any amount thereafter.

51. Mr. Tripathi has opposed the plea by stating that Section 89 of the MR Act is in the nature of statutory protection conferred by the Parliament in recognition of the functions carried out by DMRC in the public interest. He also stated that as per Section 89 of the MR Act only earnings of DMRC would be open for attachment and not the amounts held by DMRC in Trust for construction of metro

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projects in NCR and elsewhere. In other words, any attachment of funds lying in the bank accounts of DMRC would lead to the stoppage of operation and maintenance activities of DMRC and halting of public carriage activities of DMRC.

52. Similar submissions were made by the applicant / decree holder before this Court which resulted in the order dated March 10, 2022. The Court in Paragraph 40 gave an option to the DMRC / Judgment debtor either to divert its funds shown to be available in different heads after seeking the permission of the Central Government or raise loans to satisfy the Award. It is the case of the DMRC / Judgment debtor that the Central Government has not granted sanction for diversion of funds in terms of their communications dated April 13, 2022 and April 27, 2022, respectively.

53. Rather the case of the DMRC / Judgment debtor is that in terms of the liberty granted for raising loans, the DMRC has called for quotations / proposals for raising Capex loan from various banks for payment of the amount due and payable to the applicant/ decree holder and the DMRC expects to process the bids of the banks by July 10, 2022, and expects the signing of loan documents by August 15, 2022. He, during his oral submissions, did state that the matter be posted in the early part of August 2022 to ensure payment of the outstanding amount to the applicant / decree holder.

54. Noting the submissions made by the counsels, this Court is of the view that the challenge to the order dated March 10, 2022, by the petitioner was decided on May 05, 2022, and action has been initiated by the DMRC, as noted above, time should be granted to DMRC to ensure payment of the outstanding amount to the applicant/decree holder on or before August 05, 2022. It is ordered accordingly."

8. The said order was challenged by the execution petitioner before the Supreme Court by way of Special Leave Petition (C) 11358/2022. The said petition was ultimately withdrawn on 14 October 2022. The order sheet would reflect that on 18 November 2022, the Court was apprised of a proposal which was being

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considered by the **Union Ministry of Housing and Urban Affairs**[6] and the **Government of National Capital Territory of Delhi**[7] with respect to equity infusion in order to enable DMRC to meet the liability that stood created pursuant to the Award. The learned Attorney General, who had appeared on that occasion on behalf of the DMRC, had consequently prayed for the deferral of proceedings to enable both the principal shareholders to explore that possibility. The matter was accordingly directed to be re- notified on 12 December 2022.

9. The said order of 18 November 2022 was challenged by the execution petitioner by way of Special Leave Petition(C) 21396/2022. The said petition came to be disposed of on 14 December 2022 in the following terms:-

> "This petition basically challenges the order passed by the learned Single Judge of the High Court dated 18.11.2022 whereby adjourning the matter to 12.12.2022.
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> Shri R. Venkatramani, learned Attorney General for India basically objects to the tenability of the petition. He submits that the special leave petition arises only out of an adjournment matter and the court should not entertain the same.
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> In ordinary circumstances, we would not have entertained the matter.
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> The arbitration award passed in favour of the present petitioners has reached finality in as much as in special leave petition filed by the respondent, has been dismissed by an elaborate judgment of this Court dated 09.09.2021.
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> Subsequent thereto, the petitioner(s) herein had filed a petition under Section 36 of the Arbitration and Conciliation Act.
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> In the said petition, certain directions were issued by the learned Single Judge of the High Court of Delhi vide order dated

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[6] MoHUA/Union Ministry
[7] GNCTD

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10.03.2022 and special leave petition challenging the same was also dismissed by this Court vide order dated 05.09.2022. In spite of that, the matter is only being adjourned by the learned Single Judge from time to time. The law with regard to execution is not different either for the Government or the Statutory Corporation.

We, therefore, direct the learned Single Judge of the High Court to proceed further with the execution of the award expeditiously and take the same to its logical end in accordance with law as early as possible and in any case, within a period of three months from today.

The special leave petition is disposed of accordingly. Pending application(s), if any, stand(s) disposed of."

10. When the matter was taken up thereafter on 04 January 2023, the Court was apprised that the GNCTD in term of its communication of 21 December 2022 had apprised DMRC that it would not be desirous of participating either in any rights issue or in considering further infusion of funds by way of equity. The learned Attorney General, however, made a statement that both the Union Government as well as DMRC were actively debating on how the impasse which existed could be resolved. On his request, the matter was adjourned and posted for 19 January 2023.

11. On 31 January 2023 when the execution petition was again taken up for consideration, the learned Attorney General informed the Court that the measures which were being considered for adoption and resolution could not fructify. He, however, prayed for the deferral of the proceedings to grant DMRC one last opportunity to explore all possible modes in terms of which the debt owed to the execution petitioner could be liquidated.

12. When the matter was thereafter called on 17 February 2023, the Court on hearing submissions proceeded to pass the following order: -

"**EX.APPL.(OS) 2933/2022 IN OMP (ENF.) (COMM.) 145/2021**

1. The present execution proceedings have been instituted in respect of an Arbitral Award which was rendered on 11 May 2017. In terms of the said Award and as per the disclosures made in these proceedings by the Enforcement Petitioner, the total gross decretal amount along with interest up to 14 February 2022 stood at Rs. 8009.38 crores as on that date. According to the petitioner, out of the aforesaid amount, a sum of Rs. 1678.42 crores alone has been paid so far by the Respondent **Delhi Metro Rail Corporation** [Respondent Corporation]. According to the Enforcement Petitioner, the said amount along with interest has further swelled to Rs. 6330.96 crores.

2. For the purposes of disposal of the proceedings today, the entire history of the present execution petition, the various orders passed thereon as well as those which were passed by the Supreme Court on challenges laid by respective parties need not be reiterated in this order. Suffice it to note that from the various additional affidavits which have been filed by DMRC post the order of the Supreme Court dated 14 December 2022, it is essentially submitted that despite requisite efforts having been expended, its two principal shareholders have been unable to arrive at a consensus of the manner in which the debt due and payable under the Award is proposed to be liquidated.

3. Mr. Sibal, learned Senior Counsel appearing for the Enforcement Petitioner, has commended for the consideration of the Court the judgment rendered by the Bombay High Court in **Bhatia Industries vs. Asian Natural Resources & Anr.**[2016 SCC OnLine BOM 10695] as well as of the Supreme Court in **Cheran Properties Ltd. vs. Kasturi & Sons Ltd.**[(2018) 16 SCC 413] to submit that in light of the position as it prevails today, the Court would be justified in lifting the corporate veil of the DMRC and proceeding further against the shareholders for the purposes of execution of the Award which undisputedly has attained finality. The Bombay High Court in **Bhatia Industries** while dealing with the issue of whether the doctrine of piercing of the corporate veil could be adopted in execution proceedings observed as follows: -

> "19. From the conspectus of the judgments which are referred to hereinabove, it is now quite well settled that the doctrine of piercing or removing corporate veil is applicable not only in the case of holding of subsidiary companies or in the case of tax evasion but can be equally applied in execution proceedings. It can be seen from these

judgments that the doctrine has been referred to also in cases:

(i) where "two separate corporate entities are functioning as if they are in partnership with one company as an alter-ego of the other company, where one company is bound hand and foot by the other";

(ii) where "parent company's management has steering influence on the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors"; and

(iii) where "the company is the creature of the group and the mask which is held before its face in an attempt to avoid recognition by the eye of equity or is a mere cloak or sham and in truth the business was being carried on by one person and not by the company as a separate entity".

(iv) where "two companies are inextricably inter-linked corporate entities".

20. We therefore hold that the concept of lifting the corporate veil is also available in execution proceedings and answer the question No. 1 above accordingly.

21. We are therefore of the view that the corporate veil can be lifted in cases where the Court from the material on record comes to the conclusion that the Judgment Debtor is trying to defeat the execution of the Award which is passed against him. In our view, the learned Single Judge was justified in carrying out that exercise."

5. Cheran Properties was dealing with the question of an Award binding even non-signatories to the arbitration agreement. While dealing with the aforesaid aspect, the Supreme Court had observed as follows: -

"20. Both these decisions were prior to the three-Judge Bench decision in *Chloro Controls* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] . In *Chloro Controls* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC

(Civ) 689] this Court observed that ordinarily, an arbitration takes place between persons who have been parties to both the arbitration agreement and the substantive contract underlying it. English Law has evolved the "group of companies doctrine" under which an arbitration agreement entered into by a company within a group of corporate entities can in certain circumstances bind non-signatory affiliates. The test as formulated by this Court, noticing the position in English law, is as follows : (SCC pp. 682-83, paras 71 & 72)

> "*71*. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [*Russell on Arbitration* (23rd Edn.)]
>
> *72*. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties."
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> The Court held that it would examine the facts of the case on the touchstone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a "direct commonality" of the subject-matter and on whether the agreement between the parties is a part of a composite transaction : (SCC p. 683, para 73)

> "*73*. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."

21. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court in *Chloro Controls case* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] held thus : (SCC p. 694, paras 103.1, 103.2 & 105)

> "*103.1*. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.
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> *103.2*. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.
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> *105*. We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory

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> affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."
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> xxx xxx xxx
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> 23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory."

6. The Court additionally takes note of the submission of Mr. Sibal who contended that in light of the unequivocal directions as appearing in the order of the Supreme Court dated 14 December 2022, both the Union Government as well as the GNCTD must be held to be liable to make good the monies payable under the Award.

7. Undisputedly, the two principal shareholders of the DMRC are the Ministry of Housing and Urban Affairs in the Union Government and the GNCTD. The ends of justice would thus warrant the said shareholders being placed formally on notice and being invited to address submissions before this Court proceeds in the matter and evolves and adopts an appropriate measure for the purposes of recovery of the moneys payable under the Award.

8. Consequently, let the Ministry of Housing and Urban Affairs in the Union Government as well as the GNCTD acting through its Chief Secretary be impleaded in the present proceedings. Ordered

accordingly. The Court requests learned counsel for the Enforcement Petitioner to effect service on the said respondents *dasti* in addition to other permissible modes. The Court additionally grants liberty to learned counsel to effect service upon the Union Ministry through the office of the learned ASG and upon the Chief Secretary of the GNCTD through the office of the Standing Counsel.

9. The newly impleaded respondents shall address submissions in light of what stands recorded hereinabove. The Court hopes and trusts that the shareholders shall bear in mind that the impasse which exists needs to be resolved expeditiously bearing in minding the peremptory directions of the Supreme Court as well as the need to protect and preserve the DMRC which not only represents a project of immense public importance but also constitutes the lifeline for the residents of the NCT.

10. Let the execution petition be called again on 20.02.2023.

11. Order *dasti* under the signatures of the Court Master.

CONT.CAS(C) 654/2022, CONT.CAS(C) 845/2022

List on the date fixed."

13. Based on the directions issued, both the Union Ministry as well as the GNCTD entered appearance and were also heard in the matter. On 27 February 2023, the following order came to be passed: -

"**EX.APPL.(OS) 2933/2022 (U.O. XXI R. 1(c) r/w S. 151CPC) in OMP (ENF.) (COMM.) 145/2021**

1. The instant execution application has been continuing on the Board of this Court for the purposes of enforcement of the Award dated 11 May 2017 which has attained finality. Pursuant to the order passed by the Court on 17 February 2023, the learned ASG along with Mr. Kurup, CGSC has appeared for the Union Ministry. Mr. Vashisht learned senior counsel assisted by Mr. Santosh Tripathi, Standing Counsel has appeared for the Government of National Capital Territory of Delhi [GNCTD].

2. At the outset, and before the Court proceeds further to deal with the objections which are taken both by the Union Ministry as well as the GNCTD and which pertain to the limited liability principle which applies to a shareholder and before the Court proceeds to consider and rule on the issue of whether circumstances warrant the corporate veil of the DMRC being lifted, it would appear

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> expedient to call upon the Union Government to take a decision on whether it proposes to accord sanction for the attachment of the movable and immovable assets of the DMRC for the purposes of satisfaction of the amounts payable under the Award. The aforesaid exercise would have to be undertaken in light of the provisions of Section 89 of the Metro Railways (Operation and Maintenance) Act, 2002.
>
> 3. In order to enable the competent authority in the Union Government to take that decision and place the same on the record of these proceedings, let the matter be called again on 02.03.2023 at 2:15 PM."

14. As would be evident from a reading of the order of 27 February 2023, the Court had granted another opportunity to the Union to consider the grant of consent as contemplated under Section 89 of the Act and for the competent authority to take a decision in that regard and place the same on the record. Although the learned ASG had placed for the perusal of the Court an affidavit which purported to convey a decision taken by the competent authority not to accord consent, the formal order which may have embodied that decision despite request had not been placed on the record. The aforesaid decision which is dated 01 March 2023 was ultimately placed on the record by way of an additional affidavit dated 03 March 2023.

15. It would be pertinent to recall that the order of 10 March 2022 had referred to three broad heads in which funds were held by the DMRC. These were described as the **"Total DMRC Funds"**, the **"Total Project Funds"** and **"Total Other Funds"**. The Total DMRC Funds were disclosed to be the funds available with the corporation and contributed by the Union Government as well as GNCTD. As per the disclosures made in these proceedings as on 14 February 2022, DMRC held a sum of Rs. 1452.10 crores under the head of Total

DMRC Funds, Rs.2681.29 crores under the head of Total Project Funds and Rs.1560.86 crores in Total Other Funds.

16. Total DMRC Funds as per the disclosures made in these proceedings relate to all earnings obtained by DMRC including from operation and management of property business, consultancy, and external project fee. The Total Project Funds are the equity and debt funds made available to it by its shareholders, namely, the Union Government and GNCTD and loans from bilateral or multilateral agencies for construction of metro lines in Delhi. Other than the aforesaid, DMRC holds funds titled Total Other Funds and which was also described at some places as "Other Than DMRC Funds". That fund holds moneys received by DMRC from external agencies including various State Governments for the purposes of execution of metro rail works and in respect of which consultancy fee/supervisory fee is earned by it.

17. Before proceeding further and till the Court notices the disclosures which were made in the last affidavit filed by the DMRC dated 03 March 2023, it would be pertinent to briefly note the details which had been proffered with respect to the aforesaid three funds at different stages of the present proceedings.

18. In an affidavit filed on 21 December 2021, the Total DMRC Funds were shown to stand at Rs.1642.69 crores. Under the heading of Total Project Funds, DMRC is stated to have held an amount of Rs.2412.12 crores. The Total Other Funds had a credit balance of Rs. 1746.12 crores. In the same affidavit, DMRC disclosed that it had

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Rs.1642.69 crores as cash which was available. However, after making various provisions, it was asserted that the net available cash stood at minus (-) Rs.6.31 crores. In a subsequent filing which was made on 05 January 2022, DMRC disclosed its fund position to be as follows:-

I. Total DMRC Funds on 22 December 2021 = Rs 1642.69 crores

II. Total DMRC Funds on 03 January 2022 = Rs 1520.63 crores

19. As per the aforesaid disclosures, it is apparent that as on 03 January 2022, Total DMRC Funds were stated to stand at Rs.1520.63 crores. In this affidavit, it was further disclosed that Rs.514 crores stood committed towards liabilities relating to payments to be made to employees on account of leave, salaries and post-retirement medical expenses. The security deposits towards smart cards were pegged at Rs.114 crores. The grand total of funds held under Total Project Funds as on 21 December 2021 stood at Rs.5,800.93 crores and on 03 February 2022 was stated to be Rs. 6208.03 crores.

20. By an additional affidavit which was filed on 10 February 2022, DMRC set out its funds position as on 09 February 2022 as under:-

I. Total DMRC Funds = Rs. 1,478.39 crore

II. Total Project Funds = Rs. 2,668.81 crore

III. Total Other Funds = Rs. 1,561.30 crore

Grand Total = Rs 5708 crore

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21. In yet another additional affidavit, the funds position of DMRC as existing on 14 February 2022 were disclosed as under:-

I. Total DMRC Funds = Rs. 1452.10 crore

II. Total Project Funds = Rs. 2681.29 crore

III. Total Other Funds = Rs. 1560.86 crore

Grand Total = Rs. 5694.25 crore

22. However, by the time DMRC filed its additional affidavit dated 13 May 2022, Total DMRC Funds were shown to have drastically reduced to Rs.291.80 crores, Total Project Funds to Rs.66.24 crores and Total Other Funds to Rs. 651.46 crores. It further made a disclosure with respect to its funds position as standing on 27 May 2022. The aforesaid disclosure which finds place at page no. 1484[8] set out the fund position with it being contended that the Total DMRC Funds stood at Rs. 267.66 crores, Total Project Funds at Rs. 53.59 crores and Total Other Funds at Rs. 639.37 crores.

23. The aforesaid reduction in the funds held by DMRC is of significance since by this time, the Court by its order of 10 March 2022 had already framed directions requiring the corporation to effect payments and liquidate the liabilities flowing from the Award. The reduction in funds clearly appears to have taken place post the passing of the aforesaid order.

24. The reduction in funds appears to have occurred in light of the communications which were exchanged between DMRC, the Union

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Ministry and the GNCTD commencing from 06 April, 2022. The aforesaid communications which have been placed on the record establish that DRMC approached the Union after the passing of the 10 March 2022 order for permission to utilize the funds standing to its credit. On receipt of that request, the Union Ministry directed the DRMC to repatriate all monies held by it in respect of various projects taking the position that the unspent balance had been released in the form of equity and debt to enable DMRC to undertake necessary works for the Delhi Metro Phase-IV and that those funds could not be utilized by it for any other purpose. DMRC acting upon those directives of the Union appears to have proceeded to repatriate the aforesaid sums back to the Union Ministry.

25. In terms of the subsequent disclosures as made in the additional affidavit filed by the DMRC dated 18 January 2023, DMRC brought on record communications addressed to the Union Government as well as the GNCTD for infusion of equity funds. However, and as was noticed hereinabove, this no longer remains a live issue since the two principal shareholders have failed to reach a consensus on that mode of infusion of funds.

26. On 03 March 2023, DMRC placed on record its funds position through which it sought to assert that the Total DMRC Funds available with it as on 03 March 2023 stood at Rs. 450.05 crores. However, net DMRC funds were shown to stand in the negative at Rs. (-) 2210.58 crores. This was explained by it to be the result of requisite provisions having been made with respect to the retiral benefits of employees, contractual liabilities, operation and

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maintenance expenditure and the amounts payable in respect of the Japan International Corporation Agency Loan. The reduction under the three heads was thereafter explained by an additional affidavit filed on 03 March 2023 and certain charts which were placed on the record.

27. In terms of the charts which were placed for the consideration of the Court, Mr. Johri, learned Counsel appearing for the DMRC pointed out that out of the balance as was held on 14 February 2022 and further funds which were received from the Union Government as well as the GNCTD, various sums were repatriated in light of the directives received by the DMRC from the Union Government. The attention of the Court in this respect was drawn to various communications received by DMRC from the Union Government including those dated 13 April 2022 and 27 April 2022. The said communications themselves appear to have been prompted by the DMRC's requests to the Union Ministry for appropriations being made from the Total DMRC Funds and Total Project Funds to comply with the order of 10 March 2022.

28. The Union Government conveyed its position in terms of the aforenoted communications asserting that since the said funds had been provided specifically for various projects, the same cannot be utilized by DMRC for any purpose other than what was originally intended. The Union Ministry again referred to the provisions of Section 89 of the 2002 Act in this regard. It asserted that those funds in any case are not liable to be diverted for satisfaction of any decree passed against DMRC. It accordingly directed DMRC to repatriate the

funds so held by it. DMRC is stated to have accordingly proceeded to transfer the aforesaid funds to the Union Government and other agencies.

29. The comparative position of the Project Funds was also explained by Mr. Johri with the aid of the following two charts:-

"DELHI METRO RAIL CORPORATION LIMITED
Comparative position of DMRC funds

Rs. In Crore

	Particulars	03.03.2023	14.02.2023	Difference	Remarks
1.7	Traffic Earning	202.47	84.40	1,002.05	**Rs 920.75 crore** paid to DAMEPL pursuant to orders of Hon'ble High Court as detailed below: -Rs. 600 crore on 23.02.2022 (UTR No. UBINH22054868199) -Rs. 166.44 crore on 14.03.2022 (UTR No. UBINH22073136971) -Rs. 154.31 crore on 05.09.2022 (UTR No. PUNBR52022090516097665)
1.10	Property Business	5.07	946.67		
2.2	Consultancy	27.44	168.36		
3.3	External project fee	215.07	252.67		
		450.05	**1,452.10**		

Avg. passenger journeys in February 2022 **31.85 lakhs**
Avg. passenger journeys in February 2023 **52.8 lakhs**"

"DELHI METRO RAIL CORPORATION LIMITED

Comparative position of Project funds

Rs. in crore

Item No.	Particulars	03.03.2023	14.02.2023	Difference
4.3	Phase-III	35.65	75.23	-39.58

5.10	Phase-IV	267.08	2,606.06	-2,338.98
		302.73	**2,681.29**	**-2,378.56**

	Particulars	(Rs. in crore)
	Balance as on 14.02.2022	2,681.29
Add	Funds received from GoI, GNCTD etc.	4,773. 15
Less	Debits towards Gel, GNCTD, project expenditure etc.	-7.151 .71
	Balance as on 03.03.2023	**302.73"**

30. Insofar as the position as it prevails today, it is evident that a sum of Rs. 450.05 crores is available under Total DMRC Fund, Rs. 302.73 crores under the Total Project Funds and Rs. 699.61 crores under the Total Other Funds.

31. During the pendency of these proceedings and post the two shareholders having failed to concur on the question of equity participation, the record bears out that DMRC had approached its shareholders for being provided sovereign guarantees to enable it to raise loans from banks and financial institutions and use those funds for the purposes of satisfaction of the Award. DMRC has placed on the record the steps taken by it for obtaining Capex Loans in this direction. It is also shown to have received various bids from banks and financial institutions. Although it had specifically requested both the Union Ministry as well as the GNCTD for extension of sovereign guarantees as were being formally required by banks and financial institutions, it failed to receive any response thereto. In fact, even when the matter was closed for judgement, on that date too neither the Union Ministry nor the GNCTD appear to have taken any decision in this regard. At least the Court was neither apprised of any decision

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taken in this respect nor were learned counsels, in the absence of instructions, in a position to provide details in respect of the aforesaid proposal. The Court was also not informed of any reason which may have prevailed upon the two principal shareholders to not accede to the request as made by DMRC.

32. DMRC is also stated to have addressed communications to both the Union Ministry as well as the GNCTD for the grant of an interest free subordinate debt in the sum of Rs. 3565.64 crores. Those requests as embodied in its letter of 18 January 2023 have also not been attended to and in any case no final decision has been communicated by the competent authorities in the Union Government as well as the GNCTD.

33. Mr. Johri, learned counsel appearing for the Corporation had laid stress on the fact that the DMRC performs a vital public function with the metro rail network managed by it constituting an essential lifeline for the citizens residing in the NCT. It was submitted more than five million people across the NCT avail of the facilities provided by that network every day. It was submitted that DMRC had made herculean efforts even during the pandemic to ensure that the metro rail network remained functional and people were provided an efficient and economical mode of transport for their daily commute. Mr. Johri submitted that the metro rail network constitutes an essential service which is availed of by residents of the NCT and that the DMRC has always carried out its functions and discharged its obligations keeping the aforesaid aspect in mind.

34. Mr. Johri submitted that DMRC had made sincere and genuine efforts to meet the obligations flowing from the Award and that it was only on account of the huge losses suffered by it that it has been unable to meet its liabilities flowing therefrom. Mr. Johri also submitted that the judgment of 10 March 2022 itself had provided that the diversion of moneys from the three principal funds would be subject to due permission being accorded by the competent authority. According to learned counsel, it was in the aforesaid backdrop that it had approached the Union Ministry for grant of requisite permission. However, Mr. Johri submitted that in light of the directives issued by the Union Government noticed hereinabove, it was constrained to return all funds of the Union Government which were held by it at the relevant time.

