

(2012) 02 DEL CK 0612

In the Delhi High Court

Case No : EX.P. 72 of 2009 and Ex. Application (OS) No. 168-169, 303, 395, 522 of 2009 and 254 of 2011

Glencore Grain Rotterdam B.V.

APPELLANT

Vs

M/s Shivnath Rai Harnarain (India) Company

RESPONDENT

Date of Decision : 06-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 50, Order 21 Rule 50(2), 146, 148A, 2(10)
Partnership Act, 1932 — Section 25
Transfer of Property Act, 1882 — Section 53

Citation : (2012) 187 DLT 118 : (2012) 128 DRJ 290

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rajiv Nayyar, with Ms. Niti Dixit, Mr. Darpan Wadhwa and Mr. Vidur Bhatia, for the Appellant; Maninder Singh with Mr. Rishi Agrawala and Mr. Akshay Ringe, Advocates for JD-5/Objector. Mr. Narendra M. Sharma with Ms. Malika Gahlot, Advocates for JD Nos. 2 and 3. Mr. Anurag Nigam, Asst. Project Manager, ITCOT Consultancy Ltd. Mr. Sudhir Kr. Singh, Advocate for Bank of India, B.O: Asaf Ali Road, New Delhi, Noticee No. 4. Mr. Jitendra Kumar with Mr. Ram Krishna, Advocates for SBI, for the Respondent

Judgement

Justice S. Muralidhar

1. The objections of Judgment Debtor No. 5 ("JD-5") Shri Lal Mahal Ltd., are being disposed of by this order.

Proceedings thus far

2. Execution Petition No. 72 of 2009 by the Decree Holder ("DH") Glencore Grain Rotterdam B.V. ("Glencore") seeks the enforcement of a foreign Award dated 29th July 1997. By a judgment dated 27th November 2008 in CS (OS) No. 541 of 1998 the Award was made a rule of the Court. Another suit CS (OS) No. 1103 of 1997 filed by Judgment Debtor No. 1 Shivnath Rai Harnarain against Glencore was also disposed of by the same judgment. On 30th December 2008 the DH

called upon JD No. 1 to pay the principal sum of US \$ 6,525,680.81 and interest on the principal amount till that date and cost of the arbitration proceedings by or before 9th January 2009.

3. JD No. 1 filed RFA (OS) No. 17 of 2009 and RFA (OS) No. 20 of 2009 against the judgment dated 27th November 2008 in CS (OS) 541 of 1998 and CS (OS) 1103 of 1997. JD No. 1 also filed a caveat u/s 148A of the Code of Civil Procedure, 1908 ("CPC") praying that no order pursuant to the judgment dated 27th November 2008 for enforcing the Award be passed without prior notice to JD No. 1. A copy thereof was served on the DH, which noticed that the affidavit in support of the caveat was affirmed by one Ram Lal describing himself as "power of attorney of ex-partnership firm Shivnath Rai Harnarain (India) Company". It is stated that till then it had not been brought to the notice of this Court in the proceedings in CS (OS) 1103 of 1997 and CS (OS) 541 of 1998 that JD No.1 had been dissolved. JD Nos. 2 to 4, i.e., Mr. Prem Chand Garg, Mrs. Anita Garg and Mr. Brij Mohan Gupta respectively had also not disclosed this fact to the Court till then. Thereafter the DH made enquiries and ascertained that Shri Lal Mahal Ltd. ("JD-5") [formerly known as Shivnath Rai Harnarain (India) Company Ltd.] having its registered office at D-6 Bhagwan Das Nagar, was incorporated by Mr. Prem Chand Garg, Mrs. Anita Garg and Mr. Brij Mohan Gupta with the purported object of taking over the business, assets and liabilities of JD No. 1 partnership firm. JD Nos. 2, 3 and 4 have a combined shareholding of 52.72% in JD No.5.

