
(1993) 04 DEL CK 0018

In the Delhi High Court

Case No : C.W.P. No. 735 and C.M. No. 1267 of 1993

U.K. Mehra

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 30-04-1993

Acts Referred:

Citation : AIR 1994 Delhi 25 : (1997) 88 CompCas 213 : (1993) 51 DLT 14 : (1993) 26 DRJ 495 : (1993) ILR Delhi 403

Hon'ble Judges : G.C. Mittal, J;A.D. Singh, J

Bench : Division Bench

Advocate : P.N. Lekhi and D.S. Narula, for the Appellant; Madan Lokur and C.M. Oberoi, for the Respondent

Judgement

Dev Singh, J.—This is a petition for issue of a writ restraining the first respondent from granting approval to the application of the third respondent a company incorporated in the USA, for setting up a unit under Electronic Hardware Technology Park Scheme through the agency of its proposed Indian subsidiary.

2. According to the case set up in the writ petition, the second petitioner, a private company incorporated under the Indian Companies Act and comprising of relations of the first petitioner, entered into an international distributorship agreement dated June 9, 1986, with the third respondent a company incorporated in the USA, manufacturing computer hardware and software and automatic teller machines (for short "ATMs"), etc., whereby the second petitioner was appointed as the sole distributor in India with the right and license to market and service the products of the third respondent. It is also claimed that they entered into a joint venture agreement dated June 10, 1986, for establishing a company in India with 40 per cent. equity participation by the third respondent or its nominee and 60 per cent. by the second petitioner or its nominee to manufacture, market and service NCR products.

3. The petitioners allege that pursuant to the joint venture agreement they bought three acres of land, situate in the electronic city, developed by Electronic

Development Corporation at Bangalore, for a sum of Rs. 5,10,100. According to the petitioners necessary application was made to respondent No. 1 for seeking approval for the joint venture. Besides, an application to the Government of India is also said to have been made for grant of industrial license. It is further averred that the petitioners on June 19, 1987, and June 26, 1987, got the approval for foreign collaboration and industrial license for the joint venture respectively from the Government of India. It is the case of the petitioners that they had also expended large sums of money to achieve the purpose of the joint venture agreement, but the third respondent has backed out from the same. It seems that the second petitioner and respondent No. 3 developed differences, which do not require any further elaboration, resulting in a civil suit, being Suit No. 2107 of 1992 which is pending before a single judge of this court. In the suit a prayer was made for grant of prohibitory injunction restraining the third respondent from inducting/taking any other party as their joint venture partner and from appointing any third party as their distributor for the distribution, sales marketing and servicing of their products in India. An application for an ad interim injunction was also moved in the suit, for restraining the third respondent from signing any agreement with any other party in India for joint venture and distributorship till the disposal of the suit.

4. The third respondent in the suit took the stand that there was no concluded joint venture contract between the parties and they were only at the stage of exploring the possibilities of entering into a joint venture.

5. In the suit, the learned single judge by his order dated October 15, 1992, restrained the third respondent from signing any agreement with any other party in India for "joint venture/distributorship" till the disposal of the suit.

6. The provocation for the present writ petition lies in the fact that the third respondent by its application dated November 23, 1992, applied to the first respondent for approval for setting up a unit in India under the Electronic Hardware Technology Park Scheme (for short "EHTP Scheme") for undertaking software development systems, engineering and technical services, etc. According to the application, the proposed unit will be owned by an Indian company, which would be a subsidiary of the third respondent. The petitioners on coming to know of the said application by their letter dated December 9, 1992, requested the first respondent not to sanction or approve the proposal submitted by the third respondent. In this letter it was, inter alia, pointed out that the NCR Corporation had been restrained from signing any agreement with any other party in India for joint venture/distributorship and it requested the Government of India to ensure that the third respondent does not enter into any contract or arrangement whatsoever leading to a joint venture either directly or indirectly through their subsidiary for providing sales, marketing and servicing of their products in India in violation of the court's order in the aforesaid civil suit. Through the medium of this writ petition, the petitioner seeks a direction for restraining the first respondent i.e., respondent No. 1, (i) Secretary, Department

of Electronics, (ii) Secretary, Ministry of Commerce, Udyog Bhavan, New Delhi, (iii) Secretary, Ministry of Finance, New Delhi, and (iv) Secretary, Ministry of Industry, New Delhi, from granting the application of the third respondent for setting up a unit under the EHTP Scheme or putting up the unit through an Indian company to be set up by it. In the application for interim relief, the petitioners prayed for the same relief by way of interim measure as is being sought in the main writ petition.

7. In a short affidavit filed by the first respondent it is averred that the third respondent had applied under the EHTP Scheme on November 23, 1992, for setting up of its unit for undertaking software development systems, engineering services and technical services including systems installation and maintenance, both hardware and software development and training. It is further stated that the unit will be owned by an Indian company, which would be a 100 per cent. owned subsidiary of NCR. The affidavit of the first respondent points out that the application of the third respondent under the EHTP Scheme is not for a joint venture. It is pointed out that the proposal of the third respondent was considered by the Inter-Ministerial Standing Committee and a provisional letter of approval was issued on November 25, 1992. It is further stated that the permission to set up a 100 per cent. owned subsidiary does not in any manner give any right to NCR to violate or circumvent any orders of the court.

