

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH, KERALA**

**MA/25/KOB/2020**  
**in**  
**IBA/38/KOB/2019**  
*(Under Section 60(5) of IBC 2016)*

**Order delivered on:30.06.2021**

**Coram:**

**Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)**  
**Hon'ble Mr. Satya Ranjan Prasad, Member (Technical)**

**Operational Creditors/Applicants**

1. Sanghvi Movers Limited  
Represented by its Authorized representative,  
Mr.Vinayak Shirgaonkar  
Having Registered Office at  
Survey No.92, Tathwade,  
Taluka Mulshi, Pune 411 033
2. MNB Nair (A proprietorship concern)  
Represented by Mr. M.N.Balakrishanan,  
Having office at: Ambattu, Ambalamugal,  
Ernakulam 682 302.
3. Kerala Metal Distributors (A proprietorship concern)  
Represented by Mr.CKN Nair,  
Having office at: XL-3647, Musliam Street,  
Ernakulam, Kochi 682 035.
4. Brothers Engineering (A Partnership concern),  
duly represented by its partner Mr. Ummer P.V.  
having office at: Brothers Arcade,  
Opp. SNDP Mandir, Kuzhikkadu, Kochi 682 303.

**In the matter of:**

M/s. Sanghvi Movers Ltd.	]	
Regd Office: Survey No.92,	]	<b>Applicant/</b>
Tathawade, Taluka-Mulsi, Pune,	]	<b>Operational Creditor</b>
Maharashtra – 411 033, India.	]	

**Vs.**

- |   |   |                          |
|---|---|--------------------------|
| 1. M/s. Albanna Engineering (India) Pvt Ltd.,                         | ] |                          |
| Represented by its  | ] | <b>Corporate Debtor/</b> |
| Ex-Director Mr. Mathew Kavalan,                                       | ] | <b>Respondent</b>        |
| XIV 305 A4(4) 3E, Noel Focus,   | ] |                          |
| Sea Port Airport Road, Chittethukara,                                 | ] |                          |
| CSEZ PO, Kakkanad, Cochin 682 037.                                    | ] |                          |
| 2. M/s. Punjab National Bank, represented                             | ] |                          |
| by its Chief Manager,   | ] | <b>Respondent</b>        |
| having office at ARMB Circle Office,                                  | ] |                          |
| Ernakulam 682 011   | ] |                          |
| 3. Committee of Creditors of  | ] |                          |
| Albanna Engineering (India) Pvt Ltd.                                  | ] | <b>Respondent</b>        |
| duly represented g Mr.Vinod Balachandran(RP)]                         | ] |                          |
| having his office address at  | ] |                          |
| 70/1909, Asoka Road, Kaloor, Kochi 682 017                            | ] |                          |
| 4. M/s. Bharat Petroleum Corporation Ltd.,                            | ] |                          |
| represented by its Executive Director,                                | ] | <b>Respondent</b>        |
| having office at: Kochi Refinery Ambalamugal                          | ] |                          |
| Ernakulam District, Kerala 682 302.                                   | ] |                          |
| 5. M/s Alabanna Engineering LLC, Post Box No. 7323,                   |   |                          |
| Dubai, UAE, having its Project Office at XIV/98M, MNB Business HUBFL, |   |                          |
| Room No.3, Ambattu, Ambalamugal PO-682302.                            |   |                          |
| Represented by its Power of Attorney Holder Sreekumar S.              |   | <b>....Respondent</b>    |
|   | ] |                          |

**Appearance (through Video Conference):**

For applicant/Operational Creditor ...	:	Shri Shikhil Suri, Advocate
For Respondent No. 3/RP	:	Advocate K.B.Arunkumar, Advocate
For Respondent No.5	...	Mr.Reji George, Advocate
For Respondent No.4	....	Mr.Pranoy Harilal, Advocate

**ORDER**

MA/25/KOB/2020 has been filed by Sanghvi Movers Limited and Others (Operational Creditors) against M/s Albanna Engineering (India) Pvt Ltd and Others (Corporate Debtor and Others) seeking the following reliefs: -

- a) This Tribunal be pleased to direct the Respondent No. 4 to invoke both the Bank Guarantees provided by the parent company of Corporate Debtor and deposit the money in designated bank account under the sole control of RP.
- b) PNB be barred from further COC proceedings and Operational Creditors be given the proportionate voting rights in accordance with dues they have from Corporate Debtor.