4. The present execution petition was filed by the DH on 3rd April 2009 seeking the attachment and sale of movable and immovable assets of the JDs including their equity shares in JD No. 5. The DH has with the present execution petition enclosed a copy the Company Master Details of JD No. 5 which is the successor-in-interest of JD No.1 having purportedly assumed its debts and liabilities. It is stated by the DH that the decree in terms of the judgment dated 27th November 2008 is a debt or liability of the firm of JD No. 1 which has been assumed by JD No. 5 which was incorporated inter alia for that purpose. It is, therefore, asserted by the DH that JD Nos. 2 to 5 are jointly and severally liable for the debts and liabilities of JD No. 1. It is stated that JD No. 5 is the largest exporter of rice in India and also exports sugar, wheat, soya bean and other agricultural commodities. On 8th April 2009 while directing notice to issue in the execution petition this Court noted that since the assets and liabilities of JD No.1 had been taken over by JD No.5, the liability of "the erstwhile firm" would now be of JD No.5 "who has stepped into the shoes of the erstwhile firm and it has rightly been made JD."

5. RFA (OS) Nos. 17 and 20 of 2009 were dismissed by the Division Bench of this Court by its common judgment dated 6th November 2009 on the ground of maintainability. In the SLP filed against the said judgment the Supreme Court on 23rd November 2009 while directing notice to issue granted an interim stay of execution of the Award subject to the deposit of 50% of the principal amount

within eight weeks. The said amount has however not yet been deposited in this Court by the JDs. SLP (C) No. 31068 of 2009 filed by JD No.1 against the decision dated 6th November 2009 of the Division Bench was dismissed by the Supreme Court on 8th July 2011. SLP (C) No. 22080 of 2011 by JD No.1 against the judgment dated 27th November 2008 of the learned Single Judge was dismissed by the Supreme Court on 9th January 2012.

6. Reverting to the execution petition, on 19th April 2010 this Court passed a detailed order as follows:

Since the decree is sought to be executed by sale of shares of JDs No. 2 and 3 in the Company JD No. 5, the sale of these shares be done through an authorized broker. SBI Capital Markets Limited, Word Trade Tower, 6th Floor, Barakhamba Lane, New Delhi-110 001 is appointed as authorized broker. It is directed to sell the shares of JDs No. 2 and 3 held by them in JD No. 5 and the amount so released be kept by SBI in suspense account and the court be informed about the amount realized by sale of share for satisfaction of the decree out of the amount so raised from the sale of the shares. Since the shares of JDs No. 2 and 3 have been attached in execution of this decree, and JD No. 5 is not a listed company these shares shall be sold by SBI Capital Markets Ltd in the manner shares of an unlisted company are sold, after getting the value of the shares assessed through a Chartered Accountant. The SBI Capital Markets Ltd. shall appoint a Chartered Accountant for assessment of value/worth of shares. The charges of the Chartered Accountant shall be borne by the Decree Holder. JDs No. 2, 3 and 5 are directed to provide the account books and other necessary information to the Chartered Accountant so appointed so as to assess value/worth of the shares and once the value of the shares is assessed by the Chartered Accountant and the information is given, the shares shall be put to auction by above broker. The Decree Holder or any other person shall be at liberty to purchase these shares.

7. The said order was challenged by JD Nos. 2 and 3 in EFA (OS) No. 15 of 2010 and by JD No. 1 and in EFA (OS) 16 of 2010 before the Division Bench. The said appeals were dismissed by a detailed order dated 11th June 2010. The plea of JD Nos. 2 and 3 that they were not the partners of the JD No. 1 at the relevant time and, therefore, were not liable to satisfy the decree was rejected by the Division Bench of this Court. It was further observed "the dissolution or metamorphism of the firm into a corporate company does not alter/dilute/ diminish or extinguish the rights of creditors to proceed against the personal assets of any or all of the erstwhile partners.

8. On 26th August 2010, the HDFC Capital Ltd. was appointed in place of the SBI to undertake the work of valuation of shares in terms of the order dated 19th April 2010. However, by a subsequent order dated 22nd February 2011 in Review Petition No. 485 of 2010 this Court appointed ITCOT Consultancy and Services Ltd. ("ITCOT"), Chennai in place of HDFC Capital Ltd. which had expressed its inability to undertake the task of valuation of the shares of JD Nos. 2 and

3inJDNo. 5.