35. Consequent to the Court having placed both the Union Ministry as well as the GNCTD on notice, both parties had appeared and had addressed elaborate submissions which are noticed hereinafter.

36. Appearing for the GNCTD, Mr. Tripathi, learned senior counsel had contended that the execution petitioner had woefully failed to either aver or disclose the basis on which the shareholders were proposed to be held liable. Mr. Tripathi submitted that in order to invoke the principle of lifting of the corporate veil, it was incumbent upon the execution petitioner to disclose the basis on which that principle was sought to be applied. Mr. Tripathi submitted that the execution petitioner undisputedly has not sought to invoke that principle on the basis of fraud or divergence of funds. According to learned senior counsel, it is also not its case that the corporation had

been incorporated to avoid obligations owed. According to Mr. Tripathi that leaves the GNCTD to only presume that the aforesaid principle is sought to be invoked against it solely on the basis of it being a mere shareholder.

37. Mr. Tripathi submitted that no precedent exists which may be read as even remotely recognizing a liability being foisted on a shareholder for the debts due and payable by a company. It was submitted that holding a shareholder liable for the dues of a corporate entity would fly in the face of the limited liability principle which stands established and engrained in our jurisprudence. Mr. Tripathi cited for the consideration of the Court, the judgment rendered by the **High Court of Justice (Family Division) of England and Wales** in **Faiza Ben Hashem versus Abdulhadi Ali Shayif & Anr.**[9] and more particularly to the following passages as appearing in the report: -

> "**159**. In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle in *Salomon v A Salomon & Co Ltd* [1897] AC 22, but clear statements to this effect are to be found in *Mubarak* at page 682 per Bodey J and *Dadourian* at para [679] per Warren J. Control may be a necessary but it is not a sufficient condition (see below). As Bodey J said in *Mubarak* at page 682 (and, dare I say it, this reference requires emphasis, particularly, perhaps, in this Division): "it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control."
> **160**. Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice. In common with both Toulson J in *Yukong Line Ltd* of Korea *v Rendsberg Investments Corporation of Liberia* (No 2) [1998] 1 WLR 294 at page 305 and Sir Andrew Morritt VC in *Trustor* at para [21], I take

[9] [2008] EWHC 2380 (Fam)

the view that the dicta to that effect of Cumming-Bruce LJ in In *re a Company* [1985] BCLC 333 at pages 337-338, have not survived what the Court of Appeal said in *Cape* at page 536:

> "[Counsel for Adams] described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon* & Co Ltd [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

161. Thirdly, the corporate veil can be pierced only if there is some "impropriety; see *Cape* at page 544 and, more particularly, *Ord* at page 457 where Hobhouse LJ said:

> "it is clear... that there must be some impropriety before the corporate veil can be pierced"

162. Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability. As Sir Andrew Morritt VC said in *Trustor* at para [22]:

> "Companies are often involved in improprieties. Indeed there was some suggestion to that effect in *Salomon v A Salomon & Co Ltd* [1897] AC 22. But it would make undue inroads into the principle of *Salomon's* case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough."

163. Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing. As the Vice Chancellor said in *Trustor* at para [23]:

> "the court is entitled to "pierce the corporate veil" and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s)."

> And in this connection, as the Court of Appeal pointed out in *Cape* at page 542, the motive of the wrongdoer may be highly relevant.
>
> **164**. Finally, and flowing from all this, a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide remedy for the particular wrong which those controlling the company have done. In other words the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."

38. Emphasis was laid on the enunciation of the legal position relating to the piercing of the corporate veil being attracted only in cases of fraud or in cases where it be established that the corporate structure was a mere facade. *Faiza Ben Hashem* holds that the doctrine of piercing of the corporate veil cannot be invoked merely because it is thought to be necessary in the interest of justice. Explaining the position which would prevail in case an impropriety be alleged, *Faiza Ben Hashem* enunciated the legal position to be that the alleged impropriety must be linked to the use of the company structure to avoid or conceal a liability. *Faiza Ben Hashem* proceeded further to postulate the necessary imperative of the twin tests of control of the company by the wrongdoer and misuse of the company as a devise or facade as being necessary for the purposes of the aforesaid principles being held to apply.

39. Mr. Tripathi also drew the attention of the Court to a more recent decision handed down in **Prest v Prest and Ors.**[10] where the U.K. Supreme Court explained the concept of piercing of the corporate veil as under: -

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[10] [2013] UKSC 34

"**[34]** These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about. Thus in a case like VTB *Capital plc v Nutritek International Corp*, where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract, the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist. The objection to that argument is obvious in the case of a consensual liability under a contract, where the ostensible contracting parties never intended that anyone else should be party to it. But the objection would have been just as strong if the liability in question had not been consensual.

[35] I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in *Ben Hashem* v *Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in VTB *Capital plc v Nutritek International Corp* [2012] 2 BCLC 437 who suggested otherwise at [79]. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

40. Learned Senior Counsel also cited for the consideration of the Court the judgment rendered by the United States District Court for the Northern District of California in **Ahcom Ltd. versus Smeding[11].** The said court while dealing with the issue of piercing of the corporate veil as applied by courts in California had held as follows:-

> "When applying these rules to particular cases, California courts have considered a variety of 12 factors, including: commingling of assets; diversion of corporate assets to personal use; whether the individual defendants held themselves out as personally liable for the debts of the corporation; whether the individual defendants acted in bad faith; whether the individual defendants entered into contracts with the intent to avoid performance by using the corporate entity as a shield against personal liability; whether the individuals and corporation used the same office; whether they employed the same attorney; whether the individuals used the corporation to procure labor, services and merchandise for another person or entity; whether the individuals failed to adequately capitalize the corporation; and whether the individuals failed to maintain minutes or adequate corporate records. Assoc. Vendors, 210 Cal. App. 2d at 838-840 (collecting cases)."

41. Mr. Tripathi further submitted that similar principles have been adopted in Australia and placed for the perusal of the Court the judgment handed down by the High Court of Australia in **Industrial Equity Limited & Ors. v. Blackburn & Ors.[12]** Mr. Tripathi relied upon the following passages from that decision: -

> "In the first place, it is a natural consequence of the recognition of the separate personality of each company, a recognition which derives from *Salomon v. Salomon & Co. Ltd.* (28), and which has been confirmed by *Lee v. Lee's Air Farming Ltd.* (29). It has been said that the rigours of the doctrine enunciated by *Salomon v. Salomon & Co. Ltd.* have been alleviated by the modern requirements as to consolidated or group accounts introduced in the United Kingdom by the *Companies Act*, 1948 and in New South Wales by the *Companies Act*, 1961 (N.S.W.)-see Gower,

[11] Case No. 07-1139 SC
[12] (1977) 137 C.L.R.

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Modern Company Law, 3rd ed. (1969), pp. 198-199. But the purpose of these requirements is to ensure that the members of, and for that matter persons dealing with, a holding company are provided with accurate information as to the profit or loss and the state of affairs of that company and its subsidiary companies within the group, information which would not be forthcoming if all the shareholders received was limited to the accounts of the holding company disclosing as assets the shares which it holds in its subsidiaries. It is for this purpose that the *Companies Act* treats the business group as one entity and requires that its financial results be incorporated in consolidated accounts to be circulated to shareholders and laid before a general meeting (s. 162 (4), s. 164 (1)) and requires that the accounts and other documents shall accompany the annual return which shall be lodged with the Corporate Affairs Commission (s. 158; Eighth Schedule, Pt II).

However, it can scarcely be contended that the provisions of the Act operate to deny the separate legal personality of each company in a group. Thus, in the absence of contract creating some additional right, the creditors of company A, a subsidiary company within a group, can look only to that company for payment of their debts. They cannot look to company B, the holding company, for payment (see *Walker v. Wimborne* (30)).

The *Companies Act* does not, in the case of holding companies, substitute the requirement for group accounts for the old requirement of accounts of the holding company itself. Group accounts are an additional requirement; the holding company is still obliged to lay before its shareholders in general meeting its profit and loss account and balance sheets (s. 162 (1) and (3)). containing the information prescribed by the statute and accompanied by the prescribed documents. Indeed, s. 162 in sub- s. (1) and sub-s. (4) draws a distinction between the "profit or loss of the company" and "the profit or loss of the company and its subsidiaries", thereby indicating, to my mind. that s. 376 (1) refers to the profits of the company, not those of the group. The predecessors of s. 376 (1), expressed in like terms, were in force well before the provisions as to group accounts were introduced. There are, of course, even stronger grounds for taking a similar view of art. 129 expressed, as it is, according to a time- honoured formula which originated long before group accounts or groups of companies became part of the company scene."

42. It would be pertinent to note that *Industrial Equity Limited* was essentially dealing with the accounting principle of consolidation of

group accounts and whether the aforesaid accounting practice could be said to enable the creditor of a company to move against the assets of a subsidiary within a group. It was in that context that the High Court of Australia observed that in the absence of a contract creating any additional right, the creditor can only look at the company which owes the debt and cannot seek recourse against any other company which may form part of that group.

43. Turning then to the principles relating to the lifting of the corporate veil as elucidated by our courts, Mr. Tripathi placed reliance on the judgment rendered by three learned Judges of the Supreme Court in **Balwant Rai Saluja & Anr. vs. AIR India Limited & Ors.**[13]. The said doctrine was explained by the Supreme Court in the following terms:-

> "**69**.*Vodafone case [*Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 : (2012) 3 SCC (Civ) 867] further made reference to a decision of the US Supreme Court in *United States v. Bestfoods* [141 L Ed 2d 43 : 524 US 51 (1998)] . In that case, the US Supreme Court explained that as a general principle of corporate law a parent corporation is not liable for the acts of its subsidiary. The US Supreme Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, only if it is shown that the corporal form is misused to accomplish certain wrongful purposes, and further that the parent company is directly a participant in the wrong complained of. Mere ownership, parental control, management, etc. of a subsidiary was held not to be sufficient to pierce the status of their relationship and, to hold parent company liable."
>
> **70.** The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the

[13] (2014) 9 SCC 407

company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of *Salomon* v. *Salomon & Co. Ltd.* [1897 AC 22 : (1895-99) All ER Rep 33 (HL)] Lord Halsbury LC, negating the applicability of this doctrine to the facts of the case, stated that : (AC pp. 30 & 31)

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

Most of the cases subsequent to *Salomon case* [1897 AC 22 : (1895-99) All ER Rep 33 (HL)] , attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "façade". However, there was yet to be any clarity on applicability of the said doctrine.

71. In recent times, the law has been crystallised around the six principles formulated by Munby, J. in *Ben Hashem* v. *Ali Shayif* [*Ben Hashem* v. *Ali Shayif*, 2008 EWHC 2380 (Fam)] . The six principles, as found at paras 159-64 of the case are as follows:

> (*i*) Ownership and control of a company were not enough to justify piercing the corporate veil;
>
> (*ii*) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;
>
> (*iii*) The corporate veil can be pierced only if there is some impropriety;
>
> (*iv*) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;
>
> (*v*) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and
>
> (*vi*) The company may be a "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.

72. The principles laid down by *Ben Hashem case* [*Ben Hashem* v. *Ali Shayif*, 2008 EWHC 2380 (Fam)] have been reiterated by the UK Supreme Court by Lord Neuberger in *Prest* v. *Petrodel Resources Ltd.* [(2013) 2 AC 415 : (2013) 3 WLR 1 : 2013 UKSC 34] , UKSC at para 64. Lord Sumption, in *Prest case* [(2013) 2 AC

415 : (2013) 3 WLR 1 : 2013 UKSC 34] , finally observed as follows : (AC p. 488, para 35)"

> "*35*. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in *LIC* v. *Escorts Ltd.* [(1986) 1 SCC 264] , while discussing the doctrine of corporate veil, held that : (SCC pp. 335-36, para 90)"

> "*90*. … Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."

74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the

company. The application would thus depend upon the peculiar facts and circumstances of each case."

44. *Balwant Rai Saluja* also noticed the decision in *Faiza Ben Hashem* and had reiterated the position of law regarding the piercing principle as was enunciated by the Supreme Court in **Life Insurance Corporation of India vs. Escorts Ltd.**[14]. It was further clarified that while the doctrine of piercing the veil enables the Court to disregard the separate legal personality of a company, the same is liable to be applied in a restrictive manner and only in circumstances where it is evident that the company was a mere camouflage or sham.

45. Learned Senior Counsel then cited for the consideration of the Court the judgment rendered by this Court in **Balmer Lawrie & Co. Ltd. vs. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.**[15] It becomes relevant to note that *Balmer Lawrie* was rendered on a petition filed under Section 36 of the Act. While negating the argument of an Award being enforced against non-parties, the learned Judge made the following pertinent observations: -

> "**12.** In view of the above, the only question that needs to be addressed in the present petition is whether this Court can lift the corporate veil while enforcing the arbitral award and whether the necessary grounds for doing so have been established?
> **13.** In the first instance, it is doubtful whether this Court could enforce the arbitral award against non parties to the arbitration agreement. It is trite law that an arbitral Tribunal draws its jurisdiction from the agreement between the parties and persons who are not party to the arbitration agreement cannot be proceeded against by an arbitral Tribunal. Thus, an arbitral award made by an arbitral Tribunal against any person who is not a party to the arbitration agreement would be wholly without jurisdiction and

[14] (1986) 1 SCC 264
[15] 2017 SCC OnLine Del 7519

unenforceable. There may be exceptional cases where a Court may compel persons who are not signatories to an arbitration agreement to arbitrate provided it is established that the non-signatory(ies) are either claiming through signatory(ies) or there was clear intention to be bound as parties (see: Chloro Controls India Private Limited v. Severn Trent Water Purification Inc & Ors., MANU/SC/0803/2012 : VII (2012) SLT 502 : (2013) 1 SCC 641). However an arbitrator cannot lift the corporate veil and proceed against non parties. An arbitration is consensual. It is based on the agreement between parties. The arbitrator derives his jurisdiction to adjudicate disputes from the consent of parties, therefore, he is not in a position to enlarge the scope of his influence and extend his jurisdiction to non-parties by exercise of his limited jurisdiction based on the consent of parties.

14. Though a Court can lift the corporate veil, the same can be done only in extraordinary circumstances and by due adjudicatory process. It is trite law that an executing Court cannot go behind the decree; it must be enforced as it is. Thus, it is not open for a petitioner to claim that although the decree is against one entity it must be enforced against another. However, there may be cases where it is found that the assets of the judgment debtor have been secreted, siphoned off, or by a fraudulent device ostensibly placed outside the control of the judgment debtor, in an endeavour to frustrate the enforcement of the decree. In such cases, the Court is not powerless to extend its reach to third parties to enforce the decree; however this is limited for recovering the assets of the judgment debtor. In the event a corporate facade is used to perpetuate such fraud, the corporate veil may be lifted.

15. In the present case, none of the grounds for lifting the corporate veil are established. The DH has not made out a case of egregious fraud; the same has been neither been pleaded nor established. Thus, there is no occasion for this Court to examine the question of lifting the corporate veil. The statement that the Mundhra family members have been conducting the affairs of the JD company is no ground for piercing the corporate veil. The decision of the Bench of this Court in V.K. Uppal v. M/s. Akshay International Pvt. Ltd. (supra) is also of no assistance to the petitioner. On the contrary, in that case, this Court had observed that "This Court as the executing Court cannot execute the decree against anyone other than the judgment debtor or against the assets/properties of anyone other than the judgment debtor. The identity of a Director or a shareholder is distinct from that of the company". ”

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It may only be observed that in *Balmer Lawrie*, the Court had ultimately found it unnecessary to deal with the issue since no foundation in support of invocation of the piercing principle had been laid.

46. It becomes pertinent to note that Mr. Sibal, learned Senior Counsel appearing for the execution petitioner, had sought the impleadment of the Union Ministry as well as the GNCTD in light of the principles which had been enunciated by a Division Bench of the Bombay High Court in **Bhatia Industries & Infrastructure Limited vs. Asian Natural Resources (India) Limited**[16] and where the said High Court had come to conclude that the veil of corporate personality could be lifted in execution proceedings. The said decision had been duly noticed by the Court in its order dated 17 February 2023 when it originally placed the Union Ministry and GNCTD on notice.

47. The Bombay High Court in *Bhatia Industries* had held as follows: -

> "**12.** It would be relevant if a reference is made to the judgment in *State of U.P.* v. *Renusagar Power Co.* This judgment noted the change in the concept of lifting of corporate veil. It has been observed in the said judgment that the concept of lifting of corporate veil is a changing concept and was permissible in the expanding horizon of modern jurisprudence. It will be relevant and useful to reproduce the relevant paragraphs of the said judgment in which evolution of this doctrine has been beautifully traced. Paras 51 to 72 of the said judgment are relevant and they read as under:—
>
> > "51. This naturally brings us to the question of lifting the corporate veil or piercing the corporate veil as we often call it. On behalf of the appellants, however, it was very strongly urged that in this case there was no ground for lifting the

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corporate veil and Shri. Trivedi, learned Additional Advocate-General, State of U.P., who was assisted by Shri. Gopal Subramaniam, submitted before us elaborate arguments and made available to us all the relevant documents, urged that there was no warrant either in law or in fact to lift the corporate veil and to treat Renusagar's plant as Hindalco's own source of generation. Shri. Trivedi urged that facts in this case do not justify such a construction and the law does not warrant such an approach. We may say that Shri. Trivedi mainly relied on the proposition that normally the court has disregarded the separate legal entity of a company *only* where the company was formed or used to facilitate evasion of legal obligations. He referred us to the observations of this Court in *Western Coalfields Ltd.* v. *Special Area Development Authority, Korba* [(1982) 1 SCC 125]. The facts of that case were, however, entirely different and it is useless to refer to them but at page 17 of the report, Chandrachud, C.J. speaking for the Court quoted the observations in *APSRTC* v. *ITO* [(1964) 7 SCR 17], where this Court had held that though the Transport Corporation was wholly controlled by the State Government it had a separate entity and its income was not the income of the State Government. While delivering the judgment in that case Gajendragadkar, C.J. referred to the observations of Lord Denning in *Tamlin* v. *Hannaford* [(1950) 1 KB 18] where Lord Denning had observed that the Crown and the corporation were different and the servants of the corporation were not civil servants.

52. Chandrachud, C.J. relied on the aforesaid observations and referred to *Pennington's Company Law*, 4th Edn., pages 50-51, where it was stated that there were only two cases where the court had disregarded the separate legal entity of a company and that was done because the company was formed or used to facilitate the evasion of legal obligations.

53. The learned Editor of *Pennington's Company Law*, 5th Edn., at page 49 has recognised that this principle has been relaxed in subsequent cases. He states that the principle of company's separate legal entity has on the whole been fully applied by the courts since *Salomon case* [1897 AC 22]. Corporate veil has been lifted where the principal question before the court was one of company law, and in some situations where the corporate personality of the company involved was really of secondary importance and the application of the old principle has worked hardship and injustice. In England, there have been only a few cases where

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the court had disregarded the company's corporate entity and paid attention to where the real control and beneficial ownership of the company's undertaking lay. When it had done this, the court had relied either on a principle of public policy, or on the principle that devices used to perpetrate frauds or evade obligations will be treated as nullities, or on a presumption of agency or trusteeship which at first sight *Salomon case* [1897 AC 22] seems to prohibit. Again at page 36 of the same book, the learned author notes a few cases where the courts have disregarded separate legal entity of a company and investigated the personal qualities of the shareholders or the persons in control of it because there were overriding public interests to be served by doing so.

54. Indubitably, in this case there was no question of evasion of taxes but the manner of treatment of the power plant of Renusagar as the power plant of Hindalco and the Government taking full advantage of the same in the case of power cuts and denial of supply of 100 per cent power to Hindalco, in our opinion, underline the facts and, as such, imply acceptance and waiver of the position that Renusagar was a power plant owned by Hindalco. Shri. Trivedi naturally relied on several decisions which we shall briefly note in aid of the submission that Renusagar's power plant could not be treated as Hindalco's power plant. He referred us to the well known case of *Aron Salomon* v. *A. Salomon & Co. Ltd.* [1897 AC 22] (at pp. 27, 30-31, 43, 56) to emphasise the distinction between the shareholders and the company. This point of view was emphasised by this Court also by Chandrachud, C.J. in *Western Coalfields Ltd. case* [(1982) 1 SCC 125] relying on *Rustom Cavasjee Cooper* v. *Union of India* [((1970) 1 SCC 248] where this Court held that a company registered under the Companies Act was a legal person, separate and distinct from its individual members. Property of the company was not the property of the shareholders. These propositions, in our opinion, do not have any application to the facts of the instant case. Shri. Trivedi also drew our attention to *Bank voor Handel en Schee pvaart N.V.* v. *Slatford* [(1953) 1 QB 248] where in the context of the international law property belonging to or held on behalf of a Hungarian national came up for consideration and the distinction between a shareholder and a company was emphasised and highlighted.

55. In *Kodak Ltd.* v. *Clark* [(1976) 1 SCC 248] the Court of appeal in England while dealing with an English company carrying on business in the U.K. owned 98 per cent of the

shares in a foreign company, which gave it a preponderating influence in the control, election of directors etc. of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholders. It was held that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax. Renusagar was not the alter ego of Hindalco, it was submitted. On the other hand these English cases have often pierced the veil to serve the real aim of the parties and for public purposes. See in this connection the observations of the Court of appeal in *DHN Food Distributors Ltd.* v. *London Borough of Tower Hamlets* [(1976) 3 ALL ER 462]. It is not necessary to take into account the facts of that case. We may, however, note that in that case the corporate veil was lifted to confer benefit upon a group of companies under the provisions of the Land Compensation Act, 1961 of England. Lord Denning at page 467 of the report has made certain interesting observations which are worth repeating in the context of the instant case. The Master of the Rolls said at page 467 as follows:

> Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdsworth & Co. (Wakefield) Ltd.* v. *Caddies* [(1955) 1 ALL ER 725]. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical

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point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

I realise that the President of the Lands Tribunal, in view of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this Court, we must decide differently from him. These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly.

56. Lord Justice Goff proceeded with caution and observed as follows at pages 468 and 469 of the report:

Secondly, on the footing that that is not in itself sufficient, still, in my judgment, this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever; thirdly, in my judgment, the nature of the question involved is highly relevant, namely whether the owners of this business have been disturbed in their possession and enjoyment of it. I find support for this view in a number of cases, from which I would make a few brief citations, first from *Harold Holdsworth & Co.* (*Wakefield) Ltd.* v. *Caddies* [(1955) 1 ALL ER 725] where Lord Reid said: (All ER pp. 737-38)

It was argued that the subsidiary companies were separate legal entities, each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment, this is too technical an argument. This is an agreement *in re mercatoria*, and it

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must be construed in the light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Mfg. Co. and, under the agreement of 1947, the directors of this company were to be the nominees of the appellant company. So, in fact, the appellant company could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective.

That particular passage, is I think, especially cogent having regard to the fact that counsel for the local authority was constrained to admit that in this case, if they had thought of it soon enough, DHN could, as it were, by moving the pieces on their chess board, have put themselves in a position in which the question would have been wholly unarguable.

I also refer to *Scottish Cooperative Wholesale Society Ltd.* v. *Meyer* [(1958) 3 ALL ER 66]. That was a case under Section 210 of the Companies Act, 1948 and Viscount Simonds said: (All ER p. 71)

> '… I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. He said:
>
> > "In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view".'

My third citation is from the judgment of Danckwerts, L.J. in *Merchandise Transport Ltd.* v. *British Transport Commission* [(1961) 3 ALL ER 495] where he said that the cases — (All ER p. 518)

> 'show that where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.'