2. After hearing the learned counsel for both the parties the Division Bench of this Tribunal passed the following order

- i. The Respondent No. 4 i.e., BPCL is directed to invoke both the Bank Guarantees immediately provided by the parent company of the Corporate Debtor, i.e., Albanna Engineering LLC, and to keep the proceeds in an interest-bearing fixed deposit with itself in the name and style of "Bharat Petroleum Corporation Limited-Account-Albanna Engineering" until further orders.
- ii. The Respondent No. 4 i.e., BPCL is hereby directed to produce the original receipt of such deposit before the Registry of this Tribunal.
- iii. The Registry is directed to communicate this order to Albanna Engineering LLC, Albanna Engineering (India) Private Limited,

Bharat Petroleum Corporation Limited and all other applicants  
by email.

3. Aggrieved by the above order dated 20.04.2020 M/s. Albanna Engineering LLC through its Power of Attorney Holder filed Company Appeal (AT) (Insolvency) No. 481 of 2020 before the Hon'ble NCLAT stating that the Appellant is a Foreign Company incorporated overseas in the United Arab Emirates (UAE) with limited liability and is also having its project office at Ambalamugal, Ernakulam District, Kerala State. The Respondent, M/s Bharat Petroleum Corporation Limited. (BPCL) invited global tenders for the execution of Mechanical Works of VGO HDT Unit and DHDT Unit for Integrated Refinery Expansion Project (IREP) at Kochi Refinery, Kerala in the year 2014. The tenders submitted by the Appellant was accepted by the Respondent BPCL and Purchase Orders were issued to the Appellant. The estimated contract value of the works was Rs. 205,59,20,098/-. For execution of works the Appellant appointed its subsidiary, the Respondent No. 5 (herein) - M/s. Albanna Engineering (India) Private Limited, under an agreement as sub-contractor and carried out the works through them.

4. The Appellant furnished two Bank Guarantees in favour of the Respondent No. 8. The appellant completed the works and submitted final pro-forma invoices in respect of both the works. On 01.01.2018, the Respondent No. 8 issued completion certificates to the Appellant through its project management consultant M/s Engineers India Ltd.

5. The Respondent No. 1 – Operational Creditor approached the NCLT, Kochi Bench, under Section 9(6) of the IBC and the NCLT, Kochi

Bench vide order dated 25.10.2019 admitted the Application and declared moratorium.

6. In MA/25/KOB/2020 the Appellant (herein) was not arrayed a party in the Application and the order was passed behind the back in violation of principle of natural justice.

7. The Respondent No. 1 filed his Reply Affidavit in which he has opposed this submission and stated that the Appellant and the Respondent No. 5 are a single economic entity or Respondent No. 5 is an alter ego of the Appellant, so it is not correct that the impugned order was passed behind the back of the Appellant. The Respondent No. 6 - PNB has also filed its written submissions supporting the impugned order in which it is stated that the Adjudicating Authority has rightly passed the impugned order. It is further stated that the Adjudicating Authority after lifting the 'Corporate Veil' passed the impugned order. So, there is no merit in this Appeal and it is a fit case to be dismissed.

8. The Respondent No. 7 - CoC representing the Corporate Debtor- M/s Albanna Engineering (India) Pvt. Ltd. filed status report: in which para 2 (i) reveals as follows:

"Since Corporate Debtor had absolutely no asset to meet any of its liabilities a Misc. Application No. MA/23/KOB/2020 was filed before the Hon'ble NCLT, Kochi Bench said Application was disposed off by the Hon'ble NCLT, Kochi Bench its order dated 13th March, 2020 wherein certain directions were passed against the Respondent No. 8 directing it not to pay any amounts due to the Appellant (approx. Rs. 5.46 crores) till further orders from the Hon'ble Tribunal and also to consider impleading Appellant as a party. This has been complied with under MA/71/KOB/20 and the hearing is in progress."

9. In the appeal the Hon'ble NCLAT considered the arguments of both the parties and held that the Appellant M/s Albanna Engineering LLC was not a party in the impugned order passed by the Adjudicating Authority, NCLT, Kochi Bench and only M/s Albanna Engineering (India) Pvt. Ltd. made a party, so the Hon'ble NCLAT was of the considered view that the impugned order cannot be sustained in the eye of law as natural justice has been violated and the impugned order dated 20.04.2020 passed by the Adjudicating Authority, NCLT, Kochi Bench order was aside. The matter was remitted to the Adjudicating Authority, NCLT, Kochi Bench. It is stated that the time spent in pursuing the instant MA/ 25/KOB/2020 shall be excluded from CIRP period. The Respondent Nos. 9 and 10 was directed to renew the Performance Bank Guarantees for a period of three months. They were further directed to renew the Performance Bank Guarantees for a period of six months from the date of passing of the order.