9. On 20th April 2011 the Court in an order in the execution petition noted the submission on behalf of the counsel for JD No. 5 that it would maintain status quo with regard to its shareholding pattern. This was in light of the submission made on behalf of the DH that JD No. 5 had sought to further enhance its share capital from Rs. 33 crores to Rs. 56 crores and further that the shareholding of JD Nos. 2 and 3 which is 42% approximately as on 13th September 2008 had been brought down to 29% by 29th September 2010. It was submitted that any further dilution in the shareholding of JD Nos. 2 and 3 would not fetch sufficient proceeds to satisfy the decree. JD No. 5 was restrained from carrying out "any registration of shares in respect of the fresh equity shares that it may issue, or that it may have already been issued, unless they have already been so registered in the register of members". It was further directed that in the event that JD No. 5 "has received or receives any subscription in respect of the shares being issued at a premium of Rs. 215 per share, JD No. 5 shall retain from those proceeds up to Rs. 40 crores in a separate "no lien" account, and the same shall not be dealt with till further orders".

10. There were two significant observations in the said order dated 20th April 2011. First the Court noted that JD No. 5 had already been held by the order dated 8th April 2009 to be equally liable under the decree since JD No. 5 had taken over the assets and liabilities of the erstwhile partnership concern. Secondly it was noted that the objections of JD No. 5 which were pending consideration were not prepared to be argued by counsel for JD No. 5. Against the order dated 20th April 2011 JD No. 5 filed EFA (OS) No. 27 of 2011 which came to be dismissed as withdrawn on 21st July 2011 with liberty to seek a clarification from the learned Single Judge.

11. Next was an application, EA 342 of 2011 filed by JD No. 2 for a direction to the ITCOT to furnish a copy of the valuation report prepared by it and to grant leave to JD No. 2 to file objections to the valuation report. A further direction was sought to ITCOT to keep in abeyance the public auction proposed to be held in terms of the public notice issued by it for sale of shares of JD Nos. 2 and 3 in JD No. 5.

12. By a detailed order dated 25th May 2011 dismissing E.A. No. 342 of 2011 this Court permitted the entire shareholding of JD Nos. 2 and 3 constituting about 28% of the paid up share capital to be treated as a single lot for the purposes of sale of those shares. It was also noticed that in order to realize the value and potential of those shares they ought to be sold to the same person/entity or group of persons acting together. It was noted that according to the DH the amount payable under the decree as on 25th May 2011 was approximately Rs. 87 crores whereas the valuation of shares of JD Nos. 2 and 3 as per ITCOT was about Rs. 55.10 crores. Therefore, even if the shares were sold they would not fetch an amount sufficient to satisfy the decree. ITCOT did conduct a public auction of the shares but no valid offer was received. The order dated 25th May

2011 was challenged by JD No.2 by way of EFA (OS) No. 25 of 2011. The said appeal was disposed of by the Division Bench on 18th August 2011 by modifying the order dated 25th May 2011 to allow a copy of the valuation report of ITCOT to be provided to JD No.2.

13. By an order dated 25th August 2011 this Court directed JD No. 5 to furnish further details to ITCOT including the balance sheet for the financial year 2010-11.

