

Dispute Resolution Hotline

April 25, 2023

DELHI HIGH COURT LIFTS CORPORATE VEIL TO ENFORCE ARBITRAL AWARD AGAINST THE UNION AND DELHI GOVERNMENT

- Doctrine of lifting of the corporate veil is no longer applicable only in the context of the facade and sham tests; the principle may also be applied where equity and the ends of justice may sanction such a recourse, where legal obligations are sought to be avoided, where public policy and public interest so demand and require;
- Indian Supreme Court has taken a position contrary to the view taken in the United Kingdom, and held that the piercing principle must be left to evolve and to be determined in the facts of a particular case, rather than exhaustively enumerating the situations in which that principle could be invoked;
- By lifting the corporate veil, the executing court is not going behind the decree to enforce the decree, but merely giving full effect to the decree in favour of the decree holder;
- The Union and Delhi Government are the principle shareholders of DMRC i.e., sovereign governments. Government cannot shirk from their liability to abide by binding judgments, decrees and awards, otherwise, the very structure of the adjudicatory and judicial system would falter and crumble;

Recently the Delhi High Court ("**Delhi HC**") in Delhi Airport Metro Express Private Limited ("**Delhi Airport Metro**") v.

Delhi Metro Rail Corporation Ltd. ("**DMRC**"),¹ has held that the courts have the power to lift the corporate veil and enforce a decree, judgment or award against the shareholders of the company. The Delhi HC applied the doctrine of lifting of corporate veil in arriving at its conclusion and held that the applicability of the doctrine can be invoked in circumstances where the public interest or public policy demands peaking under the veil.

BACKGROUND TO THE DISPUTE:

The dispute arose in 2012 out of a Concessionaire Agreement ("**Agreement**") entered into between the DMRC and Delhi Airport Metro for construction, operation and maintenance of the Delhi Airport Metro Express Line ("**Airport Metro Express Line**").

In 2012, when the Delhi Airport Metro requested DMRC to conduct a joint inspection of the viaducts and bearings before the expiry of the liability period, Delhi Airport Metro exercised its right under the Agreement and issued a termination letter to DMRC. Arbitration proceedings were initiated under the Agreement, and on 11 May 2017, the arbitral tribunal passed an award ("**Arbitral Award**") in favour of Delhi Airport Metro holding that the termination was valid as DMRC had failed to cure the defects within the stipulated time. Further, the Arbitral Award also held that Delhi Airport Metro was entitled to receive termination payment and interest under the Agreement.

The Arbitral Award was challenged by DMRC and dismissed by the single judge of the Delhi HC on 6 March 2018. The order was appealed by DMRC, and the division bench of the Delhi HC set aside the Arbitral Award on 15 January 2019.² In appeal, the Supreme Court of India ("**Supreme Court**"), on 9 September 2021 reinstated the Arbitral Award i.e., set aside the decision of the division bench. Subsequently, a review petition was filed by the DMRC before the Supreme Court, which was dismissed on 23 November 2021.

After the Arbitral Award attained finality from the challenge filed by DMRC, the Delhi Airport Metro instituted the execution petition³ ("**Execution Petition**") before the Delhi HC for the realization of Arbitral Award. On 10 March 2022 the Delhi HC passed a detailed order in the Execution Petition in relation to the liability of DMRC to make the payments in terms of the Arbitral Award.

Delhi HC directed DMRC to liquidate the funds from the "Total DMRC Funds", "Total Project Funds", and "Total Other Funds" (collectively "**Funds**") or to raise loans to discharge the liability under the Arbitral Award. DMRC subsequently challenged the order dated 10 March 2022 (passed by Delhi HC) before the Supreme Court, which was dismissed on 5 May 2022. A review petition before the Supreme Court was also dismissed on 20 May 2022.

Subsequently, the Delhi HC also substantially reviewed the matter and the issues involved and reiterated its decision (of 10 March 2022) on 20 June 2022, which was again challenged before the Supreme Court and dismissed as withdrawn on 14 October 2022.

