

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : SUIT FOR RECOVERY

RFA No.46/2002

Reserved on : 23rd September, 2008

Date of decision: 28th November, 2008

ASHISH POLYFIBRES (BIHAR) LTD. ... Appellant
Through: Mr. K.K. Bhuchar, Adv.

versus

STATE BANK OF INDIA Respondent
Through: Mr. Rajiv Kapur, Adv.

CORAM :-
THE HON'BLE MR.JUSTICE PRADEEP NANDRAJOG
THE HON'BLE MR. JUSTICE J.R. MIDHA

J.R. MIDHA, J.

1. Appellant No.1 is a Limited Company of which Appellants No.2 and 3 and Respondent No.2 are the Directors. Appellant No.1 had Current Account No.CA- 5527 with State Bank of India, Nehru Place Branch. In the year 1990 entries were being recorded by the bank pertaining to the account of its customers by means of an escota machine.

2. On 17th May, 1990, the escota machine, due to technical defect, made a wrong credit in the sum of Rs.1,86,421.57 in the account of Appellant No.1. Respondent No.1/Bank detected the aforesaid mistake on 2nd April, 1991 whereupon letters were written by the Bank to the appellants who acknowledged the liability and refunded Rs.20,000/- by cheque and promised to pay the balance in installments, but failed to honour the commitment and, therefore, Respondent No.1 filed a suit for recovery before the learned District Judge.

3. The appellants appeared before the learned Trial Court and filed a joint written statement in which they denied all the aforesaid averments made in the plaint, except the refund of Rs.20,000/-. Respondent No.2, who was defendant No.4, did not appear before the learned Trial Court and was proceeded ex parte.

4. At the trial, Respondent No.1 produced one witness, PW-1, who proved the overdraft of Rs.1,86,721.57 created in the account of Appellant No.1 due to wrong credit

and defect in the escota machine. The witness proved the Statement of Account-Ex.PW-1/1, letters Ex.PW-1/C, PW-1/D and legal notices Ex.PW-1/J and PW-1/S by the Bank to the appellants and letters Ex.PW-1/E, PW-1/G, PW-1/H, PW- 1/I, PW-1/Q by the appellants to the Bank.

5. The appellants did not lead any evidence in defence.

6. The appellants acknowledged the liability in their letters written to the Bank. The relevant extract of the letters by the appellants to the Bank are as under:- (i) Ex.PW-1/I letter dated 3rd April, 1991 of Appellant No.1 (signed by Appellant No.3 as its Managing Director) to the Bank in which it was stated as under:- We wish to inform you that our Accountant Shri Manoj received a telephone call from your Branch intimating that the Bank had through inadvertence credited a sum of Rs.1,86,421.57 in our aforesaid account. We have informed you that our books are with our statutory auditors at Calcutta. We have taken up the matter to verify this particular entry. We assure you that we will arrange to put adequate funds, for you to debit the principal amount to our account, without any interest charges, in case the above is found correct. It may please be noted that it will take 5 to 6 weeks to carry out the above assurance. We will request you to please wait for the said period. We once again assure you that the funds will be put at your disposal in the above time in case the entry is found to be correct. (ii) Ex.PW-1/H letter dated 27th May, 1991 of Appellant No.1 (signed by Appellant No.2 as Joint Managing Director to the Bank) in which it was stated as under:- Please refer to your letter No.CandI/91/314 dated 11 May, 91. Regarding the debit balance of Rs.1,78,841.60 in our above mentioned account we are hereby depositing Rs.20,000/- (Rupees twenty thousand only) vide Cheque No.680009 dated 27/5/91 drawn on SBI, New Guwahati. We hope to deposit the balance in 6 equal monthly installments. We hope this will meet your requirement. We will appreciate a confirmation to this effect. (iii) Ex.PW-1/G letter dated 2nd December, 1991 of Appellant No.1 (signed by Appellant No.3 as Managing Director) in which it was stated as under:- We wish to acknowledge the receipt of your letter No.CandI/91/1034 dated 11-11-1991. We have received the statement of accounts, sent by you, from October, 1989 to September 28, 1991. We are going through it. Unfortunately, our accountant is on leave and therefore, we have to request you to grant us time upto 15th December, 1991, before we can deal with the matter. Please give us an appointment on 16th December, 1991, to enable us to come and discuss with you. (iv) Ex.PW-1/E letter dated 6th December, 1991 of Appellant No.1 (signed by Appellant No.3 as Managing Director) in which it is stated as under:- An amount of Rs.20,000/- was paid to you vide Cheque No.680009 dated 27/5/91 drawn on State Bank of India, Gauhati. It was duly agreed at that time that you will favour us with your confirmation that no interest will be charged on the alleged over draft amount. Till date, we have not received a confirmation from you. We had also desired a detailed statement of account to enable us to verify finally as to how this over draft had taken place in the above said account. Please send the same to us. On verification and after receipt of your confirmation that interest charges will not be payable by us we would clear the over draft amount by monthly installments spread over a period of 6-12 months.

