

WP-5693-2016

(M/S UMANG DEVELOPERS THRU. RAVI SOMANI Vs INDORE DEVELOPMENT AUTHORITY)

10-11-2016

Shri V.K. Jain, learned counsel for the petitioner.

Shri Aniket Naik, learned counsel for the respondent.

ORDER

(Passed on .11.2016)

With the consent of parties, petition is heard finally.

In this case, the facts are not disputed, hence, summarized as under:

1. On 12.08.2010, Indore Development Authority advertised Scheme No.71 and invited offer for allotment of a plot by way of lease for commercial-cum-residential in Scheme No.71, Sector-C. The advertisement was very attractive as after payment of only 50% of amount, the possession was liable to be handed over. The partnership firm was constituted on 18.08.2010 with six partners. That later on petitioner's firm got registered by Registrar (Firms and Society), Indore. The petitioner submitted tender and his offer was found highest and Indore Development Authority allotted the plot measuring 4710 sq.mt. on premium @ Rs.29,313/- per sq.mt. The total amount of premium is Rs. 13,80,64,230/-. The Indore Development Authority has issued reservation letter dated 30.09.2010. Thereafter, an agreement dated

29.10.2010 was executed between the petitioner and Indore Development Authority followed by another agreement dated 07.12.2011. The Indore Development Authority has issued reservation letter dated 30.09.2010. Allotment letter dated 24.02.2012 was issued and the possession was given to the petitioner on 26.03.2012.

2. That on 06.02.2011, out of six partner, four partners have retired from the petitioner's firm and the deed was executed on 06.02.2011 and on very next day i.e. on 07.02.2011, partnership deed was executed after inducting six new partners in the firm. Again on next day i.e. on 08.02.2011, remaining two original partners walked out from the firm and new deed was executed on 08.02.2011. Accordingly, original six partners had left and the firm continued with new six partners.

3. Vide letter dated 20.02.2014, the petitioner firm made a request to Indore Development Authority for execution of lease deed. The Indore Development Authority has been informed about the new partnership deed by the petitioner vide letter dated 16.11.2015.

4. That, by retiring old partner and induction of new partner in the petitioner's firm, doubt came in the mind of respondent/Indore Development Authority and they sought legal opinion whether a lease deed can be executed with the petitioner's firm in a change circumstances. The fact remains that successful bidder was the partnership firm i.e. the petitioner. Legal opinion came in favour of the petitioner to the effect that change

in the constitution of firm due to retirement or induction of new partner is legally permissible and same does not involve any transaction of transfer of property.

5. Thereafter, the matter was referred and vide resolution No.206, dated 02.12.2015, it was resolved that the change of Director/Partner in the partnership firm is permissible subject to verification of the document from the office of Registrar (Firms and Society).

6. Again the respondent decided to reconsider the said resolution and note-sheet was forwarded. By that time, the petitioner has paid the entire premium amount and lease rent. Again, in the note-sheet, it was recommended that it is a regular practice to permit the change in the constitution of firm and lease deed can be executed by accepting 1% charges under Rule 34 of Madhya Pradesh Vikas Pradhikarno Ki Sampattiyo ka Prabandhan Tatha Vyayan Niyam 2013.

7. Despite the aforesaid note-sheet, the lease deed could not be executed and respondent again passed the impugned resolution No.74 and 110 dated 28.05.2016 and 14.06.2016 to the effect that the lease deed shall be executed with the petitioner through the Original partners as on the date of allotment. A letter to that effect was issued to the petitioner dated 25.07.2016 that Indore Development Authority is ready to execute the lease with the petitioner in the name of the partners, who were the partners at the time of allotment of the plot. Hence, the petitioner has approached this Court

challenging the resolution dated 25.05.2016 and 14.06.2016 and the letter dated 25.07.2016 (P/12 to P/14) respectively.