In the meantime, DMRC has approached its shareholders, Union Ministry of Housing and Urban Affairs ("**Union Ministry**") and the Government of National Capital Territory of Delhi ("**GNCTD**") to explore various methods of raise money towards paying Delhi Airport Metro in terms of the Arbitral Award, and order dated 10 March 2022. During the pendency of the Execution Petition, DMRC had also approached the Union Ministry to seek permission to utilize the Funds to make payments to Delhi Airport Metro. However, the shareholders, Union Ministry and GNCTD failed to take any steps to raise money to make payments to Delhi Airport Metro.

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Further, the additional affidavits filed by DMRC, in relation to the Funds available with it, reflected a decline in the amounts from INR 5694.25 crores (approx. USD 700 million) to INR 960.62 crores (approx. USD 117.1 million). The decline in the Funds was due to the instructions by the Union Ministry to repatriate all monies held by DMRC in respect of various projects.

In such exceptional circumstances, Delhi Airport Metro sought the lifting of the corporate veil, and impleadment of the shareholders of DMRC, namely, the Union Ministry and GNCTD, for the realization of the money due to Delhi Airport Metro under the Arbitral Award.

ISSUES BEFORE THE COURT

- Whether the Funds can be attached in execution proceedings by court in light of Section 89⁴ of the Metro Railways (Operation and Maintenance) Act, 2002 ("**Metro Railways Act**") and Section 60⁵ of the Code of Civil Procedure, 1908 ("**CPC**")?
- Whether the execution court can lift the corporate veil of an entity in absence of any allegation of fraud or creation of corporate structure to commit fraud?

SUBMISSION OF GNCTD AND UNION MINISTRY:

- The permission of the Central Government is necessary for liquidating metro railways property under Section 89 of the Metro Railways Act, and therefore, only the earnings of the DMRC, and not the Funds available with them could be appropriated towards payment to Delhi Airport Metro in terms of the Arbitral Award.
- The Funds could not have been diverted for the satisfaction of the Arbitral Award, for payment to Delhi Airport Metro. The Funds were allocated by the Union Ministry for Phase-4 expansion projects of the DMRC and could not be used for any other purposes.
- Reliance was placed on the judgment of the Supreme Court in *Balwant Rai Saluja & Anr. v. Air India Limited & Ors.*, (2014) 9 SCC 407, to submit that the lifting of the corporate veil can only be undertaken in exceptional circumstances, and the doctrine cannot be used to shift the liability from the company to its shareholders; *Balmer Lawrie & Co. Ltd. v. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.*, 2017 SCC OnLine Del 7519, to submit that arbitral awards cannot be enforced against non-parties to the arbitral proceedings; *Mitsui OSK Lines Ltd. v. Orient Ship Agency Pvt. Ltd.*, 2019 SCC OnLine Bom 6773, and *V.K. Uppal v. Akshay International Pvt. Ltd.*, 2010 SCC OnLine Del 538 to state that the doctrine of lifting of corporate veil cannot be applied in execution proceedings.
- The directors and shareholders of a company cannot be held personally liable for the debts and dues of the company. Reliance was placed on the decision of the Delhi High Court in *Anirban Roy & Anr. vs. Ram Kishan Gupta & Anr.*, 2017 SCC OnLine Del 12867.
- Delhi Airport Metro does not have right to proceed against Union Ministry and GNCTD as they were not parties to the arbitration proceedings. Section 60 and 47⁶ of the CPC were relied on to contend that an executing court cannot go behind a decree and must enforce the same in the form and manner given in the decree. Since the Arbitral Award is against DMRC, the Delhi HC cannot go behind the Arbitral Award to enforce the same against Union Ministry and GNCTD.

SUBMISSIONS OF DELHI AIRPORT METRO:

- The issue with respect to utilization of the Funds to make payments to Delhi Airport Metro could not be reagitated, as the orders dated 10 March 2023 and 20 June 2023 passed by the Delhi HC had dealt with the issue, and have attained finality.
- The fact that DMRC had repeatedly approached its shareholders i.e., Union Ministry and GNCTD, for permission to use the Funds demonstrates that DMRC had ignored the corporate veil, and the shareholders were exercising power.

