(2019) 12 DEL CK 0397

In the Delhi High Court

Case No : Company Appeal No. 10 Of 2019, Civil Miscellaneous Application No. 18455, 37262, 37487, 39863, 39864 Of 2019

Surinder Singh Marwah & Anr. APPELLANT

Vs

Aeren Entertainment Zone Private Limited & Ors RESPONDENT

Date of Decision : 16-12-2019

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 2013 — Section 134, 339, 339(2), 340, 341, 342, 447, 542

Citation : (2019) 12 DEL CK 0397

Hon'ble Judges : Vipin Sanghi, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : Vivek Kohli, Sunil Tyagi, Nalin Talwar, Prerna Kohli, Manoj Gupta, Yeshi Rinchhen, Mudit Gupta, Akhil Sibal, Tanmay Mehta, Jatin Sehgal, Devna Soni, Ashish Garg, Shriya Mishra, Jayant Mehta, Gursat Singh, Ruchi Sindhwani, Megha Bhargava

Final Decision : Allowed

Judgement

S.No.,Money received from,Amount (In Rs.),,,

1,Consortium of Banks,"100,00,00,000/-",,,

2,Foreign Investors,"152,99,98,000/-",,,

3,"Various Investors (including

Complainants)","120,00,00,000/-",,,

4,"Transfer of land development rights

pursuant to merger of AVM with

Accused Company.","75,00,00,000/-",,,

,Total,"Rs.447,99,98,000/- [Rupees Four

Hundred and Forty Seven Crores

Ninety Nine lacs and Ninety Eight

Thousand Only]",,,

Lakhs Seventy Nine Thousand Eight Hundred and Sixteen) in their favour. The funds invested in the Project Mall have been diverted or siphoned off,,,,,

to benefit shareholders of Respondent No.1. Further, in complete disregard and violation of the terms of the Term Loan, the monies of the investors of",,,,,

the Project Mall were not deposited in the escrow account opened / maintained with Allahabad Bank (Lead Bank). Instead, a new account in the",,,,,

name of the Respondent No.1 was opened in the State Bank of Saurashtra (now State Bank of India), Lodhi Road, New Delhi and approximately",,,,,

Rs.19,00,00,000/- (Rupees Nineteen Crores) were diverted into this new account. As a result, due to non-payment of loan to the tune of Rs. 65 crores,",,,,,

the account of the Respondent No.1 was declared as Non-Performing Asset (NPA). The beneficiaries of the Respondent No.1 have also floated,,,,,

various other companies, including - but not limited to, A.R. Developers Private Limited, Everest Buildwell Private Limited etc. Dr. Rajesh Aeren is",,,,,

Promoter/Director and/or related with 44 (forty four) Companies. The beneficiaries in all the Related Party Companies at the time of siphoning off -,,,,,

i.e., in the year 2007-2008/ were Respondent No. 1 and Dr. Rajesh Aeren, and this money has been utilized in purchasing the subject land, by different",,,,,

Companies belonging to Dr. Rajesh Aeren.,,,,,

Impugned order of the Learned Single Judge,,,,,

6. On an application [C.A. 788/2017] filed by the Appellant under section 339, 340, 342 and 447 of the Companies Act, 2013 read with Rule 9 of the",,,,,

Companies (Court) Rules 1959, the learned Company Court on perusing the charge-sheet filed by the police, vide order dated 11.07.2018 restrained",,,,,

Related Party Companies from transferring, selling or alienating the properties in village Bonkar, Dogra, Ludhiana. On 16.08.2018, on another",,,,,

application [C.A. No. 910/2018], Court ordered that the company Aeren R. Mallz Private Limited and Yashraj Buildcon Private Limited shall also be",,,,,

covered by the interim order dated 11.07.2018. Subsequently, Respondent No.2, intervener in the said Winding Up Petition, filed applications [C.A.",,,,,