14. On 16th December 2011 ITCOT conducted a second public auction of the shares of JDs 2 and 3 in JD No.5 but no bids were received. On 21st December 2011 after noticing the background facts it was observed by the Court that in an affidavit dated 21st July 2011 the JD No. 5 disclosed that the subscription money for the shares received by it on 30th and 31st March 2011 to the tune of Rs. 1,232.23 lakhs was utilized towards the PCPFC and EPC liability of State Bank of Bikaner and Jaipur. Further, the Court was informed by ITCOT that the prospective buyers would be willing to pick up the shares if it was possible for them to have two nominee directors on the Board of JD No. 5. The Court also noticed that even on that date JD No. 5 was not prepared to argue its objections and wanted some more time. The details of the bank accounts of JD No. 5, as furnished by ITCOT as on 31st March 2011 showed that its financial position was such that it could satisfy the decretal amount even without the sale of shares of JD Nos. 2 and 3 in JD No. 5. While giving a last opportunity to JD No. 5 to argue its objections, this Court restrained the transfer of amounts totaling to the decretal amount from the accounts of JD No. 5. By an order dated 2nd January 2012 the Division Bench disposed of JD No.5's appeal against the order dated 21st December 2011 permitting JD No.5 to provide security in the sum of Rs. 86.85 crores to the satisfaction of the Registrar of the High Court. However, no such security has been provided by JD No.5 till date.

15. JD Nos. 2 and 3 filed EA No. 54 of 2012 stating that since the valuation by ITCOT of their shares in JD No.5 was around Rs. 55 crores, they were prepared to transfer those shares in favour of the DH. At the hearing of the said application on 18th January 2012, it was submitted that these were the only unencumbered assets of JD Nos. 2 and 3 that were available for satisfaction of the decree. As regards the suggestion that the purchaser of the shares of JD Nos. 2 and 3 should have the facility of nominating at least two directors on the Board of JD No. 5, this Court was informed by counsel for JD No. 5 that it was agreeable to have only one nominee director of the holder of shares constituting more than 37% of the share capital. The DH expressed unwillingness for the transfer in its favour of the shares of JD Nos. 2 and 3 in JD No.5. Consequently, this prayer in E.A. 54 of 2012 was rejected.

16. The further prayer in E.A. No. 54 of 2012 was that the decretal amount should be computed. Two charts were handed over by learned Senior counsel for JD Nos. 2 and 3. In one, the decretal amount was calculated on the basis of the rate of exchange of the US\$ as on 29th July 1997, the date of the Award, and

this was around 44.06 crores. The other chart, with the rate of exchange taken as that prevalent on the date of the order of the Single Judge dismissing the objections to the Award, i.e. 27th November 2008, worked out to Rs. 67.18 crores. The Court observed that this would be decided in the main execution petition. E.A. No.54 of 2012 was accordingly disposed of on 18th January 2012.

17. At the hearing on 18th January 2012 the learned Senior counsel for JD No. 5 handed over the details of the three bank accounts of JD No. 5 in respect of which also restraint orders were passed by this Court. On 23rd January 2012, this Court heard the objections of JD No. 5.

Objections of JD No. 5

18. Mr. Maninder Singh, learned Senior counsel appearing for JD No. 5 first submitted that the JD No. 5 could not have been straightway impleaded in the execution petition without notice being issued to it. According to him, the jurisdiction in execution proceedings was not one of discretion or equity but of prescription. He sought to draw a distinction between Section 47 and Section 146 of the CPC. Referring to the definition of "judgment debtor" u/s 2(10) CPC it was submitted that a person could be proceeded against only when a decree had been passed against such person or an order capable of execution had been made. Referring to Form VI, it is pointed out that execution of a decree could be sought only against a JD and in the context of the decree sought to be executed. It is submitted that JD No. 5 was in fact not a judgment debtor within the meaning of the CPC. According to Mr. Maninder Singh, JD No. 5 was for the purposes of Section 47 CPC not even a successor-in-interest of JD No. 1. u/s 46 CPC a person claiming under a decree could be made a party to the proceedings but in this case JD No. 5 was not claiming under JD No. 1. Referring to Section 25 of the Partnership Act ("PA"), it is submitted that it is only the partners, i.e., JD Nos. 2 and 3 of JD No. 1 who could be made liable even after the dissolution of JD No. 1 and not JD No. 5. It is submitted that under Order XXI Rule 50 (2) CPC the leave of the Court had to be sought before impleading JD No. 5 and that was not done in the instant case. All the proceedings thereafter involving JD No. 5 would be rendered invalid and this was not an irregularity that could be cured. He referred to the decisions in *P. Arumugha Gounder v. R. Adhinarayanan* 76 Law Weekly (Madras) 796 and *Madho Das v. Ramji Patak* 16 All 286, Indian Decisions, New Series. Relying on the decision in *Budhia Swain and Others Vs. Gopinath Deb and Others*, , it is submitted that the order dated 8th April 2009 ought to be recalled. Mr. Maninder Singh further pointed out that although JD No. 5 had been incorporated on 12th May 1997 for the purposes of taking over the assets of JD No. 1, the extent of the take over the liability had to be mutually agreed between the partners who were also shareholders of JD No. 5. That was done subsequently on 1st April 1998 by an agreement under which only those liabilities of JD No. 1, other than its liability under the Award, were taken over. Consequently, the liability arising out of the decree in the instant case was not taken over by JD No. 5. Therefore, JD No.5 could not be proceeded against for