10. As ordered by the Hon'ble NCLAT, MA/25/KOB/2020 has been listed before this Bench for a fresh consideration. The Respondent No. 5 filed an objection to the application under Rule 111 of the NCLT Rules, 2016 stating that MA/25/KOB/2020 has been filed under the mistaken impression that the 1<sup>st</sup> and 5<sup>th</sup> Respondents can be considered as one and the same entity for the purpose of CIRP. Even though the 1<sup>st</sup> Respondent is a subsidiary of the 5<sup>th</sup> Respondent, as per the provisions of the Companies Act, the 5<sup>th</sup> Respondent is not liable for the various liabilities of the 1<sup>st</sup> Respondent. The 5<sup>th</sup> Respondent is only a share holder of the 1<sup>st</sup> Respondent and the status of the 5<sup>th</sup> Respondent is not

better than that of an ordinary shareholder of any another Company with limited liability. The 1<sup>st</sup> Respondent and the 5<sup>th</sup> Respondent are separate legal entities and the 5<sup>th</sup> Respondent cannot be held liable for any of the acts of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent is a Company with limited liability incorporated under the Companies Act, 1956; whereas the 5<sup>th</sup> Respondent is a Corporation incorporated at Dubai as per the laws in force in that country. The 1<sup>st</sup> and 5<sup>th</sup> Respondents are totally independent and separate legal entities and the 5<sup>th</sup> Respondent has no liability to repay any amount on behalf of the 1<sup>st</sup> Respondent. No amount is due from the 5<sup>th</sup> Respondent to the 1<sup>st</sup> respondent either. All the amounts due from the 4<sup>th</sup> Respondent to the 5<sup>th</sup> Respondent absolutely belong to the 5<sup>th</sup> Respondent and the 1<sup>st</sup> Respondent has no claim whatsoever with respect to that amount. It is also stated that the 5<sup>th</sup> respondent is liable to pay the various amounts to its creditors abroad and the assets of the 5<sup>th</sup> respondent cannot be utilized for paying the liabilities of the 1<sup>st</sup> Respondent in India.

11. They have referred to a decision of the Hon'ble Supreme Court in ***Gangotri Enterprises Ltd. v. Union of India and others, (2016) 11 SCC 720***, in which it was held that "*the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the Respondents, they had no right to encash the Bank Guarantee.*" Therefore, neither the 4<sup>th</sup> Respondent has the legal right to invoke the performance bank guarantees after the 5<sup>th</sup> Respondent has completed the works in

accordance with the work orders. In such circumstances, the direction sought for in MA/25/KOB/2020 requiring the 4th Respondent, BPCL, to invoke the performance guarantees, after the completion certificate has been issued to the 5<sup>th</sup> Respondent, is evidently illegal. The assets and properties of the 5<sup>th</sup> Respondent cannot be said to be the property of Respondent No. 1, the Corporate Debtor, for the purpose of the present CIRP.

12. During the arguments the learned counsel for the Applicants in MA/25/KOB/2020 i.e., the Operational Creditor stated that Respondent No. 5 and Respondent No. 1 are the single economic entity (SEE) and Respondent No. 5 is liable for the debts of Respondent No. 1 which it has fraudulently incurred and which it has malafide refused to pay. Respondent No. 5 was in control and management of Respondent No. 1 and in view of the fraudulent trading and incurring of debts, the Respondent No. 5 is liable to contribute to the assets of Respondent No. 1. The corporate veil ought to be lifted. The parent company ought not to be to get away from its obligations towards the contractors/suppliers engaged by the Corporate Debtor to execute the contract of the parent company. The Hon'ble Adjudicating Authority has only passed to invoke the Bank Guarantees provided by the Respondent No. 5 and keep the proceeds in an interest-bearing fixed deposit with Respondent No. 4 until further orders. Hence there is no error in the order passed by this Tribunal on 20.04.2020 in MA/25/KOB/2020. However, the learned counsel for the 5<sup>th</sup> Respondent vehemently opposed the submission stating that since the 1<sup>st</sup> Respondent is a subsidiary of the 5<sup>th</sup>

Respondent, as per the provisions of the Companies Act, the 5<sup>th</sup> Respondent is not liable for the various liabilities of the 1<sup>st</sup> Respondent. The 5<sup>th</sup> Respondent is only a shareholder of the 1<sup>st</sup> Respondent and the status of the 5<sup>th</sup> Respondent is not better than that of an ordinary shareholder of any another Company with limited liability. The 1<sup>st</sup> Respondent and the 5<sup>th</sup> Respondent are separate legal entities and the 5<sup>th</sup> Respondent cannot be held liable for any of the acts of the 1<sup>st</sup> Respondent.