8. Mr. Lekhi, learned counsel appearing for the petitioners, contended that the first respondent was not right in granting the said approval inasmuch as there is a restraint order by the court, whereby the third respondent has been restrained from entering into any joint venture with any other party in India. Learned counsel submitted that a perusal of the application of the third respondent shows that it will be entering into a joint venture with its proposed Indian subsidiary. It was his submission that in law a subsidiary has a different legal entity from the parent company and any arrangement with the subsidiary will tantamount to a joint venture. It was asserted that the restraint order passed by the learned single judge will be applicable to any joint venture by the third respondent with its subsidiary company.

9. On the other hand, Mr. Madan Lokur, learned counsel for the first respondent submitted that what has been prohibited by the learned single judge, by his order dated October 15, 1992, is only entering into any joint venture by the third respondent with a third party and does not come in the way of the NCR Corporation to set up a subsidiary for carrying out business of the EHTP unit.

10. We have given our earnest consideration to the rival contentions of learned counsel for the parties and have also gone through the record of the present writ petition and Civil Suit No. 2107 of 1992. In pursuance of the powers vested in sub-section (1) of section 3 of the Foreign Trade (Development and Regulation) Ordinance, 1992, the Government of India by a notification dated September 14, 1992, ratified the scheme for building up a strong electronics industry in the country with focus on enhancing its export potential and developing an efficient

electronic component industry in the country. This scheme, which has been christened as Electronic Hardware Technology Park (EHTP) Scheme, permits foreign equity up to 100 per cent. in the case of EHTP units. Pursuant to this scheme, the third respondent filed an application for setting up of its subsidiary for manufacture of its products in India. A perusal of the application of the third respondent shows that the third respondent will be owning the entire equity of the proposed Indian subsidiary. No element of joint venture is involved in setting up of the subsidiary company as it is the third respondent alone who would be bringing into existence the Indian company. For the purpose of setting up of the unit, the third respondent will make an investment of US 15 million dollars over a period of five years. By no stretch of imagination, can the setting up of the subsidiary company by the third respondent be construed as a joint venture. Joint venture would come into existence when the resources of two different persons or entities are pooled together. In the instant case, none other than the third respondent is setting up the Indian company in accordance with the requirements of the EHTP Scheme.

11. The submission of learned counsel for the petitioners that any arrangement between the third respondent and the Indian subsidiary would constitute a joint venture and would attract the restraint order passed by the learned single judge does not impress us. According to the application a wholly owned subsidiary of the third respondent will undertake software development, engineering services, technical services including installation and maintenance, both hardware and software development and training on a world wide basis including India. Where a subsidiary is wholly owned by the principal company which has a pervasive control over it and the former acts as the hand and voice of the latter, the subsidiary in that event would be nothing but an instrumentality, rather a part, of the principal company. The two in that event would have to be treated as one concern. Contemporary trend shows that the lifting of the corporate veil is permissible whenever public interest so demands. Courts have been pragmatic in their approach in unveiling companies, especially the subsidiary companies to see their real face in the interests of justice.

12. The Supreme Court in *State of U.P. and Others Vs. Renusagar Power Co. and Others*, , while relying upon the decision in *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, lifted the veil of Renusagar Power Company, a subsidiary company generating power for Hindalco, for allowing the claim of Hindalco for reduced rate of electricity bill on the basis that Renusagar Power Plant has its own source of generation u/s 3(1)(c) of the U.P. Electricity (Duty) Act, 1952, and the bills should have been made by the electricity board on that basis. In this regard the Supreme Court observed as follows (page 158) :

"Mr. Justice O. Chinnappa Reddy, speaking for this court in *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, had emphasized that the corporate veil should be lifted where the associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor

desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest and the effect on the parties who may be affected. After referring to several English and Indian cases, this court observed that ever since *A. Salomon and Co. Ltd.*'s case [1897] AC 22 (HL), a company has a legal independent existence distinct from its individual members. It has since been held that the corporate veil may be lifted and the corporate personality may be looked into. Reference was made to *Pennington and Palmer's Company Law*.

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

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 u/s 3(1)(c) of the Act . . ."

13. Having regard to the aforesaid judgment we are of the view that learned counsel for the petitioner is not right in submitting that the subsidiary of the third respondent would be considered as a third party for the purpose of the interim order dated November 15, 1992.

14. The EHTP Scheme of the Government is meant to build up the electronic industry in the country and to boost exports. The growth of the scheme cannot be permitted to be impeded in the national interest.

15. Transformation of economy and industry in the country and to set them on

the right path is the purpose for which the scheme has been put into action. Establishment of Indian subsidiaries of foreign companies in accordance with the EHTP Scheme and in accordance with the laws of the country should be free from interference of the courts. Even an interim order in one case can send wrong signals to the foreign entrepreneurs and shake their confidence in the scheme.

16. Accordingly, we reject the submission of learned counsel for the petitioner and hold that the approval of the Government of India dated November 25, 1992, does not infringe the interim order of the learned single judge dated October 15, 1992.

17. As already noticed the ground on which the petitioners seek the relief is not available to them as such we are not inclined to grant rule. Accordingly the writ petition and the application are dismissed.