8. Shri V.K.Jain, learned counsel for the petitioner has argued that under the law, there is no restriction to make change in the constitution of the firm. Any partner can retire and new partners can be inducted at any time, the only requirement is information to the Registrar (Firms and Societies). Such a change do not change the existence of rights and liabilities of the firm. There is no civil liabilities attached with the retiring partner from the firm but the respondent/Indore Development Authority has taken entire issue in a wrong side and presumed that the petitioner's firm wants to avoid any taxes liabilities. There is a vast difference between the dissolution of firm and change in the constitution of firm. That even transfer of allotment is permissible under the provision of Madhya Pradesh Vikas Pradhikarno Ki Sampattiyo ka Prabandhan Tatha Vyayan Niyam 2013, after payment of 1% charges. In the case in hand, the lease deed has not been executed, therefore, question of levying such charge is also not warranted. The Indore Development Authority cannot compel for execution of lease deed with the erstwhile partner, who are not competent to execute the deed in the name of the firm and if they do, it would come in the category of forgery. Hence, prayed for quashing of resolution No.74 and 110 dated 25.07.2016 and letter dated 25.07.2016.

9. Shri Aniket Naik, learned counsel for the respondent has argued that though the successful bidder is the petitioner's firm and incoming and outgoing of document is certainly permissible by virtue of statutory provision. That the petitioner's firm was constituted after the advertisement with six partners and now all six partners has been retired and new six partners has been inducted, therefore, such a transformation is suspicious and is to be seen by lifting the veil which is very settled and recommended under the law in the corporate sector and if such a practice is permitted then it will open a new gateway of transferring the property in the name of others by avoiding necessary stamp duty. By retiring a partner and inducing the new partners some profit and loss might have been settled between partners as the price of land has drastically raised from the date of allotment of the said property till today. He has further submitted that an opinion was also sought from the Inspector General of Registration and Stamps, who opined that this conduct of the petitioner amounts to transfer of property in the name of other and it will amount to revenue loss and finally he prayed for dismissal of the writ petition.

10. By way of additional submission, he submitted that in this writ petition, the State Government is necessary party as the issue involved is evasion of stamp duty which is the domain of State Government by executing deed, the Indore Development Authority is not going to

lose any tax or fees.

ORDER

11. The facts of the case are not disputed by the respondent/Indore Development Authority in this petition. The only question which arises for consideration in this petition is due to formation of new partnership deed by retiring old partners and induction of all new partners is apparently valid and permitted under the provision of law whether the Indore Development Authority is justified in directing firm to execution of deed with the old partners of the firm which were at the time of bidding is justified or not.

12. The apex Court in case of ***Sharad Vasant Kotak Vs. Ramniklal Mohanlal Chawda***, reported in **(1998) 2 SCC 171** has held that the induction of new partners in the existing firm is only a reconstitution of the firm and it is not necessary to get a fresh registration. The change in constitution of firm will not effect the registration once made. Therefore, by induction of new partner, the firm would not be dissolved and fresh registration is not required now.

13. By retiring the old partner and induction of new partner from face of it nothing is wrong, but the Indore Development Authority is trying to see the intention behind such transaction and prayed this Court to lift the veil and which is legally permissible under the law. **14.** The apex Court in case of ***State of U.P. & Others Vs. Renusagar Power Co. and Others***, reported in **(1998)**

4 SCC 59 has held that lifting of veil can be invoked if public interest so requires and there is allegation of violation of law, attempt to evade legal obligations and to avoid welfare legislation.

15. Para 66, 67 and 68 of the aforesaid judgment is reproduced below:

¶66. It is high time to reiterate that in the expanding of 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 Renuagar 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 Renuagar 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, Renuagar is wholly owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renuagar are controlled by Hindalco. Renuagar 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 Renuagar and Hindalco as one concern and the generation in Renuagar as the own source of generation of Hindalco. In the impugned order of the profits of Renuagar 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's case 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.