13., For a re-appreciation of the facts of this case the in the findings entered by this Tribunal, the relevant paragraphs in the order dated 20.04.2020 has been quoted hereunder: -

- i. On perusing the whole case records in this application and based on preliminary information in documents submitted before us, we observed that, as per the records with Registrar of Companies, the Corporate Debtor is a 100% subsidiary of M/s. Albanna Engineerina LLC, Dubai, UAE ("LLC"). Mr. Saeed Ahmad Mohammed Saleh Albanna, subscriber to the Memorandum of Association of the Corporate Debtor (CD) as a representative of the holding Company M/s. Albanna Engineering LLC, UAE, is holding 99.99% of shares of Corporate Debtor. The said Mr. Saeed Ahmad Mohammed Saleh Albanna and Mr. Biswadeep Das along with Mathew Kavalan (presently holding one shares of Corporate Debtor) were the first Directors of the Corporate Debtor as per the Articles of MA/25/KOB/2020 in IBA/38/KOB/2019 Page 8 of 20 Association. The first two persons mentioned above

were subsequently resigned from the Director Board of the Corporate Debtor. However, they were directors of the Corporate Debtor at the time the Corporate Debtor incurred the liability to the Financial Creditor M/s Punjab National Bank (having 96% voting share in CoC. Though instructions were sought from the Mr. Mathew Kavalan as to why the Promotor and representative of the Holding Company had resigned without the approval of the Financial Creditor since the contract with the M/s. BPCL is with the holding Company, which is the only source of revenue to the Corporate Debtor, he had not furnished any explanation for the same.

- ii. It is understood from the records that Mr. Saeed Ahmad Mohammad Saleh Albanna is the Promoter and Mr. Mathew Kavalan is the Director of M/s. Albanna Engineering LLC, Dubai, UAE ("LLC"). Mr. Mathew Kavalan, is the Key Management Personnel of the LLC and instrumental in winning the contract for mechanical works of VGO HDT unit for Integrated Refinery Expansion Project with the 4th Respondent M/s. BPCL-Kochi Refinery vide PO-4504660618 dated 19.5.2014. As per the said agreement M/s. Albanna Engineering LLC, Dubai, UAE ("LLC") signed back-to-back basis with Corporate Debtor for sub-contractor services for the above-mentioned project only. As per the agreement the Corporate Debtor gets 7% of the amount received by M/s. Albanna Engineering LLC, Dubai, UAE ("LLC") from the 4th respondent M/s. BPCL Kochi Refinery.

- iii. Further, as disclosed by BPCL, the entire amount if any, payable to AELLC, which is currently retained with them by way of the Bank Guarantees and the final bill amount. The said amounts payable to AELLC have been attached by various courts in several pending suits/ garnishee proceedings. Out of the 12 Garnishee orders with M/s BPCL Kochi Refinery, 8 numbers are relating to Corporate Debtor and are included in the claims and 4 numbers are relating to parent company. The Corporate Debtor does not have other recovery option in CIRP since Corporate Debtor is no longer operational and does not have Corporate office, staff or books of account. Further Sections 43, 45, 50 of IBC,2016 may also be applicable in the above transaction. However due to absence of books of accounts and contractual information these cannot be substantiated.
- iv. There seems to be an admitted liability of BPCL towards parent company for an amount of Rs 5.40 Crores which form part of receivables to parent company, subject to TDS deductions. The same being payments towards the work executed for parent by Corporate Debtor will come under the definition of assets of the Corporate Debtor because Corporate Debtor performed the project for parent company, Corporate Debtor is eligible for receivables, and the same will be an asset of Corporate Debtor. Hence the parent company is responsible to make good the cash loss to the Corporate Debtor to settle the creditors' claims arising on account of CIRP. The parent company has also provided two

performance bank guarantees to M/s BPCL Kochi Refinery for the project (full security MA/25/KOB/2020 in IBA/38/KOB/2019 Page 10 of 20 deposit against bank guarantee) amounting to Rs. 24.67 crores which is to be expired on March 31,2020.