The third ground, which I place last because it is longest, but perhaps ought to come first, is that in my judgment, in truth, DHN were the equitable owners of the property. In order to resolve this matter, it will be necessary for me to refer in some detail to the facts."

57**.** Shaw, L.J. also observed at page 473 as follows:

> "Even if this were not right, there is the further argument advanced on behalf of the claimants that there was so complete an identity of the different companies comprised in the so-called group that they ought to be regarded for this purpose as a single entity. The completeness of that identity manifested itself in various ways. The directors of DHN were the same as the directors of Bronze; the shareholders of Bronze were the same as in DHN, the parent company, and they had a common interest in maintaining on the property concerned the business of the group. If anything were necessary to reinforce the complete identity of commercial interest and personality, clause 6, to which I have referred already, demonstrates it, for DHN undertook the obligation to procure their subsidiary company to make the payment which the bank required to be made.
>
> If each member of the group is regarded as a company in isolation, nobody at all could have claimed compensation in a case which plainly calls for it. Bronze would have had the land but no business to disturb; DHN would have had the business but no interest in the land."

58. In this connection it would be useful to refer to *Harold Holdsworth & Co. (Wakefield) Ltd.* v. *Caddies* [(1955) 1 ALL ER 725], where Lord Morton of Henryton in England, at page 734 of the report observed as follows:

> "My Lords, this clause refers to a group of companies consisting of the appellant company and their existing subsidiary companies. I cannot read the clause as compelling the board to assign duties to the respondent in relation to the business of every company in the group. Nor can I read it as compelling the board to assign him duties in relation to the business of the appellant company. That business is not treated as being on a different footing from the business of British Textile or of another subsidiary of the appellant company, Whalley

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& Appleyard, Ltd., which is mentioned in the respondent's condescendence 3. As I read the clause, it leaves the board of the appellant company free to assign to the respondent duties in relation to the business of one only, or two only or all of the companies in the group, and to vary the assignment and the duties from time to time. Further, I think the clause leaves the board free to appoint another person to be 'a managing director', and to divide the duties and powers referred to in the clause between the respondent and the other managing director in such manner as they think fit. It is true that each company in the group is, in law, a separate entity, the business whereof is to be carried on by its own directors and managing director, if any; but there is no doubt that the appellant company, by taking any necessary formal steps, could make any arrangements, they pleased in regard to the management of the business of (for instance) British Textile. They owned all the issued capital and the directors were their nominees."

59. Lord Reid at pages 737-38 observed as follows:

"It was argued that the subsidiary companies were separate legal entities, each under the control of own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment, this is too technical an argument. This is an agreement *in re mercatoria*, and it must be construed in the light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Manufacturing Co. and, under the agreement of 1947, the directors of this company were to be the nominees of the appellant company. So, in fact, the appellant company could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective."

60**.** Our attention was drawn by Shri. Sen to *Scottish Cooperative Wholesale Society Ltd.* v. *Meyer* [(1958) 3 ALL ER

66], where Viscount Simonds of House of Lords observed at pages 71-72 as follows:

> "My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent of each other, competitors in the rayon market, and using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former. It will give an example of this. I observed that, in the course of the argument before the House, it was suggested that the company had only itself to blame if, through its neglect to get a contract with the society, it failed in a crisis to obtain from the Falkland Mill the supply of cloth that it needed. The short answer is that it was the policy of the society that the affairs of the company should be so conducted, and the minority shareholders were content that it should be so. They relied — how unwisely the event provided — on the good faith of the society, and in any case they were impotent to impose their own views. It is just because the society could not only use the ordinary and legitimate weapons of commercial warfare but could also control from within the operations of the company that it is illegitimate to regard the conduct of the company's affairs as a matter for which it had no responsibility. After much consideration of this question, I do not think that my own views could be stated better than in the late Lord President, Lord Cooper's words on the first hearing of this case. He said (1954 SC at p. 391):
>
> > 'In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.'
>
> At the opposite pole to this standard may be put the conduct of a parent company which says "our subsidiary company has served its purpose, which is our purpose. Therefore let it die" and, having thus pronounced

> sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this section is inept to cover such a case, it will be a dead letter indeed. I have expressed myself strongly in this case because it appears to me to be a glaring example of precisely the evil which Parliament intended to remedy."

61. Similarly, at page 84 of the report, Lord Keith's observations are also relevant to the facts of this case:

> "My Lords, if the society could be regarded as an organisation independent of the company and in competition with it, no legal objection could be taken to the actions and policy of the society. Lord Carmont pointed this out in the Court of Session. But that is not the position. In law, the society and the company were, it is true, separate legal entities. But they were in the relation of parent and subsidiary companies, the company being formed to run a business for the society which the society could not at the outset have done for itself unless it could have persuaded the respondents to become servants of the society. This the respondents were not prepared to do. The company, through the knowledge, the experience, the connections, the business ability and the energies of the respondents, had built up a valuable goodwill in which the society shared and which there is no reason to think would have been maintained, if not increased, with the Cooperation of the society. The company was in substance, though not in law, a partnership consisting of the society and the respondents. Whatever may be the other different legal consequences following on one or other of these forms of combination one result, in my opinion, followed in the present case from the method adopted, which is common to partnership, that there should be the utmost good faith between the constituent members. In partnership the position is clear. As stated in Lindley on *Partnership* (11th Edn.), p. 401:
>
> 'A partner cannot, without the consent of his co-partners, lawfully carry on for his own benefit, either openly or secretly, any business in rivalry with the firm to which he belongs.'
>
> It may not be possible for the legal remedies that would follow in the case of a partnership to follow here, but the principle has, I think, valuable application to the circumstances of this case.

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62**.** In *Charterbridge Corpn. Ltd.* v. *Lloyds Bank Ltd.* [(1969) 2 ALL ER 1185] at page 1194 Justice Pennycuick emphasised that the reality of the situation must be looked in.

63**.** Shri. Trivedi drew our attention to the decision in *Marshall Richards Machine Co. Ltd.* v. *Jewilt* [36 Tax Cases 511], where at page 525 of the report Lord Upjohn, J. observed that where you have a wholly owned subsidiary, and both the parent company and wholly owned subsidiary enter into trading relationships, there is, of course, a dual relation, but you cannot for the purposes of tax disregard the fact that there are, in fact, two entities and two trades, that is to say, the trade of each company. It is normally a question of fact whether the disbursement in question is laid out wholly and exclusively and for the purposes of the trade. In aid of this proposition and in furtherance Shri. Trivedi drew our attention to the profits of the two companies which were separately computed and also referred to Vol. C, p. 641 where the profits of Renusagar were separately indicated and Vol. C at p. 642 where the profits of Hindalco were separately indicated.

64**.** We are, however, of the opinion that these tests are not conclusive tests by themselves. Our attention was also drawn to the decision of the Madras High Court in *Spencer & Co. Ltd. Madras* v. *CWT* [(AIR 1969 Mad 359] where Veeraswami, J. held that merely because a company purchases almost the entirety of the shares in another company, there was no extinction of corporate character for each company was a separate juristic entity for the tax purposes. Almost on similar facts, are the observations of P.B. Mukharji, J. in *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.* [AIR 1969 Cal 238], where he held that holding company and subsidiaries are incorporated companies and in this context each has a separate legal entity. Each has a separate corporate veil but that does not mean that holding company and the subsidiary company within it, all constitute one company.

65**.** Mr. Justice O. Chinnappa Reddy speaking for this Court in *LIC* v. *Escorts Ltd.* [(1986) 1 SCC 264] had emphasised that the corporate veil should be lifted where the associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the

element of the public interest, the effect on parties who may be affected. After referring to several English and Indian cases, this Court observed that ever since *A. Salomon & Co. Ltd. Case [1897 AC 22]* a company has a legal independent existence distinct from individual members. It has since been held that the corporate veil may be lifted and corporate personality may be looked in. Reference was made to Pennington and Palmer's *Company Laws.*

66**.** It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order the profits of Renusagar have been treated as the profits of Hindalco.

67**.** In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(*c*) of the Act. The learned Additional Advocate-General for the State relied on several decisions, some of which have been noted.

68**.** The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The ghost of *Salomon*

case [1897 AC 22] still visits frequently the hounds of Company Law but the veil has been pierced in many cases. Some of these have been noted by Justice P.B. Mukharji in the *New Jurisprudence [Tagore Law Lectures, p.183]*

69**.** It appears to us, however, that as mentioned the concept of lifting the corporate veil is a changing concept and is of expanding horizons. We think that the appellant was in error in not treating Renusagar's power plant as the power plant of Hindalco and not treating it as the own source of energy. The respondent is liable to duty on the same and on that footing alone; this is evident in view of the principles enunciated and the doctrine now established by way of decision of this Court in *Life Insurance Corpn. of India* [(1986) 1 SCC 264] that in the facts of this case Sections 3(1)(c) and 4(1)(c) of the Act are to be interpreted accordingly. The persons generating and consuming energy were the same and the corporate veil should be lifted. In the facts of this case Hindalco and Renusagar were inextricably linked up together. Renusagar had in reality no separate and independent existence apart from and independent of Hindalco.

70**.** In the aforesaid view of the matter we are of the opinion that consumption of energy by Hindalco is clearly consumption by Hindalco from its own source of generation. Therefore, the rates of duty applicable to own source of generation have to be applied to such consumption, that is to say, 1 paisa per unit for the first two generating sets and nil rate in respect of third and fourth generating sets. It is appropriate to refer that having regard to the conduct of the State the power cuts matter and also the present proceedings the State should not be permitted to treat consumption of Renusagar's energy by Hindalco as anything other than (*sic* or) different from consumption of energy by Hindalco from its own source of generation. We are, therefore, of the opinion that in the facts of this case the corporate veil must be lifted and Hindalco and Renusagar should be treated as one concern and if that is taken the consumption of energy by Hindalco must be regarded as consumption by Hindalco from its own source of generation.

71**.** Inasmuch as the High Court upheld this contention of the respondent we are in respectful agreement of its views and the appeal directed against this finding of the High Court must, therefore, be rejected.

72**.** The electricity bill for arrears, subject to consideration of other aspects of the matter, that is to say, the validity of the

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order of rejection passed by the State on February 16, 1982 rejecting the claim for exemption would be treated hereinafter."

13. Even after the said judgment was delivered, it has now been held that even in respect of execution proceedings, this doctrine can be adhered to. The Delhi Delhi High Court in *Formosa Plastic Corporation Ltd.* v. *Ashok Chauhan* and Punjab and Haryana High Court in *Sai Sounds Private Limited* v. *Kiran Contractors Private Limited* have held that this doctrine can be applied even in execution proceedings.

14. The Delhi High Court in *Formosa Plastic Corporation Ltd.* (supra) has in terms held in para 45 as under:—

> "45. The question whether the assets and the properties in question are owned and/or possessed by Chauhan and/or the names in which they may have been acquired are fictitious or fraudulent or merely cloaks can be decided after parties have led evidence. The Court has always the power of lifting the corporate veil or mere cloaks where device is employed and the properties have been acquired fictitiously in others names for the purpose of committing illegalities or for defrauding others so as to enable it to pass appropriate orders to do justice between the parties concerned (See *DDA* v. *Skipper Construction Co. (P) Ltd.*, AIR 1996 SC 2005."

15. Brief facts in the said case were 'Formosa' and 'KOA' entered into agreement for supply of Resin. As per the said agreement, Formosa began delivering Resin but no payment was made by KOA. One Chavan had signed individual guarantee in 1993 in which he personally vouched for the "existence and future qualified claims of Formosa". The suit was filed by Formosa in District Court of Texas, USA. Decree was passed in favour of Formosa. Appeal filed against it was dismissed. Application was filed in execution of the decree before High Court of Justice, London. Leave was granted by the High Court, London to enforce the decree in India. In the execution proceedings various objections were raised and in that context Delhi High Court held that it was open for the Court in execution proceedings to resort to the power of lifting the corporate veil.

16. Punjab and Haryana High Court in *Sai Sounds Private Limited* v. *Kiran Contractors Private Limited*[1] has also taken a view that in execution proceedings corporate veil can be lifted. In para 10 of the said judgment, it has been observed as under:—

> "10. The issue of competency of the decree-holder to proceed against the assets of the Managing Director could be taken only if it is a circumstance when it is possible to tear the corporate veil. There is no difficulty in understanding the fundamental proposition that a company registered under the Companies Act is an independent entity and the liability of the company cannot be understood as constituting a personal liability for the Managing Director, except to the extent provided under the Income Tax Act. The known exceptions are exceptions which courts have accepted through judicial interpretation when the corporate veil could be lifted. The decision are abundant, which I do not feel constrained to cite that if in the suit a Managing Director is sought to be made as party along with the company when the liability is contracted by the Company, the Court will examine whether there has bee any fraud committed by the Managing Director to use the corporate cloak only as a facade to secure personal immunity. In this case, admittedly the decree is only aagainst the company and there is no reference to the Managing Director's personal liability. However, it must be noticed that when the execution petition was filed, the petitioner had made a specific reference to the fact of the admission made by the Managing Director of the Company offering to make the payment before the Company Court, while prefering the appeal, but failed to comply with the direction of the Company Court's order. A plea of undertaking and default persisted even before the Appellate Court against the decree when the Company was preferring an appeal through the Managing Director and seeking for stay. There was a direction for payment but he failed to comply with the direction. The decree-holder was, therefore, saying that the Managing Director of the Company had approached the Division Bench of the Calcutta High Court only with a motive to buy time and after the dismissal of appeals, the Managing Director was operating from House No. 703, Sector 3, Chandigarh, but evading all types of liabilities."

19. <u>From the conspectus of the judgments which are referred to hereinabove, it is now quite well settled that the doctrine of piercing or removing corporate veil is applicable not only in the case of holding of subsidiary companies or in the case of tax evasion but can be equally applied in execution proceedings.</u> It can be seen from these judgments that the doctrine has been referred to also in cases:

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(i) where "two separate corporate entities are functioning as if they are in partnership with one company as an alter-ego of the other company, where one company is bound hand and foot by the other";

(ii) where "parent company's management has steering influence on the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors"; and

(iii) where "the company is the creature of the group and the mask which is held before its face in an attempt to avoid recognition by the eye of equity or is a mere cloak or sham and in truth the business was being carried on by one person and not by the company as a separate entity".

(iv) where "two companies are inextricably inter-linked corporate entities".

26. On the basis of this material the learned Single Judge has observed that BIIL and BIL was one single economic entity which was being managed by Surinder Singh Bhatia and his close relatives.

33. It was then contended that BIIL had established the ownership of the said goods which were purchased by entering into High Seas Sale Agreement. It was submitted that the Appellant had also produced High Seas Sale Invoice/Debit Note. It was submitted that the learned Single Judge had rejected the said evidence of ownership of BIIL by holding that BILL had not shown that payment, if any, was made by it to the seller of the cargo. It was submitted that Respondent No. 2-Vitol had never disputed the aforesaid agreement and invoice in any way and had not placed any material before this Court to show that High Seas Sale Agreement and High Seas Sale Invoice/Debit Note were either false or incorrect. It was submitted that the finding of the learned Single Judge was given firstly without giving an opportunity to the Appellant to produce proof of payment by BILL. It was submitted that the Appellant had prepared an additional affidavit to bring on record the proof of payment by BIIL. At this stage, the learned Counsel appearing on behalf of Respondent No. 2 took an objection to the production of the additional affidavit at the hearing of the appeal. The objection raised by the learned Counsel for Respondent No. 2 is sustained and the Appellant cannot be permitted now to produce this additional affidavit.

34. In our view, this submission also cannot be accepted. It has to be noted that the learned Single Judge proceeded to examine the

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material on record which indicated that the BILL and the BIL was a single entity and has come to the said conclusion after piercing the corporate veil of both the companies.

35. It was then vehemently urged that the finding of the learned Single Judge that BIIL is an alter-ego of BIL was contrary to law and facts of the case and it was submitted that in any case BIIL cold not be held liable for the debt of BIL. It was submitted that the BILL was incorporated in 1993 and is a registered Company on the Bombay Stock Exchange since 5/4/2001. It was further submitted that 34% of the equity shares of the Company were held by public at large. It was further contended that BILL, from the time of its incorporation, has been carrying on business with regard to coal. It was further submitted that the learned Single Judge had relied on the following judgments to arrive at a conclusion that BIIL is an alter-ego of BIL.

"**a.** *Adams* v. *Cape Industries PLC* (1990) Ch. 433 CA.
b. *D.H.N. Food Distributors Ltd.* v. *Tower Hamlets London Borough Council* (1976) 1 W.L.R. 852.
c. *New Horizon Limited* v. *Union of India* (1997) Co. cases 785 (Del).
d. *New Horizon Limited* v. *Union of India* (1995) 1 SCC 478.
e. *State of U.P.* v. *Renu Sagar Power Company* (1988) 4 SCC 59.
f. *Jones* v. *Lipman* [1962] 1 All ER 442.
g. *Gilford Motor Co. Ltd.* v. *Horn* (1933) ALL ER REP 109.""

48. According to Mr. Tripathi, learned Senior Counsel appearing for the GNCTD, the aforesaid decision is clearly distinguishable on facts as was noticed by a learned Judge of the same High Court who had refused to invoke or adopt the principle of lifting of the corporate veil in execution proceedings relating to an Award which had been rendered. Mr. Tripathi, in this connection, drew the attention of the Court to the decision of **Mitsui OSK Lines Ltd. vs. Orient Ship Agency Pvt. Ltd.**[17] and more particularly to Para 74 thereof which reads as follows: -

[17] 2019 SCC OnLine Bom 6773

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"**74**. The Award Holder has not been able to produce a Single judgment where, as in the present case, the Additional Respondents are to be made personally liable to satisfy the decree passed against the Respondent/Judgment Debtor. In fact, the Judgment relied upon by the Award Holder viz. *Bhatia Industries And Infrastructure Ltd.* (supra) is entirely distinguishable on facts as in that case, the attachment was alleged to be made in respect of coal which belonged to BIIL and not the Judgment Debtor (BIL). It was when the said BIIL sought to vacate the attachment, the Division Bench of this Court concluded that both BIL and BIIL are in fact, one and the same and therefore, the attachment was in effect of the properties of BIL the Judgment Debtor. In fact, it appears from the decision of the Single Judge in case of *Bhatia Industries And Infrastructure Ltd.* (supra) that, the claim made by the BIIL that the coal belonging to it, could not be attached as BIIL is not the Judgment Debtor was held to be false and a finding was arrived at that the coal in fact belonging-to-BIL who was the Judgment Debtor. In the present case, the Award Holder is not going against the Associate Companies who are the Additional Respondent Nos. 1 to 4 in respect of particular assets claiming that they belong to the Judgment Debtor, but is in fact, making the Additional Respondents personally liable in respect of the Foreign Award passed against the Judgment Debtor. Hence, the judgment in *Bhatia Industries And Infrastructure Ltd.* (supra) will have no application in the facts and circumstances of the present case. In any event, the Supreme Court in the case of *Bhatia Industries And Infrastructure Ltd.* (supra) has kept the question of law open. Considering that the ratio decidendi arrived at in the case of *Bhatia Industries And Infrastructure Ltd.* (supra) does not apply to the present case, the precedent relied upon by the Award Holder cannot apply in the facts and circumstances of the present case."

49. Mr. Tripathi had also placed reliance on the decision rendered by this Court in **V.K. Uppal Vs. Akshay International Pvt. Ltd.**[18] where while considering an application for execution of an Award, a similar argument with respect to the doctrine of lifting of the corporate veil came to be negatived in the following terms: -

[18] 2010 SCC OnLine Del 538

"**5.** The counsel for the decree holder has relied upon (i) Ashish Polyfibres (Bihar) Ltd. v. State Bank of India 2009 (107) DRJ 1 (DB); (ii) Jawahar Lal Nehru Hockey Tournament v. Radiant Sports Management 149 (2008) DLT 749; (iii) M.R. Khanna v. Union of India MANU/DE/8981/2006 : 133 (2006) DLT 114; (iv) Iyer & Son Pvt. Ltd. v. LIC2007 X AD (Delhi) 643 and Saurabh Exports v. Blaze Finlease & Credits Pvt. Ltd. MANU/DE/1052/2006 : 129 (2006) DLT 429.

6. The admitted position is that the arbitration award having force of the decree is against the judgment debtor company only and not against its Directors. The question which arises is whether a money decree against a Private Limited Co. can be executed against its Directors. There is no provision therefore in the CPC. Order 21 Rule 50 does provide for execution of a money decree against a firm from the assets of the partners of the said firm mentioned in the said rule but there is no provision with respect to the Directors of a company. The executing court, as this Court is cannot go behind the decree and can execute the same as per its form only. The decree is against the company. This Court as the executing court cannot execute the decree against anyone other than the judgment debtor or against from the assets/properties of anyone other than the judgment debtor. The identity of a Director or a shareholder of a company is distinct from that of the company. That is the very genesis of a company or a corporate identity or a juristic person. The classic exposition of law in this regard is contained in Solomon v. Solomon & Co. Ltd. 1897 AC 22 where the House of Lords had held that in law a company is a person all together different from its shareholders and Directors and the shareholders and Directors of the company are not liable for the debts of the company except to the extent permissible by law.

7. The counsel for the decree holder has sought to, by relying upon the judgments aforesaid make out a case for invoking the principle of lifting of the corporate veil. The question which arises is, in what circumstances and in which proceedings is the corporate veil to be lifted. Whether it can be lifted in execution proceedings also or it has to be lifted in the substantial proceedings, of orders/decrees wherein execution is sought. In the judgment of the single judge in Jawahar Lal Nehru Hockey Tournament (supra) there is an observation that there could be a case where the court even in an execution proceeding lifts the veil of a closely held company, particularly a private limited company and in order to satisfy a decree, proceeds against the personal assets of its Directors and shareholders. However, I may notice that the aforesaid judgment has been overruled by the Division Bench in EFA(OS) No. 17/2008 decided on 7th November, 2008 and

> reported as MANU/DE/1756/2008. Though the Learned Single Judge had held no case of lifting of the corporate veil in execution to be made out in that case, the Division Bench found that the Director of the company had agreed to be personally liable to satisfy the decree and held him liable. However, the Division Bench refrained from commenting authoritatively on the aspect of lifting of the corporate veil in execution. Thus the said judgment cited by the counsel for the decree holder does not come to his rescue. "

50. Supplementing the arguments addressed by Mr. Tripathi for and on behalf of the GNCTD, Mr. Vashisht, learned Senior Counsel in addition to the judgments which had been cited and have been noticed hereinbefore also placed for the consideration of the Court the judgment rendered in **Anirban Roy & Anr. vs. Ram Kishan Gupta & Anr.**[19] which had reiterated the well-settled position that directors and shareholders are not to be held personally liable for the debts and dues of the company. In *Anirban Roy***,** the Court had held as follows: -

> "**8.** It is settled principle of law that the Directors and shareholders of a company are not liable for the dues of the company except to the extent permitted by law.
>
> **9.** I have in *V.K. Uppal* v. *Akshay International Pvt. Ltd.*, 2010 SCC OnLine Del 538 held; (i) that there is no provision in the CPC for execution of a money decree against a Pvt. Ltd. company, against its directors; (ii) that though Order XXI Rule 50 of the CPC does provide for execution of a money decree against a firm, from the assets of the partners of the said firm mentioned in the said Rule but there is no provision with respect to directors of a company; (iii) that the Executing Court cannot go behind the decree and can execute the same as per its form only; (iv) that if the decree is against the company, the executing Court cannot execute the decree against anyone other than the judgment-debtor company or against the assets and properties of anyone other than the judgment-debtor company; (v) that the identity of a director or a shareholder of a company is distinct from that of the company—that is the very genesis of a company or a corporate identity or a

[19] 2017 SCC OnLine Del 12867

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juristic person;(vi) the classic exposition of law in this regard is contained in *Solomon* v. *Solomon & Co. Ltd.*, [1897] A.C. 22 where the House of Lords held that in law, a company is a person all together different from its shareholders and directors and the shareholders and Directors of the company are not liable for the debts of the company except to the extent permissible; (vii) that though a Single Judge of this Court in *Jawahar Lal Nehru Hockey Tournament* v. *Radiant Sports Management*, (2008) 149 DLT 749 observed that there could be a case where the Court even in a execution proceeding lifts the veil of a closely held company, particularly a Pvt. Ltd. company and in order to satisfy a decree, proceed against the personal assets of its directors and shareholders but the said judgment was over ruled by the Division Bench EFA(OS) No. 17/2008 decided on 7th November, 2008 and reported as 2008 SCC OnLine Del 342, finding that the director of the company had agreed to be personally liable to satisfy the decree and for this reason holding him liable; however the Division Bench refrained from commenting authoritatively on the aspect of lifting of the corporate veil in execution; (viii) that though Section 53 of the Transfer of the Property Act, 1882 allows the creditors to have a transfer of property made with an intent to defeat the creditors set aside but a case therefor has to be pleaded; (ix) that it cannot be laid as a general proposition that whenever the decree is against a company, its Directors/shareholders would also be liable-to hold so would be contrary to the very concept of limited liability and obliterate the distinction between a partnership and a company; (x) that though the Courts have watered down the principle in *Solomon* supra to cover the cases of a fraud, improper conduct, etc. as laid down in *Singer India Ltd.* v. *Chander Mohan Chadha*, (2004) 7 SCC 1 but a case therefor has to be made out; (xi) that the decree holders in that case had not made out any case therefor; the directors were not parties to the proceedings in which decree was passed and were not impleaded in the execution petition also and there were no averments in the execution petition of fraud or improper conduct or of incorporation of the company to evade obligations imposed by law and in which situations Supreme Court in *Singer India Ltd.* supra has held that the corporate veil must be disregarded.