7. From the evidence on record, it is clear that the appellants clearly admitted the wrong credit of Rs.1,86,421.57 in their account and made the part payment of Rs.20,000/- vide cheque No.680009 dated 27th May, 1991 and also agreed to pay the balance in installments. However, the appellants insisted that the Bank should not charge interest on the said amount and, therefore, did not make further payment. Needless to state, the suit was decreed against not only the company but even its directors. Liability has been fastened on its directors merely on account of them being the directors of the company.

8. This appeal was filed jointly by Appellant No.1/Company and its two Directors, namely, Appellants No.2 and 3. However, during the course of the hearing dated 18th April, 2007, learned counsel for the Appellants submitted that he would confine the present appeal only to the decree against Appellants No.2 and 3 and Respondent No.2 as the liability was of the Company only and the Directors were not personally liable. It was, therefore, ordered that the appeal shall be heard only on this aspect. The relevant portion of the order dated 18th April, 2007 is as under:- Appellant No.1 is a limited company incorporated under the Companies Act,1956. Respondent No.1, State Bank of India, has filed a suit against this company for recovery of Rs.2,70,000/-. Along with the appellant No.1 company, three directors of the said company were also impleaded as defendant Nos. 2 to 4. By impugned judgment and decree dated 15.9.2001, decree in the sum of Rs.2,70,000/- with costs and interest @ 12% p.a. from the date of filing of the suit till its realization has been passed against the defendants. Though the appeal is filed by all these defendants, learned counsel for the appellants submits that he would confine his appeal only to the passing of decree against the defendant Nos. 2 to 4. His submission is that liability was only of the company and directors could not be made personally liable. It is made clear that the appeal shall be heard only on this aspect.

9. The short question in this appeal is whether the Appellant Nos.2 and 3 are liable in the present case.

10. The learned counsel for the appellants has submitted that the liability was of the Company alone and the Directors were not personally liable.

11. An amount of Rs.1,86,421.57 was wrongly credited to the account of appellant No.1-Company on 17th May, 1990 which was detected by the Bank on 2nd April, 1991 and the demand letter-Ex.PW-1/D was issued to the Company. Appellant No.3 was the Managing Director and Appellant No.2 was the Joint Managing Director of the Company at that time. The appellants made part payment of Rs.20,000/- and promised to pay the balance, but did not honour their commitment.

12. In the decision reported as Saurabh Exporters (M/S.) Pvt. Ltd. Vs. Blaze Finance and Credits Pvt. Ltd. 2006 IV AD (DELHI) 343, a suit for recovery was filed against a private limited company and its directors and a joint and several decree was sought against all of them. The directors raised the similar plea. The learned Single Judge of this court lifted the veil and passed a joint and several decree against the company and its directors. The learned Single Judge referred to and relied upon the judgments of Honble

Supreme Court in cases of *Singer India Ltd. vs Chander Mohan Chadha and Ors.* reported as (2004) 7 SCC 1 and *Subra Mukherjee and Anr. vs Bharat Coking Coal Ltd. and Ors.* reported as (2000) 3 SCC 312. It was held as under:- I am, thus, of the considered view that the principles laid in the judgments referred to aforesaid for lifting of the corporate veil are satisfied in the present case. It has already been observed that the concept of corporate entity was evolved to encourage and promote trade and commerce, but not to defraud people. The present case is one where clearly the plaintiff is sought to be defraud of the amount of Rs.15 lakhs under the cloak of a corporate entity of defendant No.1 company and, thus, such a corporate veil must be lifted especially taking in to consideration that defendant No.1 company was only a family arrangement of the remaining defendants.

13. We agree with the ratio of the above case. 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. In the present case also public money has been misappropriated by the appellants who time and again promised to return the money in installments but their intention appear to have turned dishonest and they chose to misappropriate the money. The examination of the appellant would reveal as to what happened to the money and how the appellant were running the affairs of the company. Therefore, before lifting the corporate veil, we would like to examine appellant Nos. 2 and 3 under Section 165 of the Indian Evidence Act, 1872.

14. There is another aspect of this matter. Appellant No.3 was the Managing Director and Appellant No.2 was the Joint Managing Director when Rs.1,86,421.57 was wrongly credited to the account of Appellant No.1/Company and they became aware of the said mistake upon being pointed out by the Bank. Appellants No.2 and 3 may have misappropriated the aforesaid amount. Whether that money was misappropriated by Appellant No.1 or by Appellants No.2 or 3, is within their specific knowledge. Under Section 106 of the Indian Evidence Act, where any fact is specifically within the knowledge of a person, the onus to prove that fact is upon him. As such, onus to prove how the amount in question was misappropriated was on the Appellants. Appellants No.2 and 3 did not lead any evidence that they have not personally misappropriated the amount in question. In the absence of any positive evidence having been led by the Appellants, an inference can be drawn that Appellants No.2 and 3 have misappropriated the Banks money and they can be held jointly and severally liable. However, before drawing such an inference, we would like to examine appellants No. 2 and 3 on this aspect also.

15. In view of the above, we hereby direct appellants No. 2 and 3 to appear before this Court on 2nd March, 2009 for examination under Section 165 of the Indian Evidence Act, 1872. We make it clear that we are passing this order in view of the special circumstances of the case and the public money involved.

Sd./-
J.R. MIDHA,J

Sd./-
PRADEEP NANDRAJOG,J

28th November, 2008