- v. In the meanwhile, the Operational Creditors of the Corporate Debtor has filed this application to this Bench to urgently consider the above since the bank guarantees are expiring on March 31, 2020. As we are facing the situation of lock down in our country, the Bank Guarantee No. 0010BG00002215 dated 14.07.2014 issued by ICICI Bank for an amount of ₹ 12,96,01,078/- and Bank Guarantee No. 5525604809 dated 07.07.2014 for USD 16,50,000/- issued by the CITI Bank, Mumbai have amended the expiry dates to 30.06.2020 respectively. The emails sent by ICICI Bank to M/s BPCL Kochi Refinery and CITI Bank to M/s BPCL Kochi Refinery on 31.03.2020 were sent by the Resolution Professional through mail to the Registry and was placed on record.
- vi. Circumstances being as above, the applicants quoted the case of State Bank of India Versus Videocon Industries Limited (VIL) & Ors (MA/2385/2019 in C.P.(IB)-02/MB/2018 dated 12.02.2020 of NCLT, Mumbai Bench) for piercing the corporate veil of the company and considering the group companies as one. It was their contention that the assets of the subsidiaries and assets of holding Company are not different and distinct, as there is common control, management and 100% shareholding by the

parent Company. The Corporate Debtor was floated by the same directors of parent company, which was evident from the shareholding pattern and the signatories of Memorandum of Association of the Corporate Debtor. Further, it is also evident from the MA/25/KOB/2020 in IBA/38/KOB/2019 Page 11 of 20 Agreement entered between the parent company and Corporate Debtor on 19th May, 2014 that Albanna Engineering (India) Pvt Ltd. has been identified by Albanna Engineering LLC as a potential subcontractor. This is a typical instance of a “see through provision”, so that one is able to arrive at persons who are actually in “control”, whether jointly, or in concert, with other persons. In such cases, the principle will apply where a group company could be held liable for the debts of its associate and subsidiary companies.

- vii. Similarly, in Jaypee group (Chitra Sharma & Ors V. Union of India & Ors. Supreme Court, Order dated 11.09.2017) and Amrapali group (Bikram Chatterji & Ors. V. Union of India & Ors., Supreme Court, Order dated May 17 and August 1, 2018), disregarding the separate identity of the companies, the Supreme Court directed the parent company in the former to deposit money, while the properties of the latter group were attached and bank accounts frozen.
- viii. We consider the case in hand to be a case involving ‘Group Insolvency’. We, therefore, rely upon the “Report of The Insolvency Law Committee” dated 26th March 2018” on Page 83

a part of Annexure II- [Summary Response to Comments] at Sr. No. 17 given as under:

*“It was noted that the treatment of group companies within insolvency laws is a complicated subject. The current system of insolvency law is new, and it may be too soon to introduce a complex subject, like the present issue. The UNCITRAL Legislative Guide on Insolvency Law also provides that the treatment of group companies is a very complex subject in relation to insolvency law and has multiple different approaches in different jurisdictions. Since lifting of the corporate veil in insolvency may affect corporate debtor entities significantly, this issue may be dealt with in the long-term once the present system is well established.”*

Quoting the above Report, the Order of Mumbai Bench stated as below:

*“76. At that point of time the Hon’ble Members of the Insolvency Law Committee have thought that the mechanism of combining Insolvency proceedings in respect of associate or holding companies was ‘too soon to introduce’ , but the jurisprudence on Insolvency Code developed very fast in last 3 years , as witnessed by all of us, that this problem of ‘Consolidation’ has also cropped sooner than expected in this Group of cases, so pressing that it cannot be avoided or deferred . No option is available to this Bench to declare that in the absence of any specific provisions in the I & B Code 2016 issue of*

*‘Consolidation’ is premature so be not dealt with. Nonetheless, I cannot hold that in the absence of Law, the question of Consolidation need not to be addressed. I am aware that this approach shall not be appreciated being against the natural justice. Equity demands to give a verdict on an issue raised by the litigants before a court of law, but definitely within the four corners of the Law without transgressing the jurisdiction as prevalent currently. It goes without saying that the decision hereinbelow is going to be based upon the merits of this case; supported by case-laws pronounced in the past and evidence on record. Undoubtedly the treatment of ‘group companies’ for the Insolvency purpose is a complex subject, as appropriately observed in the ‘Report’. That lifting of corporate veil for Insolvency purpose may affect Corporate Debtor’s entity significantly, but considering the high stakes of the stakeholders and the lengthy arguments raised by various parties demanding a verdict urgently on the issue of ‘Consolidation’, no choice is left but to take the call, although with due care that not to exceed the jurisdiction enshrined in the Insolvency Code.”*

- ix. We relied on various case laws on the subject of lifting of corporate veil mentioned in State Bank of India Versus Videocon Industries Limited (VIL) & Ors (Supra). The relevant portions of some of them along with inference which can be drawn from them.