10. Applying the aforesaid principles, the decree in favour of the respondent No. 1 and against the respondent No. 2 for recovery of money cannot be executed against the petitioners for the reason of the petitioners being directors of the respondent No. 2.

11. The High Court of Madhya Pradesh in *Vimalchand* v. *Arora Distillery Pvt. Ltd. Co., Vidisha*, (2009) 3 MP LJ 332 held that decree obtained against a private company cannot be executed

> against its managing director or directors and the managing director and directors cannot be held personally liable for the decretal amount.
>
> **12.** This Court again in *Balmer Lawrie & Co. Ltd.* v. *Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.*, 2017 SCC OnLine Del 7519 held that the money due under arbitrator's award against a company could not be recovered from the directors of the company. It was further held that though the court can lift the corporate veil, the same can be done only in extra-ordinary circumstances and by due adjudicatory process and the executing Court cannot go behind the decree and it must enforce it as it is and that it is not open to a decree holder to enforce a decree against any person other than the one against whom the decree is. It was further held that a mere allegation that the directors have siphoned off the assets without any particulars, cannot be accepted as the ground for improper conduct."

51. It was further submitted by Mr. Vashisht that the judgment which had been rendered by the learned Single Judge of this Court in **Jawahar Lal Nehru Hockey Tournament Society vs. M/s Radiant Sports Management (P) Ltd.**[20] and which was sought to be pressed in aid of the piercing theory being applied had subsequently come to be set aside by a Division Bench of this Court. Mr. Vashisht firstly drew the attention of the Court to Para 13 of the judgment rendered by the learned Single Judge which is extracted hereunder: -

> "**13.** It is settled law that a Company has a separate juristic or artificial existence apart from its Directors and members. The execution application has not disclosed how the property bearing No. S-524, Greater Kailash-I, New Delhi, was connected with the judgment debtor or that any part of it was owned by it. The more circumstance that a Director of the judgment debtor owned a portion of the property at some stage could not have, in the circumstances, clothed this Court with the authority to issue an attachment order and later to sell that property. There could be a case that where the Court even in an execution proceeding "lifts the veil" of a closely held Company, particularly, a private limited

[20] 2008 SCC OnLine Del 342

> company and in order to satisfy a decree, proceeds against the personal assets of its directors and shareholders. But before such a course of action is adopted, the Court has to be satisfied about the need to follow such a course and return appropriate findings in that regard. All these are absent in the present proceeding. Therefore, I have no hesitation in concluding that the attachment and the subsequent orders directing auction of the property had no legal basis."

52. It was pointed out that the aforesaid decision can no longer be countenanced as being a binding authority since it ultimately came to be set aside by the Division Bench in a Letter Patents Appeal which was allowed and stands reported as **Jawahar Lal Nehru Hockey Tournament Society vs. M/s Radiant Sports Management (P) Ltd**[21]**.** Mr. Vashisht had also taken the Court through the decision rendered by the Supreme Court in *Life Insurance Corporation of India* and **Singer India Ltd. vs. Chander Mohan Chadha & Ors.**[22] to highlight the scope of the doctrine of the corporate veil being pierced.

53. Apart from the above, Mr. Vashisht had also drawn the attention of the Court to the judgment rendered in **Moons Technologies Limited & Ors. vs. Union of India & Ors.**[23] where the position of a shareholder in a corporate structure was explained as under:-

> "**106.** In *Bacha F. Guzdar* [*Bacha F. Guzdar* v. *CIT*, (1955) 1 SCR 876 : AIR 1955 SC 74] , this Court held that though a shareholder acquires no right in the assets of a company as the company itself is the owner of such assets, yet a shareholder certainly has the right to dividends and the right to participate in the assets of the company which would be left over after winding up. The Court held : (SCR p. 882 : AIR p. 77, para 7)"

[21] 2008 SCC OnLine 342
[22] (2004) 7 SCC 1
[23] (2019) 18 SCC 401

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> "*7.* … The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in '*the assets of the company which would be left over after winding up*' but not in the assets as a whole as a Lord Anderson puts
>
> (emphasis in original)

107. In *LIC* v. *Escorts Ltd.* [*LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264] , this Court dealt generally with the rights of shareholders as follows : (SCC p. 326, para 84)

> "*84*. On an overall view of the several statutory provisions and judicial precedents to which we have referred we find that a shareholder has an undoubted interest in a company, an interest which is represented by his shareholding. Share is movable property, with all the attributes of such property. The rights of a shareholder are (*i*) to elect Directors and thus to participate in the management through them; (*ii*) to vote on resolutions at meetings of the company; (*iii*) to enjoy the profits of the company in the shape of dividends; (*iv*) to apply to the court for relief in the case of oppression; (*v*) to apply to the court for relief in the case of mismanagement; (*vi*) to apply to the court for winding up of the company; (*vii*) to share in the surplus on winding up."

108. On the facts of the present case, we are directly concerned with points (iii) and (vii). It has been argued that the profits of the company post-amalgamation will obviously come down, and dividends payable to shareholders will consequently either come down or be wiped out if the low net worth of NSEL is taken into account post amalgamation, together with potential liabilities of the amalgamated company, which may have to be paid in the near future. Secondly, if the amalgamated company is wound up, the amount that is payable to the shareholders post-amalgamation will be much less, if at all anything is to be paid, than pre-amalgamation."

54. Mr. Vashisht then submitted that the execution petitioner cannot be recognized to have a right of recourse against GNCTD bearing in mind the provisions of Sections 38 and 47 of the Code. Mr. Vashisht contended that undisputedly neither the Union Ministry nor the

GNCTD had been arrayed as parties before the Arbitral Tribunal. According to learned Senior Counsel, this fact itself would clearly disentitle the execution petitioner in law from seeking recourse against them on the execution petition. Mr. Vashisht further contended that it cannot possibly be disputed that an executing court cannot go behind the decree. The submission essentially was that the prayers made by the execution petitioner for the shareholders being held liable to satisfy the decree would clearly amount to the Court acting in violation of the settled and accepted principle as flowing from the aforesaid provisions.

55. Mr. Vashisht submitted that undisputedly the execution petitioner could not have instituted any suit against the GNCTD in respect of disputes that may have arisen between the execution petitioner and DMRC. According to Mr. Vashisht, this itself would clearly establish that the prayers made by the execution petitioner for lifting of the corporate veil and for the Union Ministry and as well as GNCTD being held liable is wholly untenable and liable to be rejected.

56. The learned ASG opening submissions on behalf of the Union Ministry relied upon the following passages from the decision of the Supreme Court in **PC Agarwala vs. Payment of Wages Inspector, M.P and Ors.**[24] in order to explain the limited circumstances in which the piercing doctrine could be invoked. The learned ASG had relied upon the following observations as appearing in Para 21 to Para 23 of the report: -

[24] (2005) 8 SCC 104

"21. In TELCO v. *State of Bihar"* the basic features of a company, its corporate existence and its position vis-à-vis shareholders was highlighted as follows: (SCR pp. 897-98)

> "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 e 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 & 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."

22. The doctrine of lifting of the veil has been applied, in the words of Palmer, in five categories of cases: where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duty and stamps, particularly where the question of the "controlling interest" is in issue; in the

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law relating to exchange control, and in the law relating to trading with the enemy where the test of control is adopted (*Palmer's Company Law*, 20th Edn., p. 136, now p. 215, 24th Edn. 1987). In some of these cases judicial decisions have no doubt lifted the veil and considered the substance of the matter.

23. Gower has similarly summarised this position with an observation that in a number of important respects, the legislature has rent the veil woven by *Salomon case*. Particularly this is so, says Gower, in the sphere of taxation and in the steps which have been taken towards the recognition of the enterprise entity rather than corporate entity. It is significant, however, that according to Gower the courts have only construed the statutes as "cracking open the corporate shell" when compelled to do so by the clear words of the statute-indeed they have gone out of their way to avoid this construction whenever possible. Thus, at present the judicial approach in cracking open the corporate shell is somewhat cautious and circumspect. It is only when the legislative provision justifies the adoption of such a course that the veil has been lifted. In exceptional cases where the courts have felt "themselves able to ignore the corporate entity and to treat the individual shareholder as liable for its acts" the same course has been adopted. Summarising his conclusions, Gower has classified seven categories of cases where the veil of corporate body has been lifted. But it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly, where fraud is intended to be prevented, or trading with the enemy is sought to be defeated, the veil of the corporation is lifted by judicial decision and the shareholders are held to be "persons who actually work for the corporation."

57. It was further contended that the funds of the Union which had been placed in the hands of the DMRC were specific to the capital expenditure likely to be incurred in connection with the Delhi Metro Phase-IV expansion project. The learned ASG would submit that the said funds could not have been possibly appropriated by DMRC for the purposes of satisfaction of the Award. The learned ASG had lastly contended that the Union Ministry has for cogent and justifiable

reasons refused to accord permission as contemplated under Section 89 of the Act.

58. Appearing for the petitioner, Mr. Sibal while refuting the aforesaid submissions contended that the very fact that DMRC had sought the specific permission of the Union to utilize the funds which were held by it, is sufficient evidence to establish and demonstrate the nature of the control that was being exercised by the principal shareholders. According to Mr. Sibal, this itself establishes that the veil of corporate personality had been disregarded by DMRC itself. Mr. Sibal also drew the attention of the Court to the observation as appearing in *Prest* and which had alluded to the piercing principle being liable to be invoked where a debtor deliberately evades or frustrates obligations by interposing a corporate structure.

59. Mr. Sibal further submitted that it is not permissible for the DMRC to urge that the total funds held under the three heads cannot be attached for the purposes of satisfaction of the Award since that is an issue which stands duly determined by the Court in terms of its order of 10 March 2022 and 20 June 2022. Mr. Sibal laid stress upon the fact that the aforesaid two orders had undoubtedly attained finality and consequently, according to learned senior counsel, the submissions addressed yet again and turning upon Section 89 are liable to be rejected outrightedly.

60. Having noticed the submissions which were addressed, the Court firstly takes up the issue arising out of Section 89 of the Act. It is pertinent to note that the aforesaid provisions were pressed into aid

by DMRC along with Section 60 of the Code yet again to assert that "Total DMRC Funds", "Total Project Funds" and "Total Other Funds" cannot be proceeded against for the purposes of satisfaction of the Award. It is pertinent to note that identical contentions had been addressed before the Court on an earlier occasion and which had ultimately culminated in the passing of the order of 10 March 2022. Significantly, the Court had upon due consideration of the aforesaid submissions proceeded to frame directions for the three aforenoted funds and monies standing to the credit thereof being utilized to liquidate the liability which stands raised under the Award. Undisputedly, the order of 10 March 2022 has attained finality consequent to the dismissal of the challenge which was mounted against that order before the Supreme Court and the subsequent rejection of the review petition. The Court is thus of the considered opinion that it is clearly not permissible for the DMRC or for that matter any of the other respondents to contend that directions cannot be framed for the liabilities flowing from the Award being satisfied from the funds which stand to the credit of "Total DMRC Funds", "Total Project Funds" and "Total Other Funds".

61. Additionally, the Court notes that Section 89 proscribes proceedings for attachment being taken against rolling stocks, metro railway tracks, machinery, plant, tools, fittings, materials or effects which are used or provided by a metro railway administration for the purposes of traffic on its railway. Additionally, it also prohibits attachment proceedings being taken against the stations, workshops, or offices of a metro railway. Insofar as the first part of Section 89 is

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concerned, that clearly restricts the powers of attachment being exercised over articles specified in that section and which are directly connected with the maintenance of traffic by a metro railway. Stations, workshops, and offices are additionally exempted from the powers of attachment. On a consideration of the plain language of Section 89, it is manifest that "Total DMRC Funds", "Total Project Funds" and "Total Other Funds" would clearly not stand covered within its ambit. On a more fundamental plane, the Court deems it apposite to observe that Section 89 places a statutory embargo on execution against metro railway properties and thus clearly impeding the execution of any decree or order of a court or any other local authority or person having the power in law to attach or distrain property. That embargo can be lifted only upon the Union Government according sanction. The significance of this provision is also liable to be understood bearing in mind the fact that the Union Government is a majority shareholder along with the GNCTD in the DMRC. What needs to be emphasized is that since these powers act as a restraint with respect to the satisfaction of decrees issued by courts, they must be accorded a strict interpretation. The Court in any case finds itself unable to accord an expansive interpretation upon that provision so as to recognize the principal funds being included therein.

62. While on Section 89 it may be additionally noted that the Court in its order of 10 March 2022 had framed directions in unambiguous terms that the monies standing under the three heads noted above, must be diverted so as to enable the DMRC to meet its liabilities as

flowing from the Award. The Court on that occasion was constrained to observe that since the Award of 11 May 2017 had attained finality, it cannot be allowed to "*remain as a paper award*". In the order of 10 March 2022, the Court had further found that DMRC was duty bound to either divert its funds shown to be available under the aforenoted three heads or raise loans to satisfy the Award. The Court clearly appears to have as a matter of abundant caution further observed that the diversion of monies standing under the aforesaid three heads would be affected after seeking permission of the Union Government "*if necessary*". Once the Court had found that the amounts standing under the aforesaid three heads were liable to be diverted so as to enable DMRC to meet its liabilities flowing from the Award, there clearly existed no justification or requirement for DMRC approaching the Union Government for being granted permission. Those directions were explicit and were clearly not dependent upon any sanction being accorded by the Union Ministry. More importantly, the directions of the Court as contained in its order of 10 March 2022 could not have in any case been eclipsed or thwarted by invocation of the previous sanction provisions as contained in Section 89. The "Total DMRC Funds", "Total Project Funds" and "Total Other Funds" as existing on 10 March 2022 thus could not have been either touched, diverted, or repatriated post the passing of that order. 10 March 2022 would thus, for all purposes, be liable to be declared to be the decisive, determinative and crucial date.

63. That takes the Court to consider the submissions which were addressed relating to the impleadment of the Union Ministry and

GNCTD in these proceedings. As the recordal of submissions would establish, both the Union Ministry as well as the GNCTD had vehemently argued that they could not be held liable to bear the liabilities flowing from the Award since they were merely shareholders in the Corporation. The elaborate submissions which were addressed on this score revolved upon the perceived narrow window in which the lifting the corporate veil principle could be applied.

64. Before proceeding to consider the decisions rendered by courts in the United Kingdom, U.S.A. and of other jurisdictions which were cited, the Court deems it apposite to firstly notice the law as enunciated on this point by our own courts. In **State of U.P. v. Renusagar Power Co.**[25], the Supreme Court had noted that in various judgments the treatise on the subject as appearing in **Robert P Pennington's Company Law, Seventh Edition**[26] had been noticed and cited with approval. That work while spelling out the exceptions to the separate and distinct corporate legal entity precept had noticed that the piercing principle had been principally applied by courts in England either on a principle of public policy or where the corporate structure is created to perpetrate fraud or evade obligations. In such circumstances, Pennington had observed that the creation of a corporate structure would be liable to be treated as a nullity. What needs to be highlighted is that even Pennington recognised the lifting of the corporate veil principle being invoked either on a principle of

[25] (1988) 4 SCC 59

[26] Pennington’s Company Law

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public policy or where the separate legal entity concept was urged in order to evade obligations.

65. It becomes significant to note that *Renusagar Power Co.* itself was not a decision where the corporate veil came to be lifted on the ground of perpetration of fraud or on an allegation that the corporate structure was a facade or a mere sham. The Supreme Court in that very decision had also noticed the opinion of the House of Lords in **Scottish Cooperative Wholesale Society Ltd. V. Meyer**[27] where Viscount Simmonds in his speech had noticed with approval the legal position as was explained by Lord Cooper who had observed that it is the *"business realities"* of a situation which must be borne into consideration rather than a narrow legalistic view being taken. Referring to the decision in *Life Insurance Corporation*, the Supreme Court in *Renusagar Power Co.* accepted the enunciation of the legal principles relating to the concept of when a corporate veil should be lifted as well as the situations or the classes of cases where it would be permissible. It had been aptly observed that rather than exhaustively enumerating the situations in which that principle could be invoked, it would be best to leave it to be considered in individual cases, depending upon the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of an element of public interest and the impact on parties who may be affected. For the purposes of the present case, it is the two concepts of element of public interest and the effect on parties which are likely to be affected, which is of import and significance.

[27] (1958) 3 All ER 66

66. The Supreme Court had gone on to observe in *Renusagar Power Co.* that in the expanding horizon of modern jurisprudence, the lifting of the corporate veil is not only permissible, its frontiers are unlimited and ever expanding. It further significantly observed that the lifting of the corporate veil was a changing concept and of expanding horizons. It was the aforesaid observations which appear to have weighed upon the Bombay High Court and the learned judges who penned the decision in *Bhatia Industries*.

67. *Bhatia Industries* too was a decision which came to be rendered in the course of execution proceedings drawn and initiated in respect of an international Arbitral Award. After taking into consideration the eloquent observations in *Renusagar Power Co.* their Lordships held that the principle of piercing or lifting of corporate veil can be equally applied to execution proceedings. This clearly appeals to reason bearing in mind the fact that in *Renusagar Power Co.* as well it had been found that the said principle should neither be restricted nor confined within the archaic views with respect to a separate legal personality which imbue upon a company and it being duly recognized that the said principle could be invoked and resorted to where either principles of public policy so dictate or where it be found that the corporate structure is set up as a defense to evade obligations, the involvement of public interest and the effect that it may have on affected parties. The Court in *Bhatia Industries* had proceeded to move against the cargo which stood in the name of a group company even though the award debtor was Bhatia International Limited. Their Lordships had found that the group companies constituted one single

economic entity and consequently, assets and properties of a party other than the judgement debtor could be proceeded against.

68. In *Balwant Rai Saluja,* our Supreme Court had observed that courts would be empowered to disregard the separate legal personality of a company and impose liabilities upon the person actually in control subject to the caveat that the doctrine should be applied in a restrictive manner. While reiterating some of the situations where such a recourse could be taken and as an exception to the well-recognised grounds of the company being a mere camouflage or sham, it was pertinently observed in Para 74 of the report that the essential intent of the piercing of veil of a corporate structure must be guided by the necessity to remedy a wrong done by persons controlling the company and that the said principle would have to be tested based upon the facts and circumstances of each case.

69. The Court notes that in the present case the proceedings for execution have been instituted in respect of an Award which had been rendered way back in 2017. Despite various orders passed during the pendency of the instant petition, DMRC is yet to liquidate the liability flowing from and under that Award. Regard must also be had to the fact that the execution petition itself had been disposed of way back in March 2022 with the Court framing peremptory directions for DMRC to clear off all liabilities as per the express directions framed and appearing in Paras 41 and 42 of the 10 March 2022 order. Despite the aforesaid orders and directions having attained finality, DMRC has neither cleared the entire debt nor has it been able to raise the requisite

funds in order to meet the obligations placed upon it and abide by the directions issued by this Court.

70. Elaborate submissions were addressed by Mr. Tripathi and Mr. Vashisht, learned senior counsels appearing for GNCTD as well as the learned ASG of the piercing of the corporate veil principle not being liable to be invoked in the facts of the present case. Those submissions were addressed in the backdrop of not just the judgements rendered by this Court as well as the Supreme Court on the subject but also on the basis of precedents handed down by courts spanning international jurisdictions.

71. Before proceeding further, it may be noted that although it was contended that *Mitsui* had distinguished the decision in *Bhatia Industries* in light of the peculiar facts that obtained there and on it being found that the goods which were attached belonged to the judgment debtor, this Court finds that the same is clearly contrary to the facts which obtained in the latter. As would be evident from Para 31 and 51 of the report, the Division Bench has clearly recorded that the case set up was of recourse being sought in respect of cargo which stood recorded in the name of BIIL on the ground that it was merely an alter ego of the judgment debtor, namely, BIL. Similarly, while it was sought to be contended that the decision of the learned Judge in *Jawahar Lal Nehru Hockey* stood reversed, a reading of the judgment rendered on the appeal would show that the invocation of the piercing principle was neither frowned upon nor reversed. The judgment of the learned Single Judge came to be set aside on a wholly independent ground.

72. From the principles which ultimately came to be laid down in *Prest*, the Court notes that courts in the United Kingdom have hesitated in adopting the principle of lifting the veil and have essentially held that where relief could be founded on other identifiable legal principles, the same would suffice. On a consideration of that decision as well as various others rendered by courts in that jurisdiction, there clearly appears to be a reluctance towards either a wholehearted acknowledgement or an express application of the doctrine. The aforesaid decision thus appears to indicate a rigid adherence to the principles laid down in **Solomon v. Solomon & Co Ltd.**[28]. The jurisprudence in the United Kingdom thus appears to tether around the aforesaid decision which was rendered in 1897. The reluctance of courts in England to move forward or to consider expanding the applicability of the piercing of the veil principle is one which has also been noticed in various authoritative texts dealing with the principles relating to modern company law.

73. In **Gower and Davies' Principles of Modern Company Law**[29], the lifting of the veil principle as explained in various decisions was described in the following words: -

> **"LIFTING THE VEIL UNDER CASE LAW**
>
> **Under statute or contract**
>
> When analysing the judicial decisions on lifting the veil, it is crucial to distinguish between those situations where the court is

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[28] [1897] A.C. 22

[29] Gower and Davies' Principles of Modern Company Law, Seventh Edition

applying the terms of a statute (other than the Companies Act) or, less often, a contract, from those where, as a matter of common law, the veil is lifted. The reason is that the justification for lifting the veil in the former group of cases is to be found in the policy of the statute or the intention of the contracting parties. As we have noted, it is perfectly in line with the doctrine of limited liability that parties should contract out of it and so there is nothing remarkable in the courts' deciding that this has occurred in a particular case, provided the parties' intention has been accurately identified. Equally, Parliament is free to decide that the policy of a particular statute requires that the doctrine of limited liability needs to be overruled, though it is doubtless the case that if Parliament took this step routinely, one would begin to have doubts about its commitment to the doctrine of limited liability.