16. Thereafter, in the case of Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd., it was observed as under:

24. In Salomon v. Salomon & Company Limited the House of Lords had observed, "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 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, on any shape or form, except to the extent and in the manner provided by that Act". Since then, however, the

Courts have come to recognize 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" 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". [(1990) 53 Modern Law Review 338]. Indeed, as far back 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" [published in (1912) XII Columbia Law Review 496] and summarized 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 generalization 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 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 to.â

17. In light of above, the action of Indore Development Authority is justified to see the intention of the petitioner's firm by which original six partners who were at the time of bidding has been replaced by the all new six partners and requested the Indore Development Authority to execute the lease deed.

18. That in the present case, the advertisement was issued by the Indore Development Authority on 12.08.2010 and the petitioner's firm was constituted on 18.08.2010. The partnership deed dated 18.08.2010 is on record as Annexure R/1. As per this deed, the business of the partnership firm deem to have commenced from 18.08.2010. The profits and losses of the six partners are divided into equal proportions i.e. 16.67% each. All the six partners executed a power of attorney in the name of one partner â Gopal Neema on 30.08.2010. The Indore Development Authority has issued a reservation letter though in the name of firm but in which the name of all the six partners along with name of power of attorney holder is mentioned.

19. That the partner no.3, 4, 5 and 6 has retired from the firm by deed dated 06.02.2011 and in their place, six new partners were inducted vide deed dated 07.02.2011. Thereafter, vide deed dated 08.02.2011 remaining two original partners has also retired including Gopal Neema

who was having the power of attorney. All the three deeds were executed from 06.02.2011 to 08.02.2011 that is within a period of two days, whereas, in the original partnership deed, it is mentioned in clause No.16 that any partner hereto intends the retirement from the firm, he shall give one month's notice in writing to the other partners to do so. Therefore, by executing three deeds within two days, entire assemblage of the firm has been changed. The Estate officers of Indore Development Authority vide letter dated 24.02.2011 has issued the letter for allotment of plot for 30 years to petitioner. In this letter also, the name of original partners are mentioned through Gopal Neema (Power of Attorney). The petitioner continued to deposit the lease rent and the premium amount. The possession letter was also issued in which, the name of original partners are mentioned along with name of the firm. Thereafter, vide letter dated 06.03.2014, the Indore Development Authority has refused to execute the lease deed on the ground that lease deed would be executed with the firm with existing partners.

20. That the State Government has framed the rule of Madhya Pradesh Vikas Pradhikarno Ki Sampattiyo ka Prabandhan Tatha Vyayan Niyam 2013. Under Rule 8, the lease deed holder may transfer the property to another person after obtaining NOC from the authority and depositing the transfer fee. Under Rule 34 also the authority may transfer the allotment made to the original

allottee, to other person at the request of original allottee. Such transfer shall be made on payment of transfer fee, which shall be 1% of the premium or applicable guidelines price, prevailing on the date of which the application for transfer is made whichever is more. However, no such transfer shall be permissible before expiry of period of six months from the date of allotment.

Rule 34 is reproduced below:

34. Transfer of allotment by original allottee

The Authority, may transfer the allotment made to the original allottee, under these rules, to such other person as such original allottee may request. Provided that such other person shall belong to same category as for which the said property was reserved. Such transfer shall be made on payment of transfer fee which shall be 1% of the premium or applicable guideline price prevailing on the date of which application for transfer is made, whichever is more. No such transfer shall be permissible before the expiry of a period of six months from the date of the allotment.

21. The case of the petitioner is that at the most this can be treated as transfer of allotment under Rule 34. In the present case, since the lease deed has not been executed and the plot has only been allotted to the petitioner's firm, therefore, the provision of Rule 34 would apply, because it is a case of transfer of allotment. The procedure is prescribed under Rule 6 for disposal of properties by inviting bid. The various forms are also annexed with this rule under which individual or the association firm or

trust may participate in the bid.

22. In case the bidder is a firm then on behalf of firm one authorized representative on affidavit shall participate in the bid and he is required to give an affidavit with certain undertaking.