Nos. 1277/2018, 1278/2018 and 1279/2018] inter-alia, seeking vacation of the

Order(s), dated 11.07.2018 and 16.08.2018. On hearing the parties, on",,,,,

11.12.2018 learned Single Judge directed the applicant to file an affidavit with details of the development agreement dated 31.05.2014 and all,,,,,

consequential steps taken pursuant thereto. Thereafter, vide impugned order dated 21.02.2019, the Learned Single Judge observed that there are no",,,,,

allegations in the charge-sheet against the accused Mr. Rajesh Aeren and Ms. Sapna Aeren regarding flow of funds of Respondent No.1 to the sister,,,,,

concern/companies for purchase of the land in question, and on this premise, the interim stay orders were vacated. At the same time, the official",,,,,

liquidator was directed to carry out an audit of the accounts of the Respondent No.1 to look into the allegations that are subject matter of C.A. No.,,,,,

788/2017. Ellahi Goel and Co., Chartered Accountant has been appointed as the â??Chartered Accountantâ? to conduct the audit. The relevant",,,,,

portion of the impugned order reads as under:,,,,,

â??CA Nos. 1277/2018, 1278/2018 and 1279/2018",,,,,

1. These applications are filed seeking vacation of the interim orders passed by this court dated 11.07.2018 and 16.08.2018 restraining transfer, selling",,,,,

or alienating of the properties purchased by Aeren R Mallz Pvt. Ltd., Aeren R Township Pvt. Ltd., Yashraj Buildcon Pvt. Ltd., Yashvardhan",,,,,

Infrastructure Developers Pvt. Ltd., Aeren R Buildcon Pvt. Ltd. and PMC Entertainment Pvt. Ltd. (name changed to Fortune R Buildco Developers",,,,,

Pvt. Ltd.) in village Bonkar Dogran, Ludhiana.",,,,,

2. On 11.07.2018 and 16.08.2018, learned counsel for the petitioners/applicants had taken the court through the chargesheet filed by the police against",,,,,

Dr.Rajesh Aeren and other directors of the respondent Company to contend that the properties have been purchased from the funds of the respondent,,,,,

Company in the name of the sister concerns, namely, (i)Yashvardhan Infrastructure Developers Pvt. Ltd, (ii) Aeren R. Buildcon Pvt. Ltd., (iii) Aeren",,,,,

R. Township Pvt. Ltd., (iv) PMC Entertainment Pvt. Ltd., (v) Aeren R. Mallz Private Limited and (vi) Yashraj Buildcon Private Limited.",,,,,

3. Based on the above allegation, this court on 11.07.2018 had passed an interim order restraining the aforenoted companies from transferring, selling",,,,,

or alienating the properties in question till further orders. On 16.08.2018, a typographical error in the description of the companies was also corrected.",,,,,

4. Pursuant to the above order, the two applications have been filed seeking

vacation of the interim orders passed by this court on 11.07.2018 read",,,,,

with order dated 16.08.2018.,,,,,

5. I have heard learned counsel for the parties.,,,,,

6. Learned senior counsel appearing for the applicant in C.A. No.1277/2018 has submitted that a perusal of the charge-sheet would show that there is,,,,,

no allegation whatsoever of any funds having been diverted from the respondent company to the sister concerns for the purchase of the properties in,,,,,

question. It is pleaded that these properties were purchased way back in 2008. Subsequently, on 31.05.2014, the applicant entered into a Development",,,,,

Management Agreement with the said companies to develop the lands in question. An investment of above Rs. 50crores has been made by the said,,,,,

applicant for the development of the properties.,,,,,

7. On 11.12.2018 this court had while hearing this application directed the applicant to file an affidavit with details of the development agreement dated,,,,,

31.05.2014 and all consequential steps taken. The applicant has filed the necessary affidavit.,,,,,

8. In the said affidavit, the applicant states that the applicant entered into a Development Management Agreement dated 31.05.2014 and Supplement",,,,,

Agreements dated 30.10.2014 and 29.12.2014 with six consortium companies for exclusive development rights of 115 acres of land. It is further stated,,,,,

that over a period of time, pursuant to various agreements, the applicant has invested approximately Rs. 50 crores in the development and acquisition",,,,,

of the interest in the properties in question inclusive of Rs.29.74 crores towards business deposit for the project in question.,,,,,