In looking at the statutory cases, it is also crucial to distinguish between those cases where the courts decide that the separate legal personality of the company should be disregarded and those where, in consequence of this disregard, the additional consequence follows that the shareholders are made liable for the company's debts or other obligations. There are in fact very few, if any, cases where the courts have concluded that the policy of the statute requires the separate legal personality of the company to be ignored so that personal liability can be imposed on shareholders, except where the statute in express terms requires this approach. Typically, as a result of ignoring the separate legal personality of the company, some legal issue other than the limited liability of the shareholders is determined in a way which is different from the way in which it would have been determined, had the separate legal personality been maintained. Thus, in *Re FG* (*Films*) *Ltd* a US company had incorporated a shell company in Britain for the purposes of claiming a declaration that a film it produced was British. The result of the failure by the courts to uphold the separation between the British and US companies was that the film was not classified as British. In some cases, in fact, ignoring the separate legal personality of the company has been for the benefit of the shareholders."

In deciding whether to lift the veil in such cases, the courts ought to be guided by the policy of the statute in question, and so the decision arrived at is likely to vary from statute to statute. Nevertheless, it is difficult to avoid the conclusion that the courts are unwilling to it the veil except where the statutory wording clearly requires this."

74. While dealing with the challenges associated with the invocation of that doctrine, the authors have made the following pertinent observations: -

> **"At Common Law**
>
> Challenges to the doctrines of separate legal personality and limited liability at common law tend to raise more fundamental challenges to these doctrines, because they are formulated on the basis of general reasons for not applying them, such as fraud, the company being a 'sham' or 'façade, that the company is the agent of the shareholder, that the companies are part of a 'single economic unit' or even that the 'interests of justice require this result. However, the courts seem, if anything, more reluctant to accept such general arguments against the doctrines than arguments based on particular statutes or the terms of particular contracts. The leading case is *Adams v Cape Industries Plc*. That case raised the issues in a sharp fashion. It concerned liability within a group of companies and the purpose of the claim to ignore the separate legal personality of the subsidiary was to make the parent liable for the obligations of the subsidiary towards involuntary tort victims. Thus, the case encapsulated two features-internal group liability and involuntary creditors-where limited liability is most in question. The facts of the case were somewhat complicated but for present purposes it suffices to say that what the Court had ultimately to determine was whether judgments obtained in the United States against Cape, an English registered company whose business was mining asbestos in South Africa and marketing it worldwide, would be recognised and enforced by the English courts. In the absence of submission to the foreign jurisdiction, this depended on whether Cape could be said to have been "present" in the United States. On the facts, the answer to that question depended upon whether Cape could be said to be present in the United States through its wholly owned subsidiaries or through a company (CPC) with which it had close business links. The court rejected all the arguments by which it was sought to make Cape liable."

75. The strict and narrow view as adopted by the Courts in the United Kingdom was also recognised by the authors, as would be evident from the following passage: -

> **“CONCLUSION**
>
> The doctrine of lifting the veil plays a small role in British company law, once one moves outside the area of particular contracts or statutes. Even where the case for applying the doctrine may seem strong, as in the under-capitalised one-person company, which may or may not be part of a larger corporate group, the courts are unlikely to do so. As Staughton L.J. remarked *in Atlas Maritime Co SA v Avalon Maritime Ltd. The Coral Rose:*
>
>> “The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine."
>
> This is in contrast to the law in the United States where the veil is lift more readily. However, even in the United States it seems the courts have never lifted the veil so as to remove limited liability in the case of a public company and will not do so as a matter of routine in private companies. Probably, the most significant addition to the grounds for lifting the veil which US law adds to the categories recognised by British law is that of inadequate capitalisation. As we shall see in the next chapter, British law has approached that problem through the statutory doctrine of wrongful trading rather than through lifting the veil. Indeed, at a more general level, the approach of British law to regulation of the abuse of limited liability is a combination of facilitating self-help and statutory constraints. In the succeeding chapters we turn to examine the latter.”

76. In **Pennington’s Company Law**, the exceptions to the rule of separate legal personality have been explained as follows:-

> **“EXCEPTIONS TO THE RULE OF SEPARATE LEGAL PERSONALITY**

> Four inroads have been made by the law on the principle of the separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The Government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to this wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is referred to the many standard text books on Corporation Tax, Income Tax, Capital Gains Tax and Inheritance Tax.
>
> The other inroads on the principle of separate corporate personality have been made by five sections of the Companies Act 1985, by the Company Directors Disqualification Act 1986 and the Insolvency Act 1986, and by judicial disregard of the principle where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by law or contract, and by the courts implying in certain cases that a company is an agent or trustee for its members."

77. Dealing with the subject of whether the said principle could be resorted to in cases where corporate entities seek to evade obligations imposed by law, the authors have explained the position as follows:-

> **"Evasion of obligations imposed by law**
>
> There are only three decided cases where the court has disregarded the separate legal personality of a company because it was formed or used to facilitate the evasion of legal obligations. In the first of these cases the defendant had been employed by the plaintiff company and had entered into a valid agreement not to solicit the plaintiff's customers or to compete with it for a certain time after leaving its employment. After ceasing to be employed by the plaintiff, the defendant formed a company which carried on a competing business, and caused the whole of its shares to be allotted to his wife and an employee of the company, who were appointed to be its directors. It was held that since the defendant in fact controlled the company, its formation was a mere 'cloak or sham' to enable him to break his agreement with the plaintiff, and an injunction was issued against him and against the company he had formed restraining them from soliciting the plaintiff's

customers. In the second cases a vendor of land sought to evade specific performance of the contract for sale by conveying the land to a moribund company which he 'bought' for the purpose. The company had been formed by third parties, and the vendor purchased the whole of its shares from them, had the shares registered in the name of himself and a nominee, and had himself and the nominee appointed to be the company's directors. It was held again that the acquisition of the company and the conveyance of the land to it was a mere 'cloak or sham' for the evasion of the contract of sale, and specific performance of the contract was therefore ordered against the vendor and the company which he had acquired. In the third case a company sought to avoid a judgment for damages for wrongful dismissal obtained against it by its manager by forming a new company to which it transferred all its assets and liabilities, except the judgment debt in favour of its dismissed manager. The company then procured its own dissolution by applying to the Register of Companies to strike it off the register of companies. It was held that the new company was bound by the judgment in view of the blatant attempt by the original company to evade its enforcement, but the new company was given time to plead any defence it might have (other than the binding effect of the judgment) before judgment was entered against it.

English law has, however, not gone so far as imposing liability on a company if it takes steps to avoid entering into an obligation to the plaintiff at all. Consequently, when a company incorporated in England set up independently managed, but wholly owned subsidiaries in foreign countries to manufacture the products of the group, it was held that breach by those subsidiaries of the obligations imposed on them by local law to ensure the safety of their employees did not result in the parent company being liable on judgments obtained in those foreign countries against the subsidiaries by their injured employees. The fact that the parent company deliberately formed the subsidiaries in order to insulate itself from safety obligations imposed on them did not of itself impose liability on the parent company.

The American courts have been far readier to disregard a company's separate legal personality when it was clearly formed or acquired to facilitate a breach of the general law or of a contractual obligation. Their attitude is summed up in the words of Sanborn J, in a passage which further litigation in this country will probably show represents English law too:

'...A corporation will be looked upon as a legal entity as a general rule... but 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.'"

78. **Gore- Browne on Companies**[30] explains the precept of piercing of the corporate veil in the following terms:-

> **"Peeping Behind the Veil**
>
> **7[8]** As has already been noted, many cases of 'lifting the veil' do not go as far as removing the separate personality status of the company, but are merely examining who the members are to determine some specific status or classification of the company. Even then, the courts have been reluctant to make such enquiries except where required to by statute. Prior to the Trading with the Enemy Act 1939 requiring it, the House of Lords was prepared to look at the membership of a company to determine whether it was an enemy alien, and more recently to determine that the frauds of a sole member should make a company subject to the doctrine of ex turpi causa.
>
> The clearest example of peeping required by statute is the requirement to produce group accounts and the associated definitions of subsidiary undertakings etc. Other provisions of the Companies Act 2006 require determination of whether a company is a subsidiary of another, such as the need for members' approval of directors' transactions, and what amounts to public companies' financial assistance.
>
> Another area where statute has required peeping for a specific purpose is taxation. In *Gramophone & Typewriter Co Ltd v Stanley*, the separate personality of subsidiaries was upheld for tax purposes, but since then elaborate statutory provisions deal with tax liabilities. Tax, or rather a concession from tax, also lay behind *Re FG (Films) Ltd*. In determining that a film was not British for tax purposes, the court looked through the UK subsidiary owned 90 per cent by the American director and held that the UK company was merely a nominee or agent of the director's American company. In The *Abbey*, *Malvern Wells Ltd v Ministry of Local Government and Planning*, the charitable purposes imposed upon the trustee-shareholders of the company could be claimed by the company to exempt its property from development charge.
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> European law seems less concerned with peeping behind the veil of incorporation for specific purposes than UK law. For

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[30] Gore-Browne on Companies , Volume 2, 45th Edition

example, although under the TUPE Regulations a transfer of control of a company is not of itself a transfer of the employees of the company, the veil can be lifted to see if, in effect, there is some transfer of business and personnel. One area where parents and subsidiaries have been treated as single entities for at particular purpose has been European competition law. In what are now Arts 101 and 102 of the European Treaty, the European Court of Justice has for a long time taken the understandable view that it is the competitive effect of the group as a whole that has to be assessed.

On the other hand, the same court has rejected the argument that, however practically convenient it may be, the nationality of incorporation of a parent company should be a factor in determining a company's 'centre of main interests' for the purpose of determining insolvency jurisdiction. In *Stojevic v Official Receiver*, a Registrar followed this approach rejecting the argument that the Austrian habitual residence of a sole owner and effective controller of an English registered company should lead to the company's insolvency being conducted in Austria rather than in England, even though the same control was considered a factor in attributing the frauds of the Austrian controller to the company when applying the doctrine of ex turpi causa.""

In exercising their wide discretion under what is now s 994 of the Companies Act 2006 (s 459 of the 1985 Act), the courts have accepted that members can be unfairly prejudiced by activities that strictly speaking involved subsidiaries of the company of which petitioners were members. In *Re Bugle Press* Ltd, a company could not be set up to expropriate a minority using what is now s 979 of the Companies Act 2006, and in *Acatos & Hutcheson plc v Watson* Lightman J admitted he would peep behind the veil to determine whether a company was being used to allow another company to improperly own its own shares, though this was not the case on the facts.

Although, as can be seen from the examples above, the courts have been quite pragmatic about peeping behind the veil, when it comes to piercing the veil, the UK courts' approach in recent years has generally reverted to the hard line taken in *Salomon*."

79. Significantly even this authoritative work had noticed that courts in the United Kingdom appear to have reverted to the strict and unerring line of reasoning which had been laid down in *Solomon* way

back in the 1800s. The aforesaid work while noticing the legal position as it prevails in England observes as follows:-

> **“Circumventing or Piercing the Veil**
>
> **7[9]** As has already been noted, the House of Lords firmly upheld the doctrine of separate personality in *Salomon v A Salomon & Co Ltd*, and the Court of Appeal maintained the same position in regard to associate and group companies in *Adams v Cape Industries plc*. Cape Industries had created subsidiaries and associates in the US, which marketed the asbestos other subsidiaries of Cape mined in South Africa. An Illinois court had held Cape Industries liable for asbestosis claims in the state, but Cape resisted the enforcement of these judgments on the argument that under UK law, Cape Industries itself had never operated in Illinois. The Court of Appeal refused to enforce the claims against Cape Industries. However, the courts have accepted that under some general principles of law, controlling members of a company (including a parent company) may be liable for (or occasionally claim rights from) what are primarily the actions of the company. This might be termed 'circumventing the veil'. They have also upheld one example of piercing the veil. This very restrictive approach to piercing, as against circumventing the veil, has been upheld twice by the Supreme Court. However, in *Prest* Lord Sumption seems to have concentrated on a slightly different distinction, the concealment principle (where only a circumventing legal principle can apply and the evasion principle (where piercing may still apply).
>
> **Piercing the Veil**
>
> **7[14B]** Circumventing the corporate veil, whether to make a controlling shareholder liable for thoughts and actions of the controlled company, or to make the controlled company liable for those of the controlling shareholder (really a question of attribution dealt with in **Chapter 7A**), only requires the application of general legal principles. What the courts have struggled with is whether there are circumstances where a special corporate rule applies to override the *Salomon* principle. Historically, the courts have referred to ‘shams' and 'facades'. Although not necessarily more enlightening, Lord Sumption's adoption in *Prest* of the distinction between the concealment and evasion principles may now be established.

Cases pre-Prest

7[14C] The Court of Appeal in *Adams* accepted that there was 'one well-recognised exception to the rule prohibiting the piercing of the "corporate veil"'.

To justify such piercing a scheme of concealment should be shown. It was a scheme of concealment behind a chain of companies that led to the veil being lifted in *Kensington International Ltd v Congo*."

This 'one well-recognised exception' to the *Salomon* principle has been based on two cases. In *Gilford Motor Co v Horne*, the respondent had contracted with the appellant company not to solicit its customers when he left their employment. On ceasing employment, Horne formed a company to carry on a competing business and this company started to solicit the Gilford Motor Co's customers. The court granted an injunction to enforce the covenant not to solicit against both Horne and the company he had formed as a 'cloak' for his activities. In *Jones v Lipman* the defendant had entered into a contract to sell his house. He sought to escape his obligation to complete by conveying the property to a company in which he and a nominee of his controlled all the shares and were the directors. Russell J, in granting a decree of specific performance, described the company as 'the creature of the first defendant, a device and a sham, a mask which he holds before his face in any attempt to avoid recognition by the eye of equity'."

These cases were followed in *Trustor AB v Smallbone*, the veil being lifted where a controlling shareholder behind a trust used a company to receive moneys improperly transferred from another company, though Sir Andrew Morritt V-C refused to extend the device and sham exception to any case involving companies and improprieties or where the interests of justice required. He also stressed that no third party rights should be affected by piercing the veil (eg depriving innocent creditors of assets), an issue that featured in the majority judgment in *Stone & Rolls Ltd v Moore Stephens*.

In *International Credit Investment Co v Adham*, Robert Walker J held that where a worldwide *Mareva* injunction (now a 'freezing order') had been granted over property it was right for the court to pierce the veil and appoint a receiver over the property in circumstances where there appeared to the court to be a real risk that such a freezing order might be breached. It is clear that the court was aware that 'serious fraud' was involved. A *Mareva* injunction has also been granted against a company probably

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holding defendant's assets, even if there was no claim against the company.

It has been held that where a constructive trust would be imposed on an individual acquiring property, the same obligation would be imposed where the property was acquired or held by a company 'owned' by the individual. This does point to the possibility that these 'sham' cases are not really about some separate doctrine of piercing the veil as much as about when knowledge may be attributed to a company to make it liable for wrongs like inducing breach of an existing contract, fraud, knowing receipt etc.

The close relationship between lifting the veil and attribution can also be seen in the 3-to-2 decision of the House of Lords in *Stone & Rolls Ltd v Moore Stephens*. The case was argued as a matter of attribution (see **Chapter 7A**), but it required the veil to be lifted to determine that there were no innocent shareholders. In effect, Stone & Rolls Ltd and Mr Stojevic were being treated as one and a company taken over for an improper purpose was being considered a sham or facade just like the company formed for an improper purpose in *Gilford Motor* or bought off the shelf for such a purpose in *Jones v Lipman*.

The most controversial use of sham or façade argument was in *Creasey v Breachwood Motors Ltd* where one of two companies (which had common shareholders and directors) was allowed to become insolvent while its assets were transferred to the other company. The court exercised its power to substitute the company to which the assets had been transferred, so that judgment on the plaintiff's claim might be enforced against it.

The Court of Appeal in *Ord v Belhaven Pubs* disapproved of *Creasey v Breachwood Motors* and refused to allow the holding company to be substituted as defendant even though a subsequent corporate reorganisation left the subsidiary without assets. Likewise, in *Yukong Lines Ltd of Korea v Rendsburg Investments Corpn of Liberia* the transfer of assets so that claims could not be met was not held to be a sham. Toulson J pointed out that other claims could be brought (against the director for breach of duty, for example). These asset moving cases would be easier to understand and reconcile if the piercing the veil argument was abandoned and instead claims were based or breaches of duty and knowledge of such breaches being attributed to other companies.

VTB Capital plc v Nutritek

7[14D] The concept of lifting the veil was resurrected by Burton J in *Gramsci Shipping Corp v Stepanovs*, and *Alliance Bank JSC v Aquanta Corporation* where controllers who had set up sham companies to divert moneys away from the group employing them were held to be parties to the fraudulent contracts. In both cases, the, need to hold the controllers to be parties to the contract was to ensure that the jurisdiction clauses in the contracts (imposing the jurisdiction of the English courts) applied.

This approach was rejected by the Supreme Court in *VTB Capital plc v Nutritek*. Lord Neuberger, who gave the court's judgment on the issue of piercing the veil found no other cases pierced the veil to make a controlling shareholder a party to a contract entered into by a company before Burton J's decisions in *Gramsci and Alliance*. He also found no reason to extend any power to pierce the veil in this way because:

(1) Agency normally relieves the agent of being a contractual party, but it was not suggested that the companies here were not parties, just that the controlling shareholders were as well.

(2) If A makes misrepresentations about B to induce C to enter a contract, there are already the remedies for C in negligent or fraudulent misrepresentation.

(3) Neither when the contract was entered nor subsequently did the controlling shareholder intend or act as a party and none of the other parties believed he was. Contractual liability is determined objectively.

(4) The undisclosed principal rule has long been regarded as anomalous and not to be extended.

Indeed, in the Supreme Court on *VTB Capital*, Lord Neuberger considered the argument from one counsel, that the sham or facade exception did not exist at all but refused to rule on the point.

The Supreme Court had almost immediately a further opportunity to review all these cases in *Prest*.

Prest v Petrodel Resources Ltd

7[14E] *Prest* involved the financial provisions of a divorce. Most of the husband's assets were held by companies that he controlled. The Supreme Court was asked to determine whether those corporate assets could be treated as the husband's for the purposes

of ss 23 and 24 of the Matrimonial Causes Act 1973. In fact, all the justices held that they could because the companies held the assets on trust for the husband, and so circumvented the corporate veil. However, the justices also considered, obiter, if there had not been a trust, could the court pierce the corporate veil.

The principal judgment in *Prest* was given by Lord Sumption who concluded that: 'the consensus that there are circumstances in which the court may pierce the corporate veil is impressive... I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse.'

The carefully defined circumstances, according to Lord Sumption, turned on the distinction between:

(1) the concealment principle 'the interposition if a company or… companies so as to conceal the identity of the real actors'; and

(2) the evasion principle 'if there is a legal right against the person in control … and the company is interposed… [to] defeat the right or frustrate its enforcement'.

Concealment was subject to conventional legal principles, which could circumvent the veil. Only evasion required piercing of the corporate veil. Lord Neuberger reduced Lord Sumption's review of the history of piercing the corporate veil to six findings:

(1) The International Court of Justice recognised the doctrine but only in the context of civil law systems.

(2) There were judgments based on the doctrine in family cases, but its application in these cases was unsound.

(3) There were two cases outside the family law context - *Gilford and Jones*-which laid the ground for the doctrine.

(4) There were two subsequent cases in which it was assumed the doctrine existed, but they were merely obiter observations.

(5) The Court of Appeal and High Court had subsequently assumed the doctrine does exist.

(6) In only two of those cases had the doctrine been relied on, and that was illegitimate as they could have been decided without recourse to the doctrine.

Although Lord Sumption left *Gilford and Jones* as cases of evasion relying on the doctrine, Lord Neuberger thought that the injunction against the company in *Gilford* could easily have been justified on the basis that the company was Horne's agent or nominee; and as for *Jones*, Lord Neuberger thought that an order for specific performance against Lipman could have compelled him to compel the company to convey the property to the plaintiffs. Nevertheless, despite concluding that he thought that there had been no cases in the UK that *needed* to rely on the doctrine, Lord Neuberger again was not prepared to declare the doctrine dead.

Only in Lady Hale's judgment is a continuing confusion in all these 'piercing' cases really highlighted. She drew the distinction between where a remedy was being sought against a controlling shareholder and where it was being sought against the company. This distinction also seems to lie behind Lord Sumption's distinction, the concealment principle being where the remedy sought is against the concealed controlling shareholder(s), the evasion principle being where the remedy is against the interposed company. In *Gilford* and in Jones, the main issue was not whether the controlling shareholders had broken their contracts, and in *Stone & Rolls v Moore Stephens*, had the fraudulent controlling shareholder been bringing a claim against the auditors, he would clearly have faced the defence of ex turpi causa. The problems arose because the remedy was being sought (or defence raised) against the company. In other words, all the cases that might still be considered ones of piercing the veil, are really cases about attributing the thoughts and actions of the controlling shareholder(s) to the company. So, if the doctrine does not have a place in the rules of attribution, it really has no place at all and like her fellow judges, Lady Hale was not prepared to go that far."

80. In contrast to the restricted construction which has been given by courts in the United Kingdom, the United States Supreme Court in **First National City Bank v. Banco Para EI Comercio Exterior De Cuba**[31] made the following pertinent observations:-

"**36**. In discussing the legal status of *private* corporations, courts in the United States [See 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974): "[A] corporation will be looked upon as a legal entity as a general rule, and until

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sufficient reason to the contrary appears; but, 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." Id., at 166 (footnotes omitted). See generally, H. Henn, Handbook of the Law of Corporations § 146 (2d ed. 1970); I.M. Wormser, Disregard of the Corporate Fiction and Allied Corporate Problems 42-85 (1927).] and abroad [*In Case Concerning The Barcelona Traction, Light & Power Co., 1970 I.CJ. 3,* the International Court of Justice acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances:" Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were intended to serve; sometimes the corporate entity has been unable to protect the rights of those who have entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. **** In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law... "ld., at 38-39. On the application of these principles by European courts, see Cohn and Simitis, "Lifting the Veil" in the Company Laws of the European Continent, 12 Int. & Comp.L.Q. 189 (1963); Hadari, The Structure of the Private Multinational Enterprise, 71 Mich.LRev. 729, 771, n. 260 (1973).], have recognized that an incorporated entity-described by Chief Justice Marshall as "an artificial being, invisible, intangible, and existing only in contemplation of law" [*Trustees of Dartmouth College v. Woodward, (*17 U.S.) 4 Wheat. 514, 636, 4 L.Ed. 629 (1819).]-is not to be regarded as legally separate from its owners in all circumstances. Thus, where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of

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the other. See *NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 402-404, 80 S.Ct. 441, 443, 44 L.Ed.2d 400 (1960). In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.,* 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). See *Pepper v. Litton*, 308 U.S. 295, 310, 60 S.Ct. 238, 246, 84 L.Ed. 281 (1940). In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. Eg, *Anderson v. Abbot, supra, 321 U.S., at 362-363, 64 S.Ct., at 537-38.* And, in *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.,* 417 U.S. 703, 94 S.Ct. 2578, 41 L.Ed.2d 418 (1974), we concluded:

37. "Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy.... [W]here equity would preclude the shareholders from maintaining the action in their own right, the corporation would also be precluded.... [T]he principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of... corporations which it owns and controls." Id., at 713, 94 S.Ct., at 2584 (citations omitted).

41. Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right. without waiving its sovereign immunity and answering for the seizure of Citibank's assets-a seizure previously held by the Court of Appeals to have violated international law. [See Banco I, supra, 478 F.2d, at 194.] We decline to adhere blindly to the corporate form where doing so would cause such an injustice. *See Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co., supra,* 417 U.S., at 713, 94 S.Ct., at 2584."