executing the decree.

19. Mr. Rajiv Nayyar, learned Senior counsel appearing for the DH, on other hand, pointed out that the original of the so-called agreement dated 1st April 1998 has not been produced till date. The existence of such an agreement was disclosed for the first time only in 2009 in the appeal filed before the Division Bench by JD Nos. 2 and 5 and JD No. 5 against the order dated 21st April 2010 of the learned Single Judge. As regards the submission concerning Order XXI Rule 50 CPC, it is submitted that the DH could validly proceed against the property of JD No. 1 firm wherever it was available at present. Admittedly JD No. 5 had taken over the assets of the firm which ceased to exist as on 31st March 1997. He pointed out that the contradiction in the dissolution dated 31st March 1998 placed on record by JD No. 5 and the certificate of incorporation and submitted that there was no question of an agreement being entered into on 1st April 1998 between the partners of the firm on which date the firm itself ceased to exist. He submitted that by an agreement between themselves the partners could not decide that only some of the liabilities of JD No.1 would be taken over by JD No. 5. Relying on the judgment in *Nauratan Lal v. M. A. Stephen* AIR 1922 Patna 572, it is pointed out that the transfer of only the assets and not the liabilities of JD No.1 to JD No. 5 was fraudulent and was done with a view to defeat the decree. Reliance is also placed on the judgment in *SBI Home Finance Limited Vs. Credential Finance Limited and Others*, . It is submitted that the alleged transfer of the assets is hit by Section 53 of the Transfer of Property Act ("TP Act").

20. At the outset, it must be noticed that the objection filed by JD No. 5 is not registered separately as an application. It is supported by an affidavit dated 23rd September 2009. Many of the objections now sought to be raised by JD No. 5 have already been dealt with in earlier judicial orders that were passed by the Division Bench of this Court, and affirmed by the Supreme Court, subsequent to the filing of the objections. These include the objections relating to the improper stamping of the decree or non-production of the original arbitration agreement, the validity of the impugned Award or of the judgment dated 27th November 2008 of the learned Single Judge making it a rule of the court in CS(OS) No. 541 of 1998. The objection that has now been raised is that JD No. 5 cannot be proceeded against in the execution proceedings.

21. The fact of JD No. 1 firm having been dissolved by a dissolution deed dated 31st March 1998 was not disclosed in the proceedings that were pending in the Court as on that date. When on 29th October 1998 a written statement was filed on behalf of the firm in CS (OS) 541 of 1998 filed by the DH to enforce the foreign Award there was no mention of such a deed of dissolution or any purported agreement dated 1st April 1998. Even when Mr. Prem Chand Garg (JD No. 2) filed an affidavit on 5th December 2001 in the said suit he did not mention the fact that the dissolution of the firm had taken place. It was only in RFA (OS) Nos. 17 and 20 of 2009 filed by JD No.1 that it was mentioned that JD

No.1 was dissolved. As regards the DH, it was only when the copy of a caveat was served on it, that it realised that JD No.1 was an "erstwhile firm". This led the DH to make enquiries to find out that JD No.5 had been incorporated way back in May 1997 for taking over the firm JD No.1. Therefore for the first time, when the present execution petition was heard on 8th April 2009, this Court was informed of the said fact and it passed an order that "the assets and liabilities of the partnership firm has been taken over" by JD No. 5 and therefore, "the liability of the erstwhile firm now be of M/s Lal Mahal who has stepped into the shoes of the erstwhile firm and it has rightly been made JD". There is no satisfactory explanation for the strange conduct of the JDs in not bringing the above fact to the notice of the Court for these many years. It is indeed a case of wilful and deliberate suppression of a material fact.