1. In the case of **State of U.P. and others Appellants v. Renusagar Power Co. and others Respondents** reported in **(1988) 4 SCC 59**, it is held as follows:

“55. In *Kodak Ltd. v. Clark*, (1903) 1 KB 505, the Court of Appeal in England while dealing with an English company carrying on business in the U. K. owned 98% of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors etc., of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholders. It was held that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income-tax. *Renusagar* was not the alter ego of *Hindalco*, it was submitted. On the other hand, these English cases have often pierced the veil to serve the real aim of the parties and for public purposes. See in this connection the observations of the Court of Appeal in *DHN Food Distributors Ltd. v. London Borough of Tower Hamlets* (1976) 3 All ER 462. It is not necessary to take into account the facts of that case. We may, however, note that in that case the corporate veil was lifted to confer benefit upon a group of companies under the provisions

*of the Land Compensation Act, 1961 of England. Lord Denning at page 467 of the report has made certain interesting observations which are worth repeating in the context of the instant case. The Master of the Rolls said at page 467 as follows: -*

*"Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies is treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdsworth and Co. (Wakefield) Ltd. v. Caddies (1955 (1) All ER 725). So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable*

*for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it. I realise that the President of the Lands Tribunal, in view of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this court, we must decide differently from him. These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly."*

66. *It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of 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 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 fulfil the condition of industrial licence of Hindalco through production of aluminium....*

2. In the case **Arcelomittal India (P) Ltd. vs. Satish Kumar Gupta reported in (2019) 2 SCC 1**, it is held as under:

*"35. I conclude that there is a limited principle of English law*

*which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.*

**37. It is thus clear that, where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil.** Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole." As such keeping in mind of the ratio laid down in above cases of LIC, Renusagar, it is clear that the law and criteria for lifting or not lifting corporate veil changes from case to case and law is evolving in modern jurisprudence. Therefore, it can not be said that corporate veil can be lifted only for particular reasons but

*has to be judged on unique facts applicable to each case. In our opinion the facts pertaining to present case and relationship of Respondent no. 1 to 5 is also unique and which is also to the knowledge of the Lenders and BPCL. All stakeholders, despite frequent change in holding structure, were/are treating it as property, assets held by VIL through the Respondent no. 2 to 5, for exclusive benefit of parent company i.e., VIL and not VOVL.”*

- x. It is clear from the aforesaid Judgments that the corporate veil between the subsidiaries and holding company are to be lifted depending on facts of each case and no straight formula can be defined. As held in aforesaid judgments, the corporate veil can be lifted for unlimited reasons and it is not only limited to the extent of the cases of fraud, impropriator. Each case needs to be tested with the unique facts of arrangement applicable to it. In the recent case of ArcelorMittal India, Hon’ble Apex Court has held that there is a limited principle of English Law which applies ***and the Court may pierce the corporate veil for the purpose, and only for the purpose of depriving company or its controller of the advantage that they would otherwise have obtained by company’s separate legal personality.***
- xi. It is also held in the said Judgment that ***where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil. Further, this principle is***

***applied even to group companies, so that one is able to look at the economic entity of the group as a whole.***

- xii. We have referred ***Hindustan Construction Company Limited and Ors. Vs. Union of India (UOI) and Ors.*** MANU/SC/1638/2019, where the Hon'ble Supreme Court have referred to their judgment in ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*** MANU/SC/ 1196/2017 : (2018) 1 SCC 353 and stated that Section 5(6) of the Insolvency Code, which defines 'disputes', read with Section 8(2) of the Insolvency Code, would make it clear that there is no bar to applying an Order VIII-A of the Code of Civil Procedure type procedure to proceedings under the Insolvency Code, so that when his client's sub-contractor triggers the Insolvency Code against his client, his client in-turn should be able to make its principal employer a party to such proceedings, so that the subcontractor may then recover these amounts from the principal employer directly, thereby absolving his client from the clutches of the Insolvency Code.
- xiii. From the above decided case laws, we came to a conclusion that the instant application is a fit case for piercing 'Corporate Veil'. Accordingly, we