81. As would be evident from a reading of the aforesaid extracts that Court had justified the adoption of the piercing principle where economic realities may so warrant as also to protect the interests of third parties in their dealings with a corporate entity. In *First National*

City Bank it was pertinently observed that the said principles could be also adopted to protect third persons such as a creditor or a purchaser or to prevent the evasion of legal requirements or obligations.

82. The United States Court of Appeals in **Wm. Passalacqua Builders v. Resnick Developers S.,**[32] explained the concept relating to the lifting of the corporate veil principle as under: -

> "...Applying this analysis is difficult because courts and commentators rarely address the historic origins of the piercing doctrine at length. Some believe its origin is equitable. See *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 713, 41 L. Ed. 2d 418, 94 S. Ct. 2578 (1974)* ("The corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. [**10] ... In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form."); *United States v. Golden Acres, Inc., 684 F. Supp. 96, 103 (D. Del. 1988)* ("Piercing the corporate veil is an action that sounds in equity."), *aff'd sub nom., Golden Acres, Inc. v. Sutton Place Corp.*, 879 F.2d 857 (3d Cir. 1989); Fletcher, Cyc. Corp. § 41 (1990 perm. ed.) ("Since the doctrine of piercing the corporate veil is an equitable one that is particularly within the province of the trial court, the right to a jury trial on the issue of piercing the corporate veil does not exist.").
>
> Other courts conclude disregarding the corporate form is of legal origin or so touches on the determination of legal issues that it is for the jury to decide. See *American Protein, 844 F.2d at 59* (" the issue of corporate disregard is generally submitted to the jury"); *FMC Fin. Corp. v. Murphree, 632 F.2d 413, 421 n. 5 (5th Cir. 1980)* ("This Court holds that the issue of corporate entity disregard is one for the jury."). And at least one early scholar has **[**11]** noted that, whatever its origin, the doctrine has been applied in courts both of law and equity. See *Wormser, I.M., Piercing the Veil of the Corporate Entity, 12 Colum. L. Rev. 496, 497-99, 513-14 (1912)* ("courts, whether of law, of equity or of bankruptcy, do not hesitate to penetrate the veil and to look beyond the juristic entity at the actual and substantial beneficiaries.").
>
> The latter view appears to have the greatest historical support. According to Professor Phillip Blumberg, enforcement of

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shareholder liability for corporate obligations began as "a crude system in which any creditor with an unsatisfied judgment [*136] against the corporation sued any shareholder at common law." Blumberg, *The Law of Corporate Groups*: *Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 2.02, at 52 (1987) (Blumberg, *The Law of Corporate Groups); cf. Widdrington v. Cudworth and Others,* (1662) Vidian's Exact Pleader, p. 3 (plaintiff who brought action in tort at common law claiming conspiracy to eject a fellow from Cambridge college, sued the fellows as a combination of individuals rather than the college as **[**12]** a corporation) (cited in Baker, *An Introduction to English Legal History* 524 (3d ed. 1990)).

The next stage in the evolution of this theory of disregard was the development of the equitable procedure known as a "creditor's bill." When fully formed, the creditor's bill had two parts. The first part was a proceeding in equity "instituted by any creditor with an unsatisfied judgment, usually on behalf of all creditors, against the corporate debtor," the purpose of which was to adjudge the extent of the total corporate liability to the group of creditors. Blumberg, *The Law of Corporate Groups § 2.02 at 53*. The second part was an action at common law against the shareholders individually to collect the amount owed in which only personal defenses were allowed to be raised. See *Abbot, Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation, 23 Harv. L. Rev. 37, 43-45 (1909); Restatement (Second) of the Conflict of Laws §308, comment e* (1971). These sources support the proposition that the nature of the ancient action disregarding the corporate form had equitable and legal components. Having examined the way **[**13]** this issue was treated historically we turn next to examine the remedy sought.

...Ten years later *Lowendahl v. Baltimore & Ohio R.R. Co., 247 A.D. 144, 287 N.Y.S. 62 (1st Dept.), aff'd, 272 N.Y. 360, 6 N.E.2d 56 (1936*), set forth the New York a rule for corporate disregard. Lowendahl took Berkey's proposition as a starting point, and proceeded to explain that to pierce the corporate veil, the parent corporation must at the time of the transaction complained of: (1) have exercised such control that the subsidiary "has become a mere instrumentality" **[**19]** of the parent, which is the real actor; (2) such control has been used to commit fraud or other wrong; and (3) the fraud or wrong results in an unjust loss or injury to plaintiff. *Id. at 157*. The doctrine, it was said, is invoked "to prevent fraud or to achieve equity." *International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 292, 79 N.E.2d 249 (1948).* Professor Blumberg believes -- and we agree -- that the

three- factor rule in New York and the *alter* ego theory sued on in this case are indistinguishable, do not lead to different results, and should be treated as interchangeable. See Blumberg, *The Law of Corporate Groups* § 6.-03 at 120.

HN8 Under New York law it has been further held that when a corporation is used by an individual to accomplish his own and not the corporation's business, such a controlling shareholder may be held liable for the corporation's commercial dealings as well as for its negligent acts. See *Walkovszky v. Carlton, 18 N.Y.2d 414, 417, 276 N.Y.S.2d 585, 223 N.E.2d 6 (1966).* Where there is proof that defendants were doing business in their individual capacities to suit their own ends shuttling their own funds in and out without [**20] regard to the corporation's form -- this sort of activity exceeds the limits of the privilege of doing business in a corporate form and warrants the imposition of liability on individual stockholders. *Id. at 420*. The critical question is whether the corporation is a "shell" being used by the individual shareowners to advance their own "purely personal rather than corporate ends." *Port Chester Elec. Constr. Corp. v. Atlas, 40 N.Y.2d 652, 656-57, 389 N.Y.S.2d 327, 357 N.E.2d 983 (1976)* (quoting *Walkovszky, 18 N.Y.2d at 418).*

We capsulized this view of New York law in *American Protein, 844 F.2d 56 (2d Cir. 1988),* where we observed that HN9 control, whether of the subsidiaries by the parent or the corporation by its stockholders, is the key; and the control must be used to commit a fraud or other wrong that causes plaintiff's loss. *Id. at 60*. See *Electronic Switching Indus., Inc. v. Faradyne Elec. Corp., 833 F.2d 418, 424 (2d Cir. 1987)* (absent a showing that "control and domination was used to commit wrong, fraud, or the breach of a legal duty, or a dishonest and unjust act" New York law will not allow a piercing **[**21]** of the corporate veil); *Gorrill v Icelandair/Flugleidir, 761 F.2d 847, 853 (2d Cir. 1985)* (same as *American Protein*).

Liability therefore may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties. See *Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 909 F.2d 698, 703 (2d Cir. 1990)* ("New York law allows the corporate veil to be pierced either when there is fraud or when the corporation has been used as an alter ego.") (emphasis in original); *Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979)* ("Because New York courts disregard corporate form reluctantly, they do so only when the form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation..., and its separate identity so disregarded, that it primarily transacted the

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> dominator's business rather than its own and can be called the other's alter ego."); cf. *Kirno Hill Corp. v. Holt, 618 F.2d 982, 985 (2d Cir. 1980)* (in federal maritime law "The prerequisites for piercing a corporate **[**22]** veil are... clear...: [the defendant] must have used [the corporation] to perpetrate a fraud or have so dominated and disregarded [the corporation's] **[*139]** corporate form that [the corporation] primarily transacted [the defendant's] personal business rather than its own corporate business.")

Wm. Passalacqua Builders has adopted the principle of courts, be it of law or of equity, being entitled to unhesitatingly penetrate the veil and look beyond the juristic entity and identify the actual and substantial beneficiaries. It also recognised the aforesaid principle being resorted to where on facts it be found that the corporation was a mere alter ego.

83. In **Dill v. Rembrandt Grp., Inc.**,[33] the Court of Appeals of Colorado while expounding upon the separate legal entity doctrine, made the following pertinent observations: -

> "**[*P27]** An LLC is a legal entity separate from the members who own it. *In re Griffith v. SSC Pueblo Belmont Operation Co. LLC, 381 P 3d 308, 2016 CO 60M, 11; Sedgwick, 15-17.* Thus, neither the members of an LLC nor its managers are personally liable for debts incurred by the LLC. *§ 7-80-705, C.R.S. 2019; Griffith, 11*. Indeed, the corporate veil fiction "isolates 'the actions, profits, and debts of the corporation from the individuals who invest in and run the entity[.]' [and] [o]nly extraordinary circumstances justify disregarding the corporate entity to impose personal liability." *Sedgwick, 15* (quoting *In re Phillips, 139 P.3d 639, 643 (Colo. 2006)).*
>
> **[*P28]** To pierce the corporate veil in Colorado, a court must conduct a three-part inquiry. *Id. at 21*. First, it must determine whether the corporate entity is the alter ego of the person or entity in issue. *Id*. An alter ego relationship exists when a corporation or LLC is merely an instrumentality for the transaction of the **[***14]** shareholders' or members' affairs and "there is such unity of interest in ownership that the separate personalities of the corporation [or LLC] and the owners no longer exist." *In re Phillips. 139 P.3d at*

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644 (quoting *Krystkowiak v. W.O. Brisben Co., 90 P.3d 859, 867 n.7 (Colo, 2004)).*

[*P29] To determine whether unity of interest exists, a court considers several factors, including whether (1) the corporation **[**184]** or LLC operates as a distinct business entity; (2) the two entities commingle funds and assets; (3) the two entities maintain inadequate corporate records; (4) the nature and form of the entities' ownership and control facilitates misuse by an insider; (5) the corporation or LLC is “used as a 'mere shell'”: (6) “the business [i]s thinly capitalized”: (7) legal formalities are disregarded; and (8) corporate funds of assets are used for noncorporate purposes. *Id.* (quoting *Leonard v. McMorris, 63 P.3d 323, 330 (Colo, 2003)); Sedgwick, 32.* Courts examine the specific facts of the case and need not find the existence of every factor to find an alter ego. *Great Neck Plaza L.P. v. Le Peep Rests., LLC, 37 P.3d 485, 490 (Colo. App. 2001),*

[*P30] Second, upon finding that an entity is the alter ego of its owners, a court must determine whether the corporate fiction was used to perpetrate a fraud or defeat a rightful claim. *Sedgwick, 21*.

[*P31] Third, a court must consider whether disregarding the corporate form would achieve an **[***15]** equitable result. *Id.* If it finds that the moving party has satisfied this three-part test by a preponderance of the evidence, then it may disregard the corporate identity and impute liability. *Griffith, 14; Sedgwick, 21*.

C. Horizontal Veil Piercing in Colorado

[*P32] RGI and PPA assert that the trial court erred by piercing the corporate veil because RGI and PPA have no parent-subsidiary relationship and do not exercise control over each other. The trial court found that, at the time RMMF assigned the RMMF note to PPA, neither RGI nor PPA possessed any ownership interest in the other, nor did either entity control the other. Rather, the five common owners, who controlled 81.25 percent of RGI's shares, were also the founders and only members of Intellitec, the LLC that wholly owned PPA.

[*P33] Entities that share common shareholders, owners, or parents are sister companies. Black's Law Dictionary 418 (10th ed. 2014) (defining sister corporation as "[o]ne of two or more corporations controlled by the same, or substantially the same, owners"); see also *Minno v. Pro-Fab, Inc., 121 Ohio St. 3d 464, 2009- Ohio 1247, 905 N.E.2d 613, 617 (Ohio 2009)*. RGI and PPA are therefore sister entities because the five common owners who own 81.25 percent of RGI also own the LLC that, in turn, owns PPA. **[**16]** Mr. Dill does not cite, nor have we found, any

Colorado case that extends piercing the corporate veil horizontally to sister companies.

[*P34] Some jurisdictions categorically bar piercing the corporate veil between entities that are not in vertical, or parent-subsidiary, relationships. See *Minno, 905 N.E.2d at 617* (holding that "a plaintiff cannot pierce the corporate veil of one corporation to reach its sister corporation" because the "lack of ability of one corporation to control the conduct of its sister corporation precludes application of the piercing-the- corporate-veil doctrine"); see also *Madison Cty. Commc'ns Dist. v. CenturyLink, Inc., No. CV 12-J-1768- NE, 2012 U.S. Dist. LEXIS 180064, 2012 WL 6685672 at *4 (N.D. Ala. Dec. 20, 2012)* (horizontal veil piercing cannot occur because "[s]ister corporations do not benefit from the corporate form of their siblings" and because, without evidence of ownership interest, complete domination and control necessary for the alter ego element cannot be established); *Kiesel Co. v. J & B Props., Inc., 241 S.W.3d 868, 872 (Mo. Ct. App. 2008)* (piercing the corporate veil doctrine "generally serves to reach shareholders, not horizontal affiliates, in cases involving fraud"). Unlike Colorado, these jurisdictions typically do not recognize reverse veil piercing.

[*P35] In jurisdictions where horizontal piercing is recognized, a plaintiff **[***17]** seeking to disregard **[**185]** the corporate formalities separating horizontal affiliates must first pierce the veils separating each entity from their shared corporate parent. *Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P.. 491 B.R. 335, 349 (S.D.N.Y. 2013); Outokumpu Eng'g Enters, Inc. v. Kvaerner EnviroPower, Inc., 685 A.2d 724, 729 (Del. Super. Ct. 1996)* (refusing to pierce the veil between sister entities for personal jurisdiction without first piercing the veils to the common parent); see also *Huntsville Aviation Corp. v. Ford, 577 So. 2d 1281, 1287-88 (Ala. 1991)* (a sister corporation could be held liable for the debts and obligations of a corporation owned by the same parent because the parent used the corporations "interchangeably"). Except for Alabama, these jurisdictions typically recognize reverse veil piercing.

[*P36] But even in jurisdictions that do not explicitly recognize reverse veil piercing, horizontal piercing between sister entities can still occur when the veil piercing elements are satisfied. See *Tower Inv'rs, LLC v III E. Chestnut Consultants, Inc., 371 III. App. 3d 1019 864 N.E.2d 927 941. 309 III . Dec. 686 (III. App. Ct 2007)* (courts may also pierce the corporate veil between two affiliated, or "sister," corporations when there is such unity of interest and ownership between the corporations that separate personalities between the corporations no longer exist, and adherence to the fiction of separate personalities would promote injustice or inequitable circumstances); see also *Greenspan v*

LADT, LLC, 191 Cal. App. 4th 486, 121 Cal. Rptr. 3d 118. 138 (Ct. App. 2010) ("Generally, alter ego liability is reserved for the parent-subsidiary relationship. **[***18]** However, under the single-enterprise rule, liability can be found between sister companies." (quoting Las Palmas Associates v. Las Palmas Center Associates, 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301, 318 (Ct. App. 1991))).

[*P37] Because our supreme court has not explicitly barred horizontal piercing to find that sister entities are alter egos, and it recognizes the doctrine of reverse veil piercing, see In re Phillips, 139 P.3d at 645, we reject RGI and PPA's contention that Colorado courts may never pierce the veil to reach sister entities. See McCallum Family L.L.C., 221 P.3d at 75 ('"[T]he mere existence or nonexistence of formal stock ownership is not necessarily conclusive' in determining whether the corporate veil may be pierced." (quoting William M. Fletcher, *Cyclopedia of Corporations* § 41.10, at 141 (2006))); see also Nursing Home Consultants, Inc. v Quantum Health Servs., Inc. 926 F. Supp. 835, 840 n.12 (E.D. Ark. 1996) ("horizontal" or "triangular" veil piercing "results from a sequential application of the traditional piercing doctrine and the 'reverse piercing' doctrine"), *aff'd*, *112 F.3d 513 (8th Cir. 1997).* Indeed, another division of this court held an individual, who was not a shareholder, officer, or director, but who had some beneficial interest in a corporation, liable for the debts and obligations of the corporation over which he exercised dominion and control through its owners. McCallum Family L.L.C., 221 P.3d at 75; see also Cathy S. Krendl & James R. Krendl, Piercing the Corporate Veil: *Focusing the Inquiry*, 55 Denv. L.J. 1, 24 (1978).

[*P38] However, we **[***19]** agree with RGI and PPA that horizontal veil piercing between sister entities may occur only if (1) the entities share a parent or common owners in the ownership chain and (2) the veils separating each entity from the parent or common owners are first pierced to find that each sister entity is the alter ego of its owners.

[*P39] Recently, a division of this court considered circumstances involving piercing the veil between related entities. Sedgwick, 45. In *Sedgwick*, the plaintiff sought to pierce the veil between a single- member, single-purpose LLC (1950 Logan) and its manager (Sedgwick, another LLC). *Id. at 16.* The division concluded that the trial court erred in finding that Sedgwick and 1950 Logan were alter egos in part because the court had failed to first find that Sedgwick was the alter ego of its principal, Paris, an individual who also controlled 1950 Logan through other business entities. *Id. at 45*.

[186] [*P40]** We therefore conclude that Colorado corporate law permits horizontal veil piercing, under the traditional

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veil piercing test, between entities that share common ownership through another entity, but only if the veil of each corporate entity is also pierced."

84. Of equal significance are the following observations as entered by the Civil Court of the City of New York in **Data Probe, Inc. vs. 575 Computer Services, Inc.**[34]:-

> "One final fact of interest: ISA's exercise of dominion over the performance at issue was so pervasive and so complete that, in its dealings with plaintiff, it even meshed Computech's original contract with a contract that had originated with ISA. Plaintiff's president testified, and defendant ISA's former president confirmed, that in December, 1970 plaintiff had called the president of Computech to complain about the failure of its parent company, ISA, to pay $ 450 owed plaintiff on another, unrelated contract, referred to below. Computech's president thereupon handed the telephone to ISA's comptroller, who was seated with him; the latter then told plaintiff's president that ISA would not pay the $ 450 it owed unless plaintiff paid the $ 200 owed to Computech on a third contract involved herein, the one on which defendants counterclaim, and as to which there is no dispute. In this setting, the imprinted bottom line on all of the letters from Computech to plaintiff, reading: "An International Systems Associates, Ltd. Company", scarcely does justice to the full degree to which ISA ruled every facet of the relationship with plaintiff.
>
> In short, on this record, I find that the parent company, ISA, was the most important actor at every critical stage of this transaction. It exercised dominion over the performance of the contract, and became the ultimate arbiter of the extent to which performance was to be discharged. I conclude that, ISA having intruded its own values, policy judgment, and edicts as to the conditions and extent of performance, in every literal and pragmatic sense, ISA cannot escape responsibility for the role that it played.
>
> In such a situation, the law will not allow the corporate structure to stand in the way of justice and equity. As Judge Cardozo long ago said, in language that fits our factual fabric like a glove, this was "Dominion * * * so complete, interference so obtrusive" that it would be a perversion of justice to permit the dictatorial parent to thumb its nose at the court. (*Berkey v. Third Ave. Rv. Co., 244 N. Y.*

[34] 72 Misc. 2d 602

> *84, 95 [1926].)* And almost simultaneously, Judge Learned Hand announced *(Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F. 2d 265, 267 [C. C. A. 2d, 1929]):* HN "One corporation may, however, become an actor in a given transaction, or in part of a business, or in a whole business, and, when it has, will be legally responsible."
>
> Whether the second corporation is denominated "agent," "alter ego," or "instrumentality," of the parent, the essential point is that the courts will not allow "a perversion of the privilege to do business in a corporate form" *(Berkey v. Third Ave. Ry. Co., supra, p. 95).* Liability rests on the fact that the parent corporation has directly intervened in the transaction (*Kingston Dry Dock Co. v. Lake Champlain Transp. Co., supra, p. 267*). Whatever the rubric used, the courts in such a setting grant relief because there is "a wrong for which the law must find a remedy." (*Lowendahl v. Baltimore & Ohio R. R. Co., 247 App. Div. 144, 156* [1st Dept., 1936], affd. *272 N. Y. 360*).
>
> Our situation meets the tests for application of the exception to the general rule as formulated in *Lowendahl* and its progeny. There was domination and control -- at least in regard to the contract with plaintiff -- "not * * * in a manner normal and usual with stockholders," but so complete as to policy and business practice that the parent becomes the real actor in the transaction. (*Lowenthal, 247 App. Div. 144, 155, supra*.) The proximate result of that control was a clear legal wrong -- the breach of plaintiff's contract -- and the parent corporation necessarily must bear the responsibility therefor."

85. *Data Probe*, as well, holds that the principle of lifting the corporate veil may be deployed bearing in mind the imperatives of the law sanctioning a remedy where a wrong may have occurred. It also notices the significant words penned by the celebrated Judge Cardozo of the said principle being invoked so as to prevent the perversion of justice. It also adopts the "alter ego" and "instrumentality" precepts holding that courts should verily step in where a corporate form is used to pervert and sully the streams of justice.

86. In yet another significant decision, the Supreme Court of Kentucky in **Inter-Tel Techs., Inc. vs. Linn Station Props.**[35] held as follows:-

> "**AFFIRMING**
>
> Piercing the corporate veil is an equitable doctrine invoked by courts to allow a creditor recourse against the shareholders of a corporation. In short, the limited liability which is the hallmark of a corporation is disregarded and the debt of the pierced entity becomes enforceable against those who have exercised dominion over the corporation to the point that it has no real separate existence. A successful veil-piercing claim requires both this element of domination and circumstances in which continued recognition of the corporation as a separate entity would sanction a fraud or promote injustice. The leading Kentucky case on piercing, *White v. Winchester Land Development Corp.. 584 S.W.2d 56 (Ky. App. 1979*), like decisions from courts across the country, refers to this two-part test as the "alter ego" test. In recent years, courts and commentators have recognized piercing by using various tests and formulations, most commonly the "alter ego" and "instrumentality" tests, and by identifying common characteristics of corporations which have forfeited the right to separate legal existence, the "equities" assessment referenced in *White, 584 S.W.2d at 61*. This case requires us to consider this important doctrine in the context of an increasingly common scenario, a creditor's attempt to collect on debt incurred by a wholly-owned subsidiary where the subsidiary has been deprived of all income and rendered asset-less by the acts of its parent (and in this case also grandparent) corporation. While piercing the corporate veil, as one leading commentator has aptly noted, is a doctrine that can be characterized by "frustrating fluidity," Stephen B. Presser, Piercing the Corporate Veil 9 (2011), we have no doubt that the case before us presents a clear example of circumstances under which entitlement to the privilege of separate corporate existence should be forfeited.
>
> **ANALYSIS**
>
> **1. The Trial Court Properly Pierced the ITS Corporate Veil**
>
> **A. Piercing the Corporate Veil Generally**

[35] LLC, 360 S.W.3d 152

Limited liability for corporate entities is described by some scholars as springing from both democratic and economic principles in the early days of the United States. The "imposition of limited liability was perceived as a means of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic," assuring that the corporate world was not dominated by industrialists who had the immense personal wealth to withstand any business risk. Presser, supra, at 19. The economic rationale was that the public would benefit from investment by shareholders who would be willing to take risks in industry, manufacturing and general commercial development if personal liability could be avoided should their ventures not succeed. *Id.* at 21. By the twentieth century, deliberate misuse of the corporate form by shareholders who were either individuals or other corporations had led courts to authorize piercing the corporate veil.

One of the most notable early piercing cases, *Berkey v. Third Ave. Railway Co. 244 N.Y. 84, 155 N.E. 58 (1926),* involved a parent-subsidiary relationship and was authored by Judge Benjamin Cardozo. Mrs. Berkey was injured on a street car operated by Forty-Second Street Railway Co. but she sued Third Avenue Railway Co., the parent which owned substantially all of the Forty-Second Street stock. Among other factors that raised questions about Forty-Second Street's separate existence were the commonality of officers and directors between the two corporations, the leasing of the streetcars by the subsidiary from the parent with the parent's name prominently displayed on the vehicles and the payment of the subsidiary's executives by the parent. The Court ultimately declined to pierce the corporate veil of Forty-Second Street, which had its own banks accounts and employees as well as assets in excess of its debts and liabilities. However, Judge Cardozo noted that "[w]e say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an 'alias' or 'dummy." *Berkey, 155 N.E. at 61*.