9. Various documents regarding the project have been placed on record including permission for change of land use and other approval including,,,,,

license to develop, etc. It is also stated that pursuant to Development Management Agreement dated 31.05.2014, the applicant was delivered vacant",,,,,

and peaceful possession of the 11 properties in question. It is also stated that the interest and rights of the applicant under the Agreement dated,,,,,

31.05.2014 have been duly secured by equitable mortgage of the properties belonging to the Consortium Companies. The equitable mortgage is duly,,,,,

notified with the Registrar of Companies and the appropriate forms have been filed with the Registrar of Companies, NCT of Delhi vide Certificate of",,,,, Registration dated 24.07.2014 issued by the Registrar of Companies.,,,,,

10. Based on the above, it has been argued that the there is no allegation of any funds having being used from the respondent Company to buy the",,,,,

lands in question. It is pleaded that the interim orders passed by this court on 11.07.2018 and 16.08.2018 be accordingly vacated.,,,,,

11. Learned counsel appearing for PMC Entertainment Pvt. Ltd. now know as Fortune R. Buildco. Pvt. Ltd. states that they have filed an application,,,,,

supported by an affidavit being CA No. 1279/2018 stating that no money has flown from the respondent company to the applicant company for,,,,,

purchase of the properties in question. A similar application being CA No. 1277/2018 is also filed by Developer Group India Pvt. Ltd.,,,,,

12. A perusal of the charge-sheet would show that the only allegation therein is as follows:-,,,,,

S. No.,Area of land,Place,Consideration,Party Name,Date of Purchase

1,"131 Karnal 17

marla/16.48 acres","V i l l . Bonkar,

Dogra, Ludhiana","Rs.8,24,06,275","Yashvardan

Infrastructure

Developers Pvt.

Ltd. (Citi Bank

A/c No.

0342546005)",22.02.2008

2,"1 2 6 Kanals

(15.75 acre)",-do-,"Rs.7,87,50,000","Aeren R Buildcon

Pvt. Ltd.",22.02.2008

3

4","48 kanals

8 5 Kanals 10

Marlas (16.68

acre)",-do-,"Rs.3,00,00,000

Rs.5,34,37,530","A e r e n R

Township Pvt.

(Citi Bank A/c

No.034171001",22.02.2008

5

6","50 Kanals

1 6 Marlas

(15.775 acre)

75Karnals 8

Marlas",-do-,"Rs.3,17,50,000

Rs.4,71,25,065","PMC

Entertainment

Pvt. Ltd.","08.02.2008

08.02.2008

7,"117 Kanals 15

Marlas (14

Acres)",-do-,"Rs.7,35,93,750","Aeren R Mallz

Pvt. Ltd.","09.04.2008

09.04.2008

,,,,,

8,"1 6 Kanals (2

acre)",-do-,"Rs.1,00,00,000",,

9,"12 Kanals (1 acre

4 Kanals)",-do-,"Rs.75,00,000","Yashraj Buildcon

Pvt. Ltd.",1.12.2008

10,9 Acre 6 Kanals,-do-,----,-do-,09.04.2008

11,2 Acre 7 Kanals,-do-,----,-do-,09.04.2008

S. No.,Inter-Corporate Deposits written off,Amount (In Rs.) As on 31.12.2009,,,

1.,A.R. Developers Private Limited,"13,39,00,000/-",,,

2.,Canvas Buildcon Private Limited,"2,40,77,270/-",,,

3.,Perfection Buildtech Private Limited,"2,58,00,000/-",,,

4.,Pivot Buildcon Private Limited,"4,40,38,000/-",,, 5.,Aeren R Enterprises Private Limited,"48,49,310/-",,,