22. In the order dated 8th April 2009 Mr. N.N. Aggarwal and Mr. Kapil Gupta, Advocates are shown to have appeared on behalf of JD No. 1. However, as on that date JD No. 1 ceased to exist. Clearly the said advocates could not have been instructed by JD No.1 but its erstwhile partners (JD Nos. 2 to 4) who were majority shareholders in JD No. 5. In any event, on 29th July 2009 Mr. Samrat K. Nigam, Advocate appeared for JD No. 5. In the circumstances, the plea about JD No. 5 not being heard, before the order dated 8th April 2009 was passed, is a technical one. In the background of the facts narrated hereinbefore, it is not bonafide.

23. It is significant that as on 8th April 2009 JD No. 1 did not exist in the eye of law. The certificate of incorporation of JD No. 5 shows the date of incorporation as 12th May 1997. One of the main objects listed out in its Memorandum of Association ("MoA") is as follows:

To take over the running business of the partnership firm namely Shivnath Rai Harnarain (India) Company alongwith all its assets, liabilities, goodwill and other rights on such terms and conditions as may be mutually agreed upon. The said firm shall cease to be in existence after its takeover of the Company on its incorporation.

24. The promoters and shareholders of the company on the date of its incorporation as per the MoA signed on 22nd March 1997 include Shri Prem Chand Garg (JD No. 2) for 1000 shares and Smt. Anita Garg (JD No.3) for 1000 shares and Shri Brij Mohan Gupta (JD No. 4) for 1000 shares. In terms of the above MoA JD No. 1 Firm was to cease to be in existence "after its takeover of the company on its incorporation". Consequently, the plea that the firm stood dissolved only on 31st March 2008 is inconsistent with what is stated in the MoA. In any event, even if there was to be a mutual agreement between the partners regarding the terms and conditions of takeover of JD No.1, that could not be after the dissolution of the firm. This raises doubts about the genuineness of the so-called agreement dated 1st April 1998, which as will be seen, did not surface for many years thereafter. In any event how could a firm that purportedly stood dissolved on 31st March 2008 be a party to an agreement on 1st April 1998?

25. On 29th July 2009 JDs assured the Court that they would not sell their properties till the next date without the leave of the court. When on 18th August 2009 JDs filed their affidavits with JD No. 1 stating that it had no assets and JD No. 4 stating that he had nil moveable properties and JD Nos. 2, 3 and 5 filing short affidavits disclosing their assets and liabilities, there was no reference to the deed of dissolution dated 31st March 1998 or the agreement dated 1st April 1998. Further time was sought on 19th August 2009 to file detailed objections. It is only on 23rd September 2009 in the present objections that for the first time it was disclosed that JD No. 5 was incorporated on 12th May 1997 and "accordingly the running business of the partnership firm was also taken over with effect from 1st April 1998 in terms of an agreement executed". It was contended that the assets of JD No. 5 cannot be called as the "assets of JD No. 1 firm". Even at this stage a copy of the agreement dated 1st April 1998 was not produced. In the appeal filed by the JD No. 5 being RFA (OS) No. 76 of 2009 against the order dated 27th November 2008 it was stated in ground (x) that under the agreement dated 1st April 1998 the running business of JD No. 1 was acquired and JD No. 5 had not undertaken/given any guarantee to satisfy debts, dues and outstanding liabilities of JD No. 1. However, even at this stage the agreement dated 1st April 1998 was not annexed with the RFA. A photocopy of the said agreement was produced in the present proceedings during the course of arguments on 24th September 2009. It was noticed that the said document was not registered. Under the agreement dated 1st April 1998, JD No. 5 Company purportedly purchased the running business of JD No. 1 as a going concern with effect from 1st April 1998. The assets and properties of the firm which were taken over were set out. Clause 5 and 6 read as under:-

5. With effect from the aforesaid, all debts, liabilities duties and obligations (except given in para 6) of the firm shall be stand transferred, without further act or deed, to the company so as to become the debts, liabilities, duties and obligations of the Company.