In the ensuing years courts have invoked other, often colorful, terms in an attempt to capture the concept of loss of separate corporate existence including "dry shell," "puppet," "stooge," "conduit" and "marionette," among dozens of others. Peter B. Oh, *Veil-Piercing, 89 Tex. L. Rev. 81, 83 n.7 (2010).* This Court, then the Court of Appeals, joined in the vivid descriptions in one of the Commonwealth's earliest piercing cases, *Veterans Service Club v. Sweeney, 252 S.W.2d 25 (Ky 1952),* a case with somewhat curious facts. Mrs. Sweeney apparently gambled $1,535.00 of family funds in games of chance at the "veterans" club, causing her displeased

husband to bring suit under a Kentucky anti-gaming statute that allowed "the loser or his creditor" to recover treble damages against gambling winners. Without extensive discussion, this Court found the Chancellor correctly "swept aside the legal fiction of separate corporate personality" to hold the three individual incorporators of the Veterans Service Club liable for their "unlawful acts." *252 S.W.2d at 27*. In so doing, the Court stated:

> The incorporation was but a cloak or mask devised by the incorporators to cover their illegal acts of gambling and to shield them from the consequences of these acts. In such a case the corporate form will be disregarded to the same extent as if it were nonexistent and liability will be fixed upon those who attempt to employ this type of instrumentality as a protective measure for their unlawful practices. It is a stern but just maxim of law that fraud vitiates everything into which it enters.

Id. While *Veterans Service Club* referred to the pierced corporation as an "instrumentality," the first extended discussion of veil-piercing, including the leading "alter ego" and "instrumentality" tests and the rationale for this equitable doctrine, came almost thirty years later in what is still viewed as Kentucky's seminal and leading case on the subject, *White v. Winchester Land Development Corp., 584 S.W.2d 56 (Ky. App. 1979).*

B. White v. Winchester Land Development Co.

While the facts in White are not as colorful as those in *Veterans Service Club*, they too are a bit different from those of a typical piercing case. Mr. and Mrs. White signed a promissory note for a personal loan with The Winchester Bank, a loan secured by shares of Allied Stores stock owned by Mr. White's mother. Shortly after their personal loan was paid off, the Whites incorporated The White House, Inc., a card and gift shop which unfortunately failed approximately two years later. The corporation also had borrowed funds from The Winchester Bank, through two separate notes, so after the corporate insolvency the bank filed suit, claiming entitlement to the Allied Stores stock which had secured the original personal loan. The bank maintained that The White House, Inc. was a mere sham and the Whites should be held personally liable despite having signed the second and third notes in their corporate capacities as President and Secretary/Treasurer of the corporation. *584 S.W.2d at 59.*

Judge Boyce Martin, writing for the appellate panel, readily distinguished the facts before the court from the fraudulent acts in

Zanone Co. v. Standard Oil Co., 322 S.W.2d 710, 711 (Ky. 1959), a case involving the transfer of assets from a debt-ridden partnership to a new corporation for no consideration and, as one shareholder frankly described it, "to be able to do business and not be entangled with the past." While the Whites had engaged in no such fraudulent conduct, Judge Martin noted that the protection of corporate s limited liability could still be lost in "specific, unusual circumstances." *584 S.W.2d at 61* (citing *Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967)*). The White Court relied upon a law review article by Professor Rutheford Campbell that addressed three basic approaches to veil-piercing, generally referred to as the instrumentality theory, the alter ego theory and the equity formulation. Rutheford Campbell, Limited Liability for *Corporate Shareholders: Myth or Matter-of-Fact*, 63 Ky. L.J. 23, 33 (1975). The Court examined each test min turn and we review them in some detail because they remain common statements of veil-piercing criteria. Judge Martin questioned whether the three theories were "indeed... distinct," *584 S.W.2d at 61*, and, in most ways, they are not.

The instrumentality theory requires the co-existence of three elements: "(1) that the corporation was a mere instrumentality of the shareholder; (2) that the shareholder exercised control over the corporation in such a way as to defraud or to harm the plaintiff; and (3) that a refusal to disregard the corporate entity would subject the plaintiff to unjust loss." *Id.* While the Whites were certainly the only shareholders there was no proof of misuse of the corporation and, most importantly for the Court, there was no evidence of fraud in the corporation's dealings with the bank and the bank's loss was not unjust because the bank could have secured itself by "requiring the Whites to sign those notes in their individual and separate capacities." *Id.* Notably, the Court did not address the "or to harm" language of the second element, which obviously refers to something less than fraud.

The alter ego test was equally unavailing for the bank for essentially the same reasons. This formulation involves two elements: "(1) that the corporation is not only influenced by the owners, but also that there is such unity of ownership and interest that their separateness has ceased; and (2) that the facts are such that an adherence to normal attributes, viz, treatment as a separate entity, of separate corporate existence would sanction a fraud or promote injustice." *584 S.W.2d at 61-62*. Once again the *White* Court focused on the absence of fraudulent conduct without addressing the non-fraud language, in this test the "promote injustice" consideration. However, the facts also failed the alter ego test because the Whites had observed "the strictures of proper

corporate existence," going so far as to adopt a corporate resolution that authorized borrowing from The Winchester Bank. *Id. at 62*.

The final equity formulation reflected acknowledgment of those factors which often appeared in a successful veil-piercing case, factors that focus on "close-connectedness" as well as "unfair dealings." *Id.* Citing William M. Fletcher, 1 *Cyclopedia of the Law of Private Corporations* § 41 (1974), the *White* Court opined that piercing should occur only in the presence of a combination of (1) undercapitalization, (2) failure to observe corporate formalities, (3) the corporation not paying or overpaying dividends, (4) siphoning of corporate funds by a shareholder and (5) personal guarantees of corporate debt by majority shareholders. *Id.* Finding absolutely no evidence to support factors (2) through (5), the *White* Court addressed the undercapitalization factor by noting that Kentucky law does not require a minimum amount of paid-in capital and, in any event, the bank "had knowledge of the financial status of the corporation and could have protected itself." *Id. at 63*. Because the facts failed to satisfy any of the three tests for piercing the corporate veil, the bank had no recourse under that doctrine, although the case was remanded for further development of the bank's claim that the corporate notes were a novation or renewal of the Whites' original personal note.

C. Post-White in the Commonwealth and Beyond

Both before and since White, this Court has only focused on veil-piercing in passing. E.g., *Morgan v O'Neil 652 SW2d 83 (Ky 1983)* (declining to pierce where the plaintiff complained of questionable acts by a sole shareholder but failed specifically to state a piercing claim in the complaint); *Natural Res and Envtl. Prot Cabinet v. Williams, 768 SW2d 47 (Ky. 1989*) (piercing the veil to hold a sole shareholder of a mining corporation responsible for a mining violation but relying on the individual liability language of the penalty statute instead of the common. law doctrine): *Lewis LP Gas, Inc. v. Lambert, 113 SW3d 171, 176 (Ky. 2003)* (disallowing an alter ego theory to pierce the corporate veil in order to reach corporate assets in a marital dissolution suit, noting that alter ego requires use of the corporation "to invoke fraudulent protection against personal liability"). Consequently, the trial courts and federal courts applying Kentucky law have relied on White for Kentucky's stance on veil-piercing.

In *United States v. WRW Corp., 986 F.2d 138, 143 (6th Cir. 1993*), the Court pierced the corporate veil, focusing on the five factors in the *White* equity formulation but most particularly the fact that WRW was undercapitalized at the time of incorporation, $3000.00

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being "insufficient to pay normal expenses associated with the operation of a coal mine." Additionally, WRW had not observed corporate formalities, the individual shareholders had commingled personal and corporate funds and some of WRW's debt was guaranteed by the individual shareholders. With these three factors present, the Sixth Circuit was unpersuaded that the absence of evidence as to the other two factors, that the individual defendants received dividends or siphoned corporate funds, precluded piercing. More recently, in *Sudamax Industria e Comercio de Cigarros, LTDA v. Buttes & Ashes, Inc., 516 F. Supp. 2d 841, 847 (W.D. Ky, 2007*), the federal district court declined to pierce the veil of a limited liability company that the plaintiff insisted was part of a "web" of organizations, each the alter ego of the other. As to the separate entity existence factor, the LLC observed corporate formalities, maintained its own bank accounts, filed corporate tax returns and filed certain financial statements required by law. There was no evidence of commingling of funds among the entities, guarantees of the LLC debt by others or undercapitalization. Interestingly, the district court employed the two-part alter ego test from White and also construed the language in the second factor, "would sanction a fraud or promote injustice," as requiring a showing of fraud. *516 F. Supp. 2d at 849*.

Beyond Kentucky, veil-piercing generally focuses on the same instrumentality, alter ego and equities factors tests explored in *White*, with the alter ego formulation appearing to be the most common test, always employed in conjunction with consideration of various equities factors. The Seventh Circuit Court of Appeals, when applying Illinois law, uses the two-part alter ego test and considers the following factors under the first prong of that test:

> (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders.

Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec. 529 F.3d 371, 379 (7th Cir. 2008) (citing Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 840 N.E.2d 767 778, 298 Ill. Dec. 654 (Ill. App. Ct. 2005)). This expanded list is more reflective of the evolving considerations as to the so-called equities factors than the

five simple factors in White. Perhaps the most straightforward listing, employed in whole or part by various jurisdictions, is derived from Fredrick J. Powell, *Parent and Subsidiary Corporations: Liability of a Parent Corporation for the Obligations of its Subsidiaries* (1931), a treatise discussed by Professor Presser in Piercing the Corporate Veil, supra, at 41-42:

a) Does the parent own all or most of stock of the subsidiary?

b) Do the parent and subsidiary corporations have common directors or officers?

c) Does the parent corporation finance the subsidiary?

d) Did the parent corporation subscribe to all of the capital stock of the subsidiary or otherwise cause its incorporation?

e) Does the subsidiary have grossly inadequate capital?

f) Does the parent pay the salaries and other expenses or losses of the subsidiary?

g) Does the subsidiary do no business except with the parent or does the subsidiary have no assets except those conveyed to it by the parent?

h) Is the subsidiary described by the parent (in papers or statements) as a department or division of the parent or is the business or financial responsibility of the subsidiary referred to as the parent corporation's own?

i) Does the parent use the property of the subsidiary as its own?

j) Do the directors or executives fail to act independently in the interest of the subsidiary, and do they instead take orders from the parent, and act in the parent's interest? k) Are the formal legal requirements of the subsidiary not observed?

While some scholars are critical of the laundry list approach to assessing corporate separateness, one referring to it as "piercing by checklist," Blumberg, supra, § 11.03[A], courts and commentators alike recognize that the checklist approach focuses on factors most often bearing on the loss of separate entity existence. As Blumberg notes, courts give the most emphasis to "grossly inadequate capitalization, egregious failure to observe legal formalities and disregard, of distinctions between parent and subsidiary, and a high degree of control by the parent over the subsidiary's operations and decisions, particularly those of a day-to-day nature." *Id.* We believe

that these are the most critical factors and that Kentucky courts should consider the aforementioned expanded lists instead of focusing solely on the five factors identified more than thirty years ago in *White*.

Seventh Circuit precedent is helpful in illustrating another way in which *White* should be revised and updated. In the leading case of *Sea-Land Services, Inc. v. Pepper Source, 941 F.2d 519 (7th Cir. 1991)*, also applying Illinois law, the Court emphasized that either sanctioning fraud or promoting injustice is sufficient to satisfy the second prong of the alter ego test. However, the injustice must be some wrong beyond the creditor's mere inability to collect from the corporate debtor. Id. at 522-23. The Sea-Land Court's notable examples of injustice include where "a party would be unjustly enriched; [where] a parent corporation that caused a sub's liabilities and its inability to pay for them would escape those liabilities; or an intentional scheme to squirrel assets into a liability-free corporation while heaping liabilities upon an asset-free corporation would be successful." *941 F.2d at 524*.

Sea-Land is instructive because it typifies modern piercing jurisprudence which almost uniformly dispenses with any requirement of actual fraud. "A handful of jurisdictions, such as New Mexico, still require actual fraud, and there are a few others in which the courts still have not decided whether it is required, but American jurisdictions today overwhelmingly accept that morally culpable conduct short of actual fraud satisfies the second element...." Blumberg, *supra*, § 11.01[C]. The alter ego test language employed in *White* and by most jurisdictions expressly refers to "promoting injustice" and, indeed, piercing should not be limited to: instances where all the elements of a common law fraud claim can be established. The examples identified in *Sea-Land* are illustrative of schemes and circumstances that, while not constituting fraud, merit piercing where there is also evidence that the debtor corporation has lost its separate identity. There are other scenarios which also qualify, as reflected in any survey of veil-piercing cases. Thus, to the extent *White* can be read to require evidence of actual fraud before an entity's veil is pierced, it is overruled. We agree with the Seventh Circuit, however, that the injustice must be something beyond the mere inability to collect a debt from the corporation.

Finally, while the Kentucky General Assembly gave statutory recognition to the veil-piercing doctrine in *Kentucky Revised Statute (KRS) 271B.6-220(2)*, it remains an equitable doctrine to be applied by the courts. *Schultz v. GE Healthcare Fin, Servs, 2010-SC-000183-DG, 360 S.W.3d 171, 2012 Ky. LEXIS 3 (February 23,*

2012). A Kentucky trial court may proceed under the traditional alter ego formulation or the instrumentality theory because the tests are essentially interchangeable. Each resolves to two dispositive elements: 1) domination of the corporation resulting in a loss of corporate separateness and (2) circumstances under which continued recognition of the corporation would sanction fraud or promote injustice. In assessing the first element, the courts should look beyond the five factors enumerated in *White* to the more expansive lists of factors discussed *supra*. As to the second element, the trial court should state specifically the fraud or injustice that would be sanctioned if the court declined to pierce the corporate veil."

87. The Court of Justice of the European Union in a recent decision rendered in **The Goldman Sachs Groups Inc. vs. European Commission**[36] significantly observed as under:-

"32. It is also settled case-law that, in the particular case in which a parent company holds, directly or indirectly, all or almost all of the capital in a subsidiary which has committed an infringement of the competition rules, the parent company is able to exercise decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does in fact exercise such influence. In those circumstances, it is sufficient for the Commission to prove that the entire capital, or virtually the entire capital, of a subsidiary is held by its parent in order for it to be presumed that the parent exercises decisive influence over the commercial policy of that subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (judgment of 28 October 2020, *Pirelli & C. v Commission,* C-611/18 P, not published, EU:C:2020:868, paragraph 68 and the case-law cited).

33. Unless it is rebutted, such a presumption therefore implies that the actual exercise of decisive influence by the parent company over its subsidiary is considered to be established and entitles the Commission to hold the parent company liable for the conduct of the subsidiary without having to produce any additional evidence. The implementation of the presumption of actual exercise of

[36] Case C-595/18 P,

decisive influence is thus not conditional upon the production of additional indicia relating to the actual exercise of influence by the parent company (judgment of 26 October 2017, *Global Steel Wire and Others v Commission*, C-457/16 P and C-459/16 P to C-461/16 P, not published, EU:C:2017:819, paragraphs 85 and 86 and the case-law cited).

34. It is true that it is common ground that, during the pre-IPO period, the appellant did not hold all of Prysmian's capital, since the GSCP V Funds' holding in Prysmian amounted, as is apparent from paragraph 47 of the judgment under appeal, during that period, and with the exception of the first 41 days, first, to approximately 91% and then to approximately 84%. It is also common ground that, in the decision at issue, the Commission did not consider that that holding meant that the appellant had owned almost all of Prysmian's capital.

35. It is apparent, however, from the case-law cited in paragraphs 31 to 33 above that it is not the mere holding of all or virtually all the capital of the subsidiary in itself that gives rise to the presumption of the actual exercise of decisive influence, but the degree of control of the parent company over its subsidiary that this holding implies. Consequently, the General Court was entitled, without erring in law, to consider, in essence, in paragraph 50 of the judgment under appeal, that a parent company which holds all the voting rights associated with its subsidiary's shares is, in that regard, in a similar situation to that of a company holding all or virtually all the capital of the subsidiary, so that the parent company is able to determine the subsidiary's economic and commercial strategy. A parent company which holds all the voting rights associated with its subsidiary's shares is able, like a parent company holding all or virtually all the capital of its subsidiary, to exercise decisive influence over the conduct of the subsidiary."

88. As would be evident from the decisions rendered across jurisdictions and noticed above, the doctrine of a separate legal personality of a corporation and the situations where that veil could be pierced or lifted is well embedded. While legal systems around the world have evolved their own tests or grounds on the basis of which that doctrine may be applied, it is manifest that the shield of a separate legal personality is neither inviolable nor impenetrable. The Court is

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essentially called upon to ascertain and articulate the circumstances in which that principle may be justifiably invoked in law. While the tests of façade, sham, or where the corporate structure is set up to evade legal obligations are well settled, the issue which arises is whether a court would be justified in law to invoke the piercing principle absent allegations of fraud, façade or evasion of taxes or any other obligations.

89. On a review of the legal position as it prevails today across various jurisdictions, it is manifest that the doctrine of lifting of the corporate veil is no longer recognized to be applicable only in the context of the facade and sham tests that have held the field for centuries. The said principle may also in an appropriate case be liable to be resorted to where equity and the ends of justice may sanction such a recourse, where legal obligations are sought to be avoided as also in a setting where public policy or public interest so demand and require. A decree or judgment of a competent court must necessarily be enforced. Courts of justice would be failing in their duty if a decree were left to be a mere dead letter. If decrees and judgments of courts were to be rendered inexecutable and courts were to simply be forced to stand on the sideline, it would clearly shake the confidence of the people in the legal system and its very efficacy. An obligation which flows from a decree or an award must not only be duly recognized but also enforced in accordance with law. Taking any other view would render the entire adjudicatory process meaningless and an exercise in futility.

90. *Prest* and the other decisions rendered by courts in the United Kingdom clearly evidence a hesitancy to jettison the Solomon principle. While sticking to that line, the cases where the piercing principle had been either alluded to or employed were sought to be justified on the ground of the ultimate directions issued by courts being otherwise justified on an independent, well recognised and entrenched legal principle. Contrary to the position taken by courts in the United Kingdom, our Supreme Court right from *LIC* and *Renusagar Power Co.* understood the piercing principle as being liable to be recognised to be one which must be left to evolve and to be determined in the facts of a particular case. As was noticed above, neither *LIC* nor *Renusagar Power Co.* were cases involving fraud or sham. The Court also deems it apposite to notice the judgments of the Supreme Court in **Arcelor Mittal v. Satish Kumar Gupta**[37] and **State of Rajasthan v. Gotan Lime Stone Khanij Udyog (P) Ltd.,**[38] which too dealt with lifting of the corporate veil in a context separated from the fraud and façade grounds which have been consistently noticed.

91. In *Arcelor Mittal*, the Supreme Court while construing Section 29 A of the **Insolvency and Bankruptcy Code of India, 2016** on an extensive review of the precedents rendered on the subject by our courts as well as courts of other jurisdictions explained the legal position as follows: -

> "**32.** The opening lines of Section 29-A of the Amendment Act refer to a de facto as opposed to a de jure position of the persons

[37] (2019) 2 SCC 1
[38] (2016) 4 SCC 469

mentioned therein. This is a typical instance of a "see-through provision", so that one is able to arrive at persons who are actually in "control", whether jointly, or in concert, with other persons. A wooden, literal, interpretation would obviously not permit a tearing of the corporate veil when it comes to the "person" whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as Section 29-A, alone governs. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in *Salomon* v. *A. Salomon & Co. Ltd.* [*Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)] will not apply. For it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan.

33. The doctrine of piercing the corporate veil is as well settled as the *Salomon* [*Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)] principle itself. In *LIC* v. *Escorts Ltd.* [*LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264], this Court held : (SCC pp. 334-36, para 90)

> "*90*. It was submitted that the thirteen Caparo companies were thirteen companies in name only; they were but one and that one was an individual, Mr Swraj Paul. One had only to pierce the corporate veil to discover Mr Swraj Paul lurking behind. It was submitted that thirteen applications were made on behalf of thirteen companies in order to circumvent the scheme which prescribed a ceiling of one per cent on behalf of each non-resident of Indian nationality or origin, or each company 60 per cent of whose shares were owned by non-residents of Indian nationality/origin. Our attention was drawn to the picturesque pronouncement of Lord Denning, M.R. in *Wallersteiner* v. *Moir* [*Wallersteiner* v. *Moir*, (1974) 1 WLR 991 : (1974) 3 All ER 217 (CA)] and the decisions of this Court in *TELCO Ltd.* v. *State of Bihar* [*TELCO Ltd.* v. *State of Bihar*, (1964) 6 SCR 885 : AIR 1965 SC 40] , *CIT* v. *Sri Meenakshi Mills Ltd.* [*CIT* v. *Sri Meenakshi Mills Ltd.*, (1967) 1 SCR 934 : AIR 1967 SC 819] and *Workmen* v. *Associated Rubber Industry Ltd.* [*Workmen* v. *Associated Rubber Industry Ltd.*, (1985) 4 SCC 114 : 1985 SCC (L&S) 957]. While it is firmly established ever since *Salomon* v. *A. Salomon & Co.*

> *Ltd.* [*Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)] was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances. Pennington in his *Company Law* (4th Edn.) states:
>
> > 'Four inroads have been made by the law on the principle of the separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is referred to the many standard textbooks on corporation tax, income tax, capital gains tax and capital transfer tax.
> >
> > The other inroads on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principle *where the protection of public interest is of paramount importance, or where the company has been formed to evade obligations imposed by the law*, and by the courts implying in certain cases that a company is an agent or trustee for its members.'

In *Palmer's Company Law* (23rd Edn.), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in *Gower's Company Law* (4th Edn.), a chapter is devoted to "lifting the veil" and the various occasions when that may be done are discussed. In *TELCO Ltd.* [*TELCO Ltd.* v. *State of Bihar*, (1964) 6 SCR 885 : AIR 1965 SC 40] the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was

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not possible to treat the company as a citizen for the purposes of Article 19. In *CIT* v. *Sri Meenakshi Mills Ltd.* [*CIT* v. *Sri Meenakshi Mills Ltd.*, (1967) 1 SCR 934 : AIR 1967 SC 819] the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In *Workmen* v. *Associated Rubber Industry Ltd.* [*Workmen* v. *Associated Rubber Industry Ltd.*, (1985) 4 SCC 114 : 1985 SCC (L&S) 957] resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. *Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern*. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."

(emphasis supplied)

34. This statement of the law was followed in *Union of India* v. *ABN Amro Bank* [*Union of India* v. *ABN Amro Bank*, (2013) 16 SCC 490], at paras 43 and 44 as follows : (SCC pp. 519-20)

> "*43*. We are of the view that in a given situation the authorities functioning under FERA find that there are attempts to overreach the provision of Section 29(1)(*a*), the authority can always lift the veil and examine whether the parties have entered into any fraudulent, sham, circuitous device so as to overcome statutory provisions like Section 29(1)(*a*). It is trite law that any approval/permission obtained by non-disclosure of all necessary information or making a false representation tantamount to approval/permission obtained by practising fraud and hence a nullity. Reference may be made to the judgment of this Court in *Union of India* v. *Ramesh Gandhi* [*Union of India* v. *Ramesh Gandhi*, (2012) 1 SCC 476 : (2012) 1 SCC (Civ) 295 : (2012) 1 SCC (Cri) 467 : (2012) 2 SCC (L&S) 508].
>
> *44*. Even in *Escorts case* [*LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264], this Court has taken the view that it is neither necessary nor desirable to enumerate the classes of cases

> where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc. In *Escorts case* [*LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264], this Court held as follows : (SCC pp. 335-36, para 90)
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> > '*90.* … Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.'"