23. The petitioner's firm with the original partners submitted bid through the power of attorney - Shri Gopal Neema, who completed all the formalities. The affidavit and undertaking given by the representative of the firm are not mere formalities but taken for a reason that firm would be bound by those terms and conditions of the bid at the time of execution of the lease deed.

24. That, in recent decision, apex Court has considered similar issue in case of ***State of Rajasthan & Others Vs. Gotan Lime Stone Khanij Udyog Private Limited and Another*** reported in ***2016(4) SCC 469***. In this case M/s Gota Lime Stone Khanij Udyog Pvt. Ltd., being a partnership firm held mining lease for 30 years. The firm applied for transfer of lease in favour of Gotan Lime Stone Khanij Udyog Pvt. Ltd. which is only change from firm to Private Limited company. The partner of firm and Director of Company are same. The newly formed private limited company instead of operating the mining lease itself sold the entire share holding to another company allegedly for Rs.160 crore which is allegedly to be sale of mining lease.

25. According to the State of Rajasthan, lease cannot be transferred without the consent of the competent

authority. The apex Court considered the question whether above transaction can be taken as unauthorized transfer of lease which could be declared void. The apex Court answered the question in favour of Government and held that lessee has achieved indirectly what could not be achieved directly by concealing the real nature of the transaction. Findings recorded in para 36 are reproduced below:

¶36. As already seen, in the present case, the original lessee sought transfer merely by disclosing that the partnership firm was to be transformed into a private limited company with the same partners continuing as directors and there was no direct or indirect consideration involved. It was specifically declared that no pecuniary advantage was being taken in the process which is clearly false. The permission to transfer the lease in favour of a private limited company was granted on that basis. Thus, it was a case of suppression veri and suggestio falsi. Once it is held that transfer of lease is not permissible without permission of the competent authority, the competent authority was entitled to have full disclosure of facts for taking a decision in the matter so that a private person does not benefit at the expense of public property. The original lessee did not disclose that the real purpose was not merely to change its partnership business into a private limited company as claimed but to privately transfer the lease by sale to a third party. This aspect has also escaped the attention of the High Court. Accordingly, our answer to the question framed is that in the facts of the present case, sale of shareholding by GLKUPL to UTCL is a private unauthorized sale of mining lease which being in violation of rules is void.

GLKUPL has been formed merely as a device to avoid the legal requirement for transfer of mining lease and to facilitate private benefit to the parties to the transaction, to the detriment of the public.â

37. Learned single Judge and the Division Bench have gone by only one aspect of law, i.e. the general principle that sale of shares by itself is not sale of assets but this principle is subject to the doctrine of piercing of corporate veil wherever necessary to give effect to the policy of law. In the present case, this principle clearly applies as transfer of shares to cover up the real transaction which is sale of mining lease for consideration without the previous consent of competent authority, as statutorily required. The statutory requirement is sought to be overcome with the plea that it was a transaction merely of transfer of shareholding when on the face of it the transaction is clearly that of sale of the mining lease. In view of the above, the view taken by the High Court cannot be sustained.

26. In the present case, the allotment in favour of the firm is transferable under Rule 34 of Niyam 2013. For such transfer, permission is required to be obtained from the Indore Development Authority. The apex Court in the case of ***State of Rajasthan Vs. Gotan Lime*** (Supra) has held that the transfer of share is to cover up the real transaction which is sale of mining lease. In the present case, the change of partner is nothing but a transfer of allotment without permission from the authority.

27. Shri Jain, learned counsel for the petitioner

submitted that the partner who has retired from the firm cannot sign the lease deed on behalf of the firm, which is impermissible under the law.

28. The condition imposed by the impugned order can be relaxed in one condition if the original partner gives a written consent for execution of lease deed with the present partner of the firm, therefore, the petition is partly allowed with the direction to the Indore Development Authority to execute the lease deed with the petitioner's firm with the existing partners, if petitioner submits an NOC from all original partners.

29. Writ petition is **partly allowed**.

30. No order as to costs.

(VIVEK RUSIA)
JUDGE