6.,Shree Mahesh Realtors Private Limited,"41,00,000/-",,,

7.,Aeren R Township Private Limited,"5,15,416/-",,,

8.,Global Distributors Limited,"39,00,00,000/-",,,

,Total,"R s. 62,72,79,816/- (Rupees Sixty Two Crores

Seventy Two Lakhs Seventy Nine Thousand Eight

Hundred and Sixteen only).",,,

S.No.,Name of the Companies,Deposited in the Year,Amount (in Rs.),,

1.,Aeren R. Township Private Limited,31.03.2008,"57,48,122/-",,

2.,Yashraj Buildcon Private Limited,31.03.2008 & 31.03.2009,"89,80,000/-",,

3.,"Yashvardhan Infrastructure Developers

Private Limited",,"30,00,000/-",,

4.,PMC Entertainment Private Limited,31.03.2008,"47,01,500/-",,

,TOTAL AMOUNT,,"Rs.2,24,29,622/- (Rupees

Two Crores Twenty Four

Lacs Twenty Nine

Thousand Six Hundred and

Twenty Two only)",,

S. N,Date,Credited Amount,"N a m e of

Company",Debited Amount,Name of Company

1,31.07.07,"6,00,00,000",AVM,"6,00,00,000",AR Developers

2,07.08.07,"4,00,00,000",AVM,"4,00,00,000",AR Developers

3,20.08.07,"1,50,00,000",AVM,"1,50,00,000",AR Developers

4,03.09.07,"5,20,000",AVM,"5,20,000",AR Developers

5,03.09.07,"5,00,00,000",AVM,"5,00,00,000",AR Developers

6,20.09.07,"1,86,80,000",AVM,"1,86,80,000",AR Developers

alia, the investors, including, the Appellants. Similar is the position with regard to transfer of funds by the Intermediate Companies in the coffers of the",,,,,

six Related Party Companies. It would be apposite to note the views expressed by one of us (Vipin Sanghi, J.) in M.R. Bhakshi vs. Fintra Systems",,,,, Ltd. and Ors. 151(2008) DLT 1 . The relevant portion of the same has been extracted below:,,,,,

â??10. Having considered the respective submissions I am, as at present advised, inclined to agree with the submissions of Mr. Rajiv Shakdher, Sr.",,,,,

Advocate the learned Amicus Curiae. Keeping in view the purpose for which Section 542 has been enacted, and the fact that timely action is of the",,,,,

essence, not only to prevent the presentation of a fiat accompli by the fraudulent Directors of the company, but also to provide relief to the victims of",,,,,

the fraud, it seems that the establishment of the fraudulent conduct for attracting the provision of Section 542 of the Companies Act does not require",,,,,

the same standard of proof as in a criminal trial and the rigours of the law of evidence as apply to a criminal trial would not apply to establish the,,,,,

commission of fraudulent acts and omissions by the Directors and managers of a company. It has also to be kept in mind that by its very nature, fraud",,,,,

is not easy to establish. This is even more so, when the fraudulent conduct is undertaken by the Directors of a company, sitting in their own office,",,,,,

with a view to defraud the creditors/investors who, though the victim of the fraud, are not involved in the transactions which constitute such conduct,",,,,,

and may have no personal knowledge of the same. In K.T. Dharanendrah v. R.T. Authority MANU/SC/0288/1987: 1987CriLJ1061 the Supreme,,,,,

Court, while dealing with a case under the Customs Act, 1962 observed that ""An economic offence is committed with cool calculation and deliberate",,,,,

design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be,,,,,

manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear,,,,,

of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and,,,,,

National Interest.""",,,,,

11. I also find merit in the submission of Mr. Shakdher that it is not necessary that each transaction/instance of funds being siphoned or fraudulent,,,,,

conduct needs to be established from the beginning to the end to invoke Section 542 of the Act. That is because it would be reasonable to assume, that",,,,,

directors/managers who are shown to have indulged in even a single act of fraud in the discharge of their duties towards the company, its shareholders",,,,, and creditors, would have generally resorted to such conduct. Traits of greed and dishonesty amongst men are known to manifest whenever the",,,,,

opportunity presents itself. This is even more true, when such conduct is displayed by the relatively affluent members of society, as their conduct is not",,,,,

driven by their need or undertaken in desperation. The pattern that emerges from the conduct of Mr. & Mrs. Shakt shows that their actions were,,,,,

focused on collecting funds in the company from the public by promising huge returns, and then siphoning them out in one way or another. That seems",,,,,

to have been the true ""business activity"" of the promoter Directors and managers of the company. No other business appears to have been conducted",,,,,

by the company with a view to earn profits for the company, its shareholders and creditors. In the aforesaid process, the entity of the company has",,,,,