DECISION OF DELHI HC:

On the applicability of Section 89 of the Metro Railways Act

First, Delhi HC held that the reliance on Section 89 of the Metro Railways Act was misplaced, as the issue was argued and could not be reagitated. In particular, Delhi HC observed that the orders dated 10 March 2022 and 20 June 2022 had adequately addressed the issue and attained finality after the Supreme Court refused to interfere with the orders passed.

Second, Delhi HC also observed that Section 89 merely places restrictions on the execution against metro railways property in the nature of rolling stock, metro railway tracks, machinery, plant tools, or stations or workshops or offices. Such a restriction is only limited to tools, machinery and workshop and offices necessarily needed for the smooth functioning of the Delhi Metro, and a reading of the language of Section 89 would clarify that the Funds would not fall under the category of metro properties protected by such restrictions under Section 89.

Third, since Section 89 places an embargo on the realization of amount due under court orders and decrees, the said provision needs to be construed narrowly to avoid a situation where the court orders or decrees become infructuous.

Finally, since Delhi HC had earlier directed diversion of the Funds for the realization of the debts due under the Arbitral Award, there was no need for the permission of the Central Government under Section 89 of the Metro Railways Act for compliance.

On the doctrine of lifting of corporate veil

The Delhi HC placed reliance on the judgment of the Supreme Court in *State of Uttar Pradesh vs. Renusagar Power Co.*, (1988) 4 SCC 59 ("**Renusagar**"). In *Renusagar*, the Supreme Court recognized that the courts could lift the corporate veil on the principles of public policy or where the corporate structure was created to perpetuate a fraud. The Supreme Court held that there is no exhaustive list of scenarios where the corporate veil can be lifted, and the doctrine must be applied on the basis of the facts in each case. Such determination must be based on the following

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factors:⁷

1. relevant statutory or other provisions;
2. the object sought to be achieved;
3. the impugned conduct;
4. involvement of an element of public interest; and
5. the impact on parties who may be affected.

The Delhi HC applied the above factors to the factors and held that the relevant factors of the Execution Petition were the public interest, and the effect on parties likely to be affected. The Delhi HC also held that even in the case of Balwant Singh Saluja, the Supreme Court had held that the lifting of corporate veil needs to be guided by the necessity to remedy a wrong done by persons controlling the company, and such determination has to be made on a case by case basis.

They observed that the Arbitral Award was passed in 2017. In spite of the numerous orders in the Execution Petition, DMRC was yet to discharge the liability under the Arbitral Award.

The Delhi HC differentiated the judgments cited by the Union Ministry and GNCTD in support of their submission against the lifting of the corporate veil, finding that either the judgments were subsequently overruled by a superior court, or were based on the peculiar facts and circumstances of that case. The Delhi HC also analysed various judgments passed by the courts in England and United States, and observed that while English courts had adopted a strict test laid down in *Solomon vs. Solomon & Co. Ltd.*⁸ ("*Solomon*") for lifting of the corporate veil, however, the test in *Solomon* is antiquated, as it was laid down in 1897. With the changing times, such an antiquated test cannot be still considered apt and adequate. In contrast to the English courts, the US has adopted a liberal approach and have justified the piercing principles where economic realities require the same, and also to protect the interest of the third parties in their dealings with the company.

Delhi HC concluded that it cannot be said that the doctrine of lifting the corporate veil is limited to cases of fraud or sham, but the doctrine can also be invoked in cases where the equity and the ends of justice demand the same. The Delhi HC opined that a decree, judgment or award must be necessarily enforced. Otherwise, the decree, judgment or award would be just "mere deal letters". The Delhi HC also placed reliance on the decision of the Supreme Court in *Arcelor Mittal vs. Satish Kumar Gupta*, (2019) 2 SCC 1 ("*Arcelor*"), and *State of Rajasthan vs. Gotan Lime Stone Khanij Udyog (P) Ltd.*, (2016) 4 SCC 469 ("*Gotan Lime*"), wherein the Supreme Court had expanded the applicability of the doctrine of lifting of corporate veil to case beyond the instances of fraud. In dealing with the development of the doctrine, the Delhi HC held as under:

"93. Both Arcelor Mittal as well as Gotan Lime Stone assume significance in light of the piercing principle having been employed on grounds of public interest or policy, to strike at attempts to circumvent the law as well as in the context of the imperatives of enforcement of legal obligations.