PROVIDED ALWAYS that except as provided herein, the agreement shall not operate to enlarge the security for any loan, deposit or facility created by or available to the firm and which shall vest in the company shall not be obliged to create any further or additional security unless specifically provided hereinafter.

6. Any liability, if any, arises on any dispute referred to any types of Court/arbitration Court etc. under any matter against the firm prior to the period of the appointed day i.e. 1st April, 1998.

26. The consideration for sale of the business of JD No. 1 was settled at Rs. 18,07,28,127.87 and was to be satisfied by issuing equity shares in the company. 40500 equity shares were issued to Mr. Prem Chand Garg (JD No. 2) 278700 equity shares to Anita Garg (JD No. 3). Rs. 11,00,015.90 was to remain as unsecured loan towards Mr. Brij Mohan Gupta. In effect, it is now sought to be contended that the liabilities of the firm prior to 1st April 1998, including the impugned Award were not taken over by JD No. 5. It is stated that the said

agreement has since been filed with the Registrar of Companies. Be that as it may, it is plain that the agreement itself was a sham document having no legal validity since it was plainly to defeat the decree against JD No.1.

27. The facts and circumstances of the case as noticed hereinbefore persuade the Court to hold that the act of dissolving the firm, and transferring only some of its assets (and not its liabilities under the impugned Award) to JD No.5 and that too not contemporaneous with the incorporation of JD No.5 appears to be a fraudulent one with a view to defeating the decree arising from the impugned Award. Clearly, by the purported agreement of 1st April 1998 what was sought to be done was to wipe out the liabilities of JD No. 1 by mutual agreement between the partners of JD No. 1. The manner in which these facts have been deliberately suppressed by the JDs with neither the dissolution deed dated 31st March 1998 nor the agreement dated 1st April 1998 being produced till nearly eleven years later impels the Court to reject all the pleas on the basis of these documents as not bonafide. There is every reason to infer that the incorporation of JD No. 5 was carefully thought out in anticipation of the Award. The attempt was to wipe out the liabilities of JD No.1 by the so-called legal device of incorporating a company to take over the firm.

28. The facts speak loudly of the brazen attempt by the JDs to frustrate the execution proceedings through every possible means. The proceedings also show the numerous attempts made by the JDs jointly and severally to frustrate the execution of the decree in respect of an Award which was passed way back on 29th July 1997. It is more than fourteen years and DH has yet to realize the amounts under the said Award. The conduct of the JDs in suppressing material facts and documents from the Court and frustrating every attempt at getting the decree executed disentitles them to any indulgence. Sections 47, 146 or Order XXI Rule 50 (2) CPC cannot come to the rescue of parties bent on defeating justice. The corporate veil shrouding JD No.5 has to be lifted. It was created only with a view to defeating the Award and consequently the decree under execution. The partners of JD No. 1 became the majority shareholders of JD No. 5 on its incorporation. JD No.5 cannot seek to avoid the liability of JD No. 1. The frustrated attempts at selling the shares of JD Nos. 2 and 3 in JD No. 5 have already been recounted. In any event, the DH cannot be compelled to take the shares of JD Nos. 2 and 3 in JD No. 5. There is, in the circumstances, no option but to proceed against the assets of JD Nos.2 to 5 if justice has to prevail.

29. The objections of JD No. 5 are hereby rejected with costs of Rs. 50,000/- which will be paid by JD No. 5 to the DH within a period of four weeks from today.