been misused and exploited.,,,,,

12. From the aforesaid reports of the CBI, prima facie it appears to me that this is a fit case for holding the directors of the company in liquidation",,,,,

personally liable, without any limitation of liability. Section 542 is an exception to the general rule that in a limited liability company, the liability of the",,,,,

shareholders and directors is limited. The purpose and object of Section 542 is to catch up with the fraudulent directors and other persons responsible,,,,,

for defrauding the creditors and shareholders of the company, who deliberately conduct the affairs of the company in a manner as to rob the company",,,,,

of its resources and allow it to bleed. Conduct, which does not appear to be bona fide or innocent, or a mere judgmental error, but which personally",,,,,

enriches the Directors/managers of the company directly or indirectly at the expense of the company, permits the Courts to take away the protective",,,,,

shield that the directors/manager enjoy under the law. The shield of corporate entity with limited liability of the shareholders/Directors, provided by the",,,,,

law is not meant to protect fraudsters. They cannot be permitted to defraud the shareholders and the public through the instrumentality of a corporate,,,,,

entity with limited liability, and then mock at their shareholders and creditors and the Courts, and seek to protect themselves behind the veil of the",,,,,

Corporate Entity. The law is not toothless, but empowers the Courts with authority to deal with such situations.",,,,,

13. At the same time, it is equally true that no one can be condemned unheard.

The language of Section 542 itself shows that an opportunity has to be",,,,,

given to the concerned persons to lead evidence in support of their case. The Director Sh. Sunil Shakt and his wife appear to have derived the funds,,,,,

for the purchase of the property directly or indirectly from the business of the company in liquidation. The funds of the company appear to have been,,,,,

siphoned off with the intent to defraud the creditors. The Directors of the Company would have known that the withdrawal of the funds from the,,,,,

account of the company in liquidation, inter alia, for the benefit of the Directors will result in the creditors being denied not only the handsome returns",,,,,

on their investments as promised, but also put in jeopardy the principal amounts invested by them. From the CBI reports, it appears that the action of",,,,,

the Directors of the Company in liquidation cannot be said to have been undertaken for the purpose of running the business of the company to,,,,,

generate income for the company sufficient to meet its expenses and fulfill its undertaken obligations towards the investors/creditors. In A Company,,,,,

Re (No. 001418 of 1988), 1991 BCLC 197 as reported in Guide to the Companies Act, by A. Ramaiya, 16th Edition 2004, ""A Director found to have",,,,,

been a knowing party to the carrying on of the company's business with the intent of defrauding creditors was ordered to pay Â£ 156,428 for its debts",,,,,

and liabilities. The company had exceeded its overdraft limits and had fallen behind with paying tax dues and trade creditors but continued to pay huge,,,,,

sums as remuneration to its managing director who was majority shareholder. The company went into liquidation. The liquidator sought to hold the,,,,,

director liable for fraudulent trading. It was held that the managing director was knowingly a party to the carrying on of the company's business with,,,,,

intent to defraud its creditors and there was real moral blame in procuring the company's continued trading when there was no reason for thinking that,,,,,

it could pay its debts as they fell due. The amount decreed represented the extent to which the creditors were defrauded and punitive element.""â??",,,,,

29. Section 339 (2) also clearly envisages that the Court would also have the power to issue further directions as it thinks proper for giving effect to,,,,,

the declaration. We are also not convinced with the arguments of Mr. Sibal that the scheme of Sections commencing from 339 to 342 do not envisage,,,,,

the relief of interim protection as has been sought by the Appellants. If in the course of winding up of a company, it appears that the business of the",,,,, company was carried on with the intent to defraud the creditors of the company or any other persons or for any fraudulent purpose, the Courts would",,,,,

necessarily have the mandate to fix the responsibility. This becomes evident from the scheme of Sections 339-342 which empower the Courts to,,,,,

assess the damages against delinquent Directors etc. Where a declaration under Section 339 or an order under Section 340 is made in respect of a,,,,,

firm or a body corporate, the Court shall also have the power under Section 341 to make a declaration or pass orders in respect of any person who",,,,,

was, at the relevant time, a partner in that firm or a Director of that body corporate. Under Section 342, the Court can also direct the liquidator to",,,,,

prosecute the offender or to refer the matter to the Registrar. The sweep of powers under Sections 339 to 342 is wide enough, and that is for the",,,,,

apparent reason that once it becomes clear that the business of the company was carried on with the intent to defraud creditors, or for any fraudulent",,,,,

purpose, the Court should have all the necessary powers to set right the fraudulent wrongs, the company has committed. The law is geared to",,,,,

appropriately deal with and catch up with the fraudsters and their ill gotten wealth, even after its conversion into a different form.",,,,,