94. ... On a more foundational ground, this Court deems it appropriate to recall the famous words of Cardozo and Hand both of whom had commended for acceptance the basic principle that a corporate structure should not frustrate the enforcement of an obligation or leave a party remediless. Courts should desist from becoming a mere mute spectator."

It was finally held that DMRC is an alter ego of the Union Ministry and the GNCTD, as the shareholding and board composition enable them to exercise control over DMRC. Further, the provisions of the Metro Railways Act, and the constitution of DMRC clearly show that it is being controlled by Union Ministry and GNCTD. Therefore, the Union Ministry and GNCTD now cannot seek to hide behind the corporate veil to seek amnesty from the liabilities of DMRC.

On applicability of Sections 47 and 60 of the CPC

Similar to the objections under Section 89 of Metro Railways Act, the objections under the provisions of CPC were recorded and addressed by Delhi HC in their orders dated 10 March 2022 and 20 June 2022. Therefore, the same cannot be reagitated.

Delhi HC clarified that the impleadment of Union Ministry and GNCTD in the Execution Petition cannot be construed to be as going behind the decree as the Arbitral Award was being enforced against them after the application of the doctrine of lifting of corporate veil.

In light of these findings, the Delhi HC directed Union Ministry and GNCTD to either accede to the requests of DMRC to raise money to repay the debts or revert and repatriate the monies that were transferred from DMRC to the Union Ministry after 10 March 2022, so that the same can be utilized to make payments to Delhi Airport Metro.

ANALYSIS:

Delhi HC has re-affirmed the arbitration friendly approach. In a departure from the conventional understanding of the doctrine of lifting of corporate veil which has been accepted in exceptional cases involving fraud or where the corporate structure has been created to evade any liability, the Delhi HC reasoned that if persons were permitted to hide behind the corporate structure, and frustrate the enforcement of decrees, judgments, and awards, the courts of justice would fail in their duty, and the decrees, judgments, and awards would be reduced to "mere dead letter(s)". It is particularly interesting that Delhi HC has clarified that the piercing principle may also be applied where equity and the ends of justice may sanction such a recourse, where legal obligations are sought to be avoided, where public policy and public interest so demand and require.

The judgment also extensively deals with international jurisprudence and observes that the Indian Supreme Court has taken a position contrary to the view taken in the United Kingdom, and held that the piercing principle must be left to evolve and to be determined in the facts of a particular case, rather than exhaustively enumerating the situations in which that principle could be invoked.

This is a noteworthy ruling by the Delhi HC as they have lifted the corporate veil of DMRC and directed the Union Ministry and GNCTD to make payments to Delhi Airport Metro. Even though the case involved a high sum of money,

the Delhi HC has passed the ruling against the Union and Delhi Government and in favour of the judgment debtor.

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You can direct your queries or comments to the authors

¹2023 SCC OnLine Del 1619.

²For our hotline on the decision of the Division Bench, setting aside the Arbitral Award, see Alipak Banerjee and Bhavana Sunder, “Delhi High Court Sets Aside the Arbitral Award passed in the Airport Metro Express Dispute”, available at https://www.nishithdesai.com/Content/document/pdf/Articles/190517_A_Delhi_HC_sets_aside_the_Arbital_award.pdf.

³Delhi Airport Metro vs. DMRC, 2023 SCC OnLine Del 1619.

⁴Section 89, Metro Railways Act states that rolling stock, metro railway tracks, machinery, tools, or its stations, workshops, etc., can be attached in execution proceedings without prior approval of the Central Government.

⁵Section 60 of CPC states that only the properties held by the judgment-debtor or another person in trust for him or on his behalf can be attached in the execution proceedings.

⁶Section 47 of the CPC only grants powers to executing court to determine question in relation to execution between the parties to the suit.

⁷State of Uttar Pradesh vs. Renusagar Power Co., (1988) 4 SCC 59, Para. 65.

⁸[1897] A.C. 22.

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