35. Similarly in *Balwant Rai Saluja* v. *Air India Ltd.* [*Balwant Rai Saluja* v. *Air India Ltd.*, (2014) 9 SCC 407 : (2014) 2 SCC (L&S) 804], this Court in following *Escorts Ltd.* [*LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264], held : (*Balwant Rai case* [*Balwant Rai Saluja* v. *Air India Ltd.*, (2014) 9 SCC 407 : (2014) 2 SCC (L&S) 804], SCC pp. 439-41, paras 70-73)

> "*70.* The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of *Salomon* v. *A. Salomon & Co. Ltd.* [*Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)] Lord Halsbury, LC, negating the applicability of this doctrine to the facts of the case, stated that : (AC pp. 30 & 31)
>
> > '[a company] must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself … whatever may have been the ideas or schemes of those who brought it into existence.'

Most of the cases subsequent to *Salomon case* [*Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)], attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "façade". However, there was yet to be any clarity on applicability of the said doctrine.

> *71.* In recent times, the law has been crystallised around the six principles formulated by Munby, J. in *Ben Hashem* v. *Ali*

Shayif [*Ben Hashem* v. *Ali Shayif*, 2008 EWHC 2380 (Fam) : (2009) 1 FLR 115]. The six principles, as found at paras 159-64 of the case are as follows:-

(*i*) Ownership and control of a company were not enough to justify piercing the corporate veil;

(*ii*) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;

(*iii*) The corporate veil can be pierced only if there is some impropriety;

(*iv*) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;

(*v*) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

(*vi*) The company may be a "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.

72. The principles laid down by *Ben Hashem case* [*Ben Hashem* v. *Ali Shayif*, 2008 EWHC 2380 (Fam) : (2009) 1 FLR 115] have been reiterated by the UK Supreme Court by Lord Neuberger in *Prest* v. *Petrodel Resources Ltd.* [*Prest* v. *Petrodel Resources Ltd.*, (2013) 2 AC 415 : (2013) 3 WLR 1 : 2013 UKSC 34, para 64]. Lord Sumption, in *Prest case* [*Prest* v. *Petrodel Resources Ltd.*, (2013) 2 AC 415 : (2013) 3 WLR 1 : 2013 UKSC 34, para 64] , finally observed as follows : (AC p. 488, para 35)

> '*35*. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise

have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.'

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in *LIC* v. *Escorts Ltd.* [*LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264], while discussing the doctrine of corporate veil, held that : (SCC pp. 335-36, para 90)

'*90*. … Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc.'"

36. Similarly in *DDA* v. *Skipper Construction Company (P) Ltd.* [*DDA* v. *Skipper Construction Company (P) Ltd.*, (1996) 4 SCC 622], this Court held : (SCC pp. 637-39, paras 24-28)

"*24*. In *Salomon* v. *A. Salomon & Co. Ltd.* [*Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)] the House of Lords had observed : (AC p. 51)

'[the] company is at law a different person altogether from the subscribers …; 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.'

Since then, however, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is "when the

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corporate personality is being blatantly used as a cloak for fraud or improper conduct". [Gower : *Modern Company Law* — 4th Edn. (1979) at p. 137.] *Pennington (Company Law — 5th Edn. 1985 at p. 53) also states that 'where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law', the court will disregard the corporate veil.* A Professor of Law, S. Ottolenghi in his article "From peeping behind the Corporate Veil, to ignoring it completely" [(1990) 53 Modern Law Review 338] says

> 'the concept of "piercing the veil" in the United States is much more developed than in the UK. The motto, which was laid down *United States* v. *Milwaukee Refrigerator Transit Company* [*United States* v. *Milwaukee Refrigerator Transit Company*, (1905) 142 Fed 247] by Sanborn, J. and cited since then as the law, is that "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". The same can be seen in various European jurisdictions.'

Indeed, as far back as 1912, another American Professor L. Maurice Wormser examined the American decisions on the subject in a brilliantly written article "Piercing the veil of corporate entity" [(1912) 12 Columbia Law Review 496] and summarised their central holding in the following words:

> 'The various classes of cases where the concept of corporate entity should be ignored and the veil drawn aside have now been briefly reviewed. What general rule, if any, can be laid down? The nearest approximation to generalisation which the present state of the authorities would warrant is this : When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.'

25. In Palmer's *Company Law*, this topic is discussed in Part II of Vol. I. Several situations where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception. It runs:

> 'The courts have further shown themselves willing to "lifting the veil" where the device of incorporation is used for some illegal or improper purpose…. Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere "sham" and made an order for specific performance against both the vendor and the company.'

Similar views have been expressed by all the commentators on the *Company Law* which we do not think necessary to refer to.

26. The law as stated by Palmer and Gower has been approved by this Court in *TELCO Ltd.* v. *State of Bihar* [*TELCO Ltd.* v. *State of Bihar*, (1964) 6 SCR 885 : AIR 1965 SC 40]. The following passage from the decision is apposite : (AIR p. 47, para 27)

> '*27*. … Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But, it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation.'

27. In *D.H.N. Food Distributors Ltd.* v. *Tower Hamlets London Borough Council* [*D.H.N. Food Distributors Ltd.* v. *Tower Hamlets London Borough Council*, (1976) 1 WLR 852 (2) : (1976) 3 All ER 462 (CA)] the Court of Appeal dealt with a group of companies. Lord Denning quoted with approval the statement in *Gower's Company Law* that

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

The learned Master of Rolls observed that 'this group is virtually the same as a partnership in which all the three companies are partners'. He called it a case of "three in one" — and, alternatively, as "one in three".

> *28.* The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family *and* [**Ed.** : The word "and" has been emphasised in original.] that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people."

(emphasis supplied)

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

92. In *Gotan Lime Stone*, the veil of corporate personality came to be pierced in relation to the transfer of a mining lease by way of acquisition of the shares of the company which was the lessee. While holding that such a course would be violative of the statutory restrictions which applied, the Supreme Court observed as under:-

> "**24.** The principle of lifting the corporate veil as an exception to the distinct corporate personality of a company or its members is well recognised not only to unravel tax evasion [*CIT* v. *Sri Meenakshi Mills Ltd.*, AIR 1967 SC 819 : (1967) 1 SCR 934] but also where protection of public interest is of paramount importance and the corporate entity is an attempt to evade legal obligations and lifting of veil is necessary to prevent a device to avoid welfare legislation [*Workmen* v. *Associated Rubber Industry Ltd.*, (1985) 4 SCC 114 : 1985 SCC (L&S) 957] . It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is

permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc. [*LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264 which refers to *Palmer's Company Law* (23rd Edn.) and *Pennington Company Law* (4th Edn.) followed in *New Horizons Ltd.* v. *Union of India*, (1995) 1 SCC 478].

25. In *State of U.P.* v. *Renusagar Power Co.* [*State of U.P.* v. *Renusagar Power Co.*, (1988) 4 SCC 59] this Court observed : (SCC pp. 94-95, paras 66-68)

> "*66*. It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. …
>
> *67*. In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(*c*) of the Act. The learned Additional Advocate General for the State relied on several decisions, some of which have been noted.
>
> *68*. The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The ghost of *Salomon case* [*Salomon* v. *Salomon and Co. Ltd.*, 1897 AC 22 : (1895-99) All ER Rep 33 (HL)] still visits frequently the hounds of Company Law but the veil has been pierced in many cases. Some of these have been noted by Justice P.B. Mukharji in *New Jurisprudence* (Tagore Law Lectures, p. 183)."

26. In *DDA* v. *Skipper Construction Co. (P) Ltd.* [*DDA* v. *Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622], it was observed : (SCC pp. 637-38, paras 24-25)

> "*Lifting the corporate veil*
>
> *24*. In *Salomon* v. *Salomon & Co. Ltd.* [*Salomon* v. *Salomon and Co. Ltd.*, 1897 AC 22 : (1895-99) All ER Rep 33 (HL)] , the House of Lords had observed,

> 'the company is at law a different person altogether from the subscriber … 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 received 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'.

Since then, however, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is '*when the corporate personality is being blatantly used as a cloak for fraud or improper conduct*'. [Gower : *Modern Company Law*—4th Edn. (1979) at p. 137.] Pennington (*Company Law*—5th Edn. 1985 at p. 53) also states that '*where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law*', the court will disregard the corporate veil. A Professor of Law, S. Ottolenghi in his article 'From Peeping Behind the Corporate Veil, to Ignoring it Completely' [(1990) 53 Modern Law Review 338] says

> 'the concept of "piercing the veil" in the United States is much more developed than in the UK. The motto, which was laid down by Sanborn, J. and cited since then as the law, is that "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". The same can be seen in various European jurisdictions'.

Indeed, as far back as in 1912, another American Professor L. Maurice Wormser examined the American decisions on the subject in a brilliantly written article 'Piercing the Veil of Corporate Entity' [(1912) 12 Columbia Law Review 496] and summarised their central holding in the following words:

> 'The various classes of cases where the concept of corporate entity should be ignored and the veil drawn aside have now been briefly reviewed. What general rule, if any, can be laid down? The nearest approximation to generalisation which the present state of the authorities would warrant is this : When the conception of corporate entity is employed to

> > defraud creditors, *to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly*, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.'
>
> *25.* In *Palmer's Company Law*, this topic is discussed in Part II of Vol. I. Several situations where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception. It runs:
>
> > 'The courts have further shown themselves willing to "lifting the veil" where the device of incorporation is used for some *illegal or improper purpose*.… Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere "sham" and made an order for specific performance against both the vendor and the company.'
>
> Similar views have been expressed by all the commentators on the *Company Law* which we do not think it necessary to refer."
>
> (emphasis supplied)
>
> **27.** It is thus clear that the doctrine of lifting the veil can be invoked if the public interest so requires or if there is allegation of violation of law by using the device of a corporate entity. In the present case, the corporate entity has been used to conceal the real transaction of transfer of mining lease to a third party for consideration without statutory consent by terming it as two separate transactions—the first of transforming a partnership into a company and the second of sale of entire shareholding to another company. The real transaction is sale of mining lease which is not legally permitted. Thus, the doctrine of lifting the veil has to be applied to give effect to law which is sought to be circumvented."

93. Both *Arcelor Mittal* as well as *Gotan Lime Stone* assume significance in light of the piercing principle having been employed on grounds of public interest or policy, to strike at attempts to circumvent the law as well as in the context of the imperatives of

enforcement of legal obligations. This flexibility of approach also seems to have been adopted by courts in the EU and the United States. This is evident from the conclusions recorded in *Dill* where the separate personality facet of a corporate entity was found to promote injustice or lead to inequitable circumstances. *Wm. Passalacqua* had traced the origins of the doctrine in the principles of equity and held that the veil of corporate personality could be validly pierced where public policy concerns so warranted. The said decision had pertinently held that courts of equity would be well advised to reach at the substance rather than being blinded by mere corporate form. In *Inter-Tel Techs*, the instrumentality theory identified three crucial elements justifying the veil being pierced- a corporation which was a mere instrumentality of the shareholder, complete control exercised by that shareholder to defraud the creditor and last but surely not the least, where a refusal to disregard the corporate structure would subject the plaintiff to unjust loss. The approach as struck in the aforesaid cases clearly commends acceptance and further consideration for reasons which follow.

94. As modern commerce and the regulatory regime in respect thereof has evolved over the decades, courts have leaned towards jettisoning a rigidity of approach or being tied down by principles which may have lost relevancy. Law in any case must grow and evolve bearing in mind the felt societal needs of the time and at the same time taking into consideration technological and social changes. It must keep abreast with the march of civilization itself. Commerce today straddles borders and boundaries of regions and countries. That

has indubitably thrown up its own share of original and novel questions. These transformational and normative changes warrant this Court to observe that the evolution of the laws cannot be tied down to conventional creeds. The web of complex corporate structures and which many a time spread across jurisdictions commands the courts to develop and adapt. On a more foundational ground, this Court deems it appropriate to recall the famous words of Cardozo and Hand both of whom had commended for acceptance the basic principle that a corporate structure should not frustrate the enforcement of an obligation or leave a party remediless. Courts should desist from becoming a mere mute spectator.

95. The decisions of our Supreme Court noticed above had prophetically observed that the doctrine of lifting of the corporate veil must be left to develop and evolve. Those decisions had in any case, and in the considered opinion of this Court, deliberately and consciously refrained from exhaustively chronicling or enumerating the myriad circumstances in which that precept could be applied. None of those decisions are liable to be read as recognizing fraud, façade or sham as being the solitary tests for application of the lifting doctrine. The power of the Court to peep behind the veil thus must be recognised and held to be justifiably invoked where questions of public policy, public interest or enforcement of settled legal obligations arise. The aforesaid three factors must be recognised as being the cornerstones of our judicial system itself. The precedents noticed above had resorted to the lifting of the veil doctrine where to overcome injustice and inequitable circumstances or results.

96. Judgments and decrees handed down by a competent court represent and symbolize declarations which bind parties to the *lis*. No party should be permitted to wriggle out from the obligations which flow therefrom. Taking any other view would result in a systemic breakdown of the adjudicatory mechanism that has evolved over centuries. It is in such situations that the issues of public policy and public interest assume significance. A corporate veil in any case should not come in the way of execution of a binding and well settled legal obligation.

97. It would be relevant to note that when the corporate veil is pierced in situations like the present, the action is not really one which is aimed at the shareholder as ordinarily understood in law. The shareholder is identified by the court principally since it represents the body and the soul of the corporate entity itself. It is the absolute control exercised by the shareholder over that corporate body which would convince and justify a court to proceed further. The Court also bears in mind the principle of "directing mind" as accepted by courts in the United Kingdom. The House of Lords in **Tesco Supermarkets v. Nattrass**[39] alluded to this aspect as would be evident from the following passages:-

> "Due diligence is in law the converse of negligence and negligence connotes a reprehensible state of mind-a lack of care for the consequences of his physical acts on the part of the person doing them. To establish a defence under s 24 (I) (b) of the Act, a principal need only show that he personally acted without negligence. Accordingly, where the principal who relies on this defence is a corporation a question to be answered is: what natural person or persons are to be treated as being the corporation itself,

[39] (1971) 2 ALL ER 127

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and not merely its agents, for the purpose of taking precautions and exercising diligence?

My Lords, a corporation incorporated under the Companies Act 1948 owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and the only place to look, to discover by what natural persons its powers are exercisable, is in its constitution. The articles of association, if they follow Table A, provide that the business of the company shall be managed by the directors and that they may 'exercise all such powers of the company' as are not required by the Act to be exercised in general meeting, Table A also vests in the directors the right to entrust and confer on a managing director any of the powers of the company which are exercisable by them. So it may also be necessary to ascertain whether the directors have taken any action under this provision or any other similar provision providing for the co-ordinate exercise of the powers of the company by executive directors or by committees of directors and other persons, such as are frequently included in the articles of association of companies in which the regulations contained in Table A are modified or excluded in whole or in part.

In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company. This test is in conformity with the classic statement of Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*. The relevant statute in that case, although not a criminal statute, was in pari materia, for it provided for a defence to a civil liability which excluded the concept, the vicarious liability, of a principal for the physical acts and state of mind of his agent.

There has been in recent years a tendency to extract from Denning LJ's judgment in *H L Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd.* his vivid metaphor about the 'brains and nerve centre' of a company as contrasted with its hands, and to treat this dichotomy, and not the articles of association, as laying down the test of whether or not a particular person is to be regarded in law as being the company itself when performing duties which a statute imposes on the company. In the case in which this metaphor was first used Denning LJ was dealing with acts and intentions of directors of the company in whom the powers of the company were vested under its articles of association. The decision in that case is

not authority for extending the class of persons whose acts are to be regarded in law as the personal acts of the company itself, beyond those who by, or by action taken under, its articles of association are entitled to exercise the powers of the company. Insofar as there are dicta to the contrary in *The Lady Gwendolen* they were not necessary to the decision and, in my view, they were wrong.

But the only relevance of this to the appellants' defence under s 24 (I) of the Trade Descriptions Act 1968, was, as the justices rightly appreciated, whether the act or default of Mr Clement was that of another person' than the appellants themselves within the meaning of s 24 (I) (a). The fact that the principal in the business transaction in the course of which an offence under s 11 (2) was committed was a corporation and not a natural person cannot affect the principal's duty to take all reasonable precautions and to exercise all due diligence under s 24 (I) (b). The articles of association of the appellants were not produced in evidence. Strictly speaking it may be that they should have been. But it is sufficiently evident from the findings of the justices as to the position held by Mr Clement in the appellants' organisation that it was too lowly for him to have had confided in him by the board of directors the co-ordinate exercise of any of the powers of the company itself.

My Lords, there may be criminal statutes which on their true construction ascribe to a corporation criminal responsibility for the acts of servants and agents who would be excluded by the test that I have stated to be appropriate in determining whether a corporation has itself committed a criminal offence. The Trade Descriptions Act 1968, however, so far from containing anything which compels one to reject that test, recognises, by s 20, the distinction between 'any director, manager, secretary or other similar officer of a body corporate' and other persons who are merely its servants or agents. Section 20 (I) provides as follows:

> "Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

The natural persons described in this subsection correspond with those who under the memorandum and articles of association of a company exercise the powers of the company itself. From this it follows that if any of them is guilty of neglect in the exercise of

> those powers such neglect is that of the company itself. That it cannot be relied on as 'the act or default of another person', so as to entitle the company to a defence under s 24 (I), is implicit in the provision in s 20 (I) that a person in the described category shall be guilty of an offence 'as well as the body corporate'. Without s 20 it would have been open to doubt whether persons whose acts were in law the acts of the company itself would have been guilty in their personal capacity also of the offence committed by the company."

98. In **Merchandise Transport Ltd. v. British Transport Commission and Ors.**[40] , which again was not a fraud or a sham case, the Queens Bench accepted that where it is imperative to identify the persons who control a corporate body, courts could go behind the mere status of the company and identify those who actually direct and control its activities. The following passages are apt for the situation which arises for consideration in the present case:-

> "Furthermore, the question arises, whether in the circumstances Harris Lebus ought to be treated as no more than genuine customers of the applicants, "persons requiring facilities for transport" who are given priority in the all-important provisions of s. 174 (4) of the Road Traffic Act, 1960. Ought they not to be treated rather as persons "providing facilities for transport" who are relegated to secondary consideration under the provisions of that subsection? Counsel for the applicants relied strongly on the technical (and irrefutable) legal distinction between a company formed under the Companies Acts and the persons who hold its shares, as shown by *Salomon v. Salomon & Co.* (18), an income tax case, in which sphere of the law technicality is no doubt of the essence. But *Daimler Co., Ltd. v. Continental Tyre& Rubber Co. (Gt. Britain), Ltd.* (19) (a trading with the enemy case) and *Unit Construction Co., Ltd. v. A Bullock (20)* (an income tax case on the residence of a company), and othercases, show that where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance. This is plainly whatthe authority had in mind when he

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40 [1961] 3 ALL E.R. 516

> explained his doubts about precedents which might be created if a licence were to be granted in the circumstances of the present case. It appears to me that if a manufacturer, who holds a C licence for vehicles for the carriage of his goods, has only to form a subsidiary company in order to secure an A licence for the latter company to carry the holding company's goods and enter into competition with public hauliers, the whole scheme of the Act might thus be evaded."

99. Undoubtedly, both the Union Ministry and GNCTD are the principal shareholders of the DMRC. The DMRC must necessarily be recognised as being a mere alter ego of those two shareholders. The two sovereign entities exercise control over the DMRC by virtue of the composition of its Board. It is their equity and debt contributions which enables the DMRC to carry out its functions and discharge its statutory obligations. Both by virtue of the capital invested in the corporation as well as the control vested and exercised by them over its affairs, the Union Ministry and the GNCTD must be recognised in law as being in absolute control and the directing mind. They cannot hide behind the veil of corporate personality especially when it comes to the discharge of binding obligations owed by the DMRC. In any case public policy demands that the veil be lifted and they be commanded to take appropriate steps to enable the DMRC to meet the obligations flowing from the award.

100. In the facts of the present case, the rendering of the Award and its executability against DMRC cannot possibly be questioned. The provisions of the Act and its constitution clearly reveal and point to it being controlled entirely by its principal shareholders, GNCTD and the Union Ministry. The two shareholders are not mere individuals having a business interest in a corporate venture but sovereign

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governments in their own right. Governments cannot shirk from their liability to abide by binding judgments, decrees and awards. If such a situation were permitted to hold, the very structure of the adjudicatory and judicial system would falter and crumble. Neither the GNCTD nor the Union Ministry disputes the liabilities that flow from the Award. Apart from the pendency of a curative petition that Award has for all practical purposes attained finality. In any case, the orders that have been passed on the present execution petition operate and bind both the GNCTD as well as the Union Ministry. The circumstances of the present case thus clearly mandates and warrants the corporate veil being lifted and torn apart and for the Court recognising the GNCTD as well as the Union Ministry being in complete and total control of the affairs of the DMRC.

101. At this stage, the Court proposes to frame directions which stand set out hereinafter. In case those measures are found to be insufficient or falling short of the obligation of DMRC flowing from the Award, the Court reserves the right to frame further appropriate measures against both the Union as well as the GNCTD for the purposes of ensuring that the liabilities flowing from the Award are duly discharged.

102. Before closing, it would appear appropriate to deal with the submission of Mr. Vashisht based on the provisions of the Code. The submission essentially was that the executing court cannot go behind the decree. According to learned senior counsel, since GNCTD had not been made a party to the arbitral proceedings, it could not at this stage of the execution proceedings be joined or held liable. The Court

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finds itself unable to sustain this submission for the following reasons. It must at the outset be noted that GNCTD has been joined in these proceedings consequent to the Court having pierced the veil. Such a course cannot possibly be construed as going beyond or behind the decree. The Court in these proceedings is essentially concerned with execution of the decree. For that purpose, it has for reasons aforenoted, come to the conclusion that the veil of corporate personality is liable to be lifted. It is in the aforesaid backdrop that GNCTD has been joined in these proceedings. The submission noted above is thus rejected.

103. Accordingly, and for all the aforesaid reasons, the Court issues the following directions: -

A. The Union Ministry as well as the GNCTD shall forthwith attend to the requests of the DMRC for extension of sovereign guarantees/subordinate debt enabling it to liquidate its liabilities under the Award. The aforesaid decision be taken within a period of two weeks from today. If permission be accorded to the DMRC in respect of either of the two modes as suggested by it, it shall proceed to deposit the entire amount payable under the Award along with up-to-date interest in terms thereof within a period of one month therefrom;

B. If the Union Ministry or the GNCTD decline the request for providing sovereign guarantees or subordinate debt, the Union Ministry shall forthwith and at the end of two weeks, revert and repatriate all moneys received by it

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from DMRC post 10 March 2022 pursuant to its directives so as to ensure that the credit balance in the Total DMRC Funds, Total Project Funds and Total Other Funds reflects the balance as it existed on 10 March 2022;

C. Upon receipt of the aforesaid moneys, DMRC shall forthwith transfer to the escrow account, an amount equivalent to the total amount payable in terms of the Award along with interest;

D. In case of a failure on the part of parties to proceed in terms of the above directions, the entire amount standing to the credit of Total DMRC Funds, Total Project Funds and Total Other Funds as of today shall stand attached forthwith without reference to Court;

E. In case DMRC fails to clear all outstanding amounts payable in terms of the Award despite the directions set forth above, the Court reserves the right to frame further appropriate directions against the Union Ministry and the GNCTD consequent to the corporate veil having been duly lifted as per the findings recorded hereinabove.

F. Parties are granted liberty to approach the Court for such further directions/clarifications as may be warranted.

YASHWANT VARMA, J.

MARCH 17, 2023
neha/SU/*bh*