30. These provisions also take into consideration the doctrine of lifting or piercing of the corporate veil. The cardinal principal that a company, in law,",,,,,

is a separate entity from those who subscribe to its memorandum of association i.e. its shareholders, as enunciated in Solomon v. A Solomon and Co.",,,,,

Ltd. [1897] AC 22 -HL has been well recognized and followed over the years. In spite of that, the Courts have in appropriate cases, resorted to lifting",,,,,

the veil, whenever the circumstances have so warranted. If the business of the company has been carried on with the intent to defraud creditors or for",,,,,

any other fraudulent purpose, the corporate veil has to be lifted. This principle of law - â??lifting of corporate veilâ? has been incorporated in the",,,,,

language of Section 339 and the succeeding sections. The fixing of responsibility or liability would follow the detailed investigation into the affairs of,,,,,

the corporate entity. Once the Court has all the relevant and requisite information before it, to come to a conclusion that a declaration as contemplated",,,,,

under Section 339 is merited, it would proceed further. The wording of Section 339 makes it evident that the said provision can be resorted to provide",,,,,

relief to the victims of fraud, so that they are not presented with a fait accompli by the fraudulent persons who carried out the business in such",,,,,

manner.,,,,,

31. Pending the audit, the subject land has to be preserved. In case, we do not do so, it would only result in creating further complications which would",,,,,

seriously complicate the rights of innocent investors/depositors who are likely to make investments into the subject land. Respondent Nos. 2 and 3,,,,,

cannot possibly object to the audit ordered into the affairs of Respondent No.1. They display the badge of â??bona fide purchaserâ?, distancing",,,,,

themselves from Respondent No. 1 and have projected and labelled themselves to be victims, though curiously they do not advance any submission to",,,,,

the detriment of the promoters of all the companies involved viz. the Aeren family. We cannot visualize the final outcome of the audit with absolute,,,,,

certainty, but since there is prima facie evidence to suggest that the trail of funds in the purchase of the subject land is linked to the fraudulent business",,,,,

affairs of Respondent No. 1, by its promoters, we feel that the balance of convenience lies in protecting the subject land. If a status quo is not",,,,,

maintained, the subject land will be embroiled in multiple title disputes which could frustrate the very purpose of Section 339, and irretrievably mar the",,,,,

interest of the Appellants and the other investors.,,,,,

32. Thus, interim directions/orders are required to be passed under Section 339, since it is reasonable to assume on the basis of the facts shown to us",,,,,

that Dr. Rajesh Aeren had a direct nexus with the Related Party Companies which emerges from the pattern/trail of funds which has been discovered,,,,,

by the Investigating Agency, noted here.",,,,,

33. Consequently, we set aside the impugned orders dated 21.02.2019 to the extent it vacates the interim orders dated 11.07.2018 and 16.08.2018, and",,,,,

direct that till such time the Court considers the audit report in terms of its order dated 21.02.2019, the Respondent Nos. 2 and 3 as also the other",,,,,

Related Party Companies listed out in orders dated 11.07.2018 and 16.08.2018 shall maintain status quo with respect to the subject land. Needless to,,,,,

say, this order is without prejudice to the rights and contentions of the parties that may be urged at the time of consideration of the audit report, as and",,,,,

when prepared and presented to the court. We also leave it to the discretion of the learned Single Judge to consider whether it would be advisable to,,,,,

take assistance of the SFIO, to conduct further investigation into the affairs of

Respondent No.1, where the report is taken up for consideration.",,,,,

34. Accordingly, appeal is allowed in the above terms. All pending applications are disposed of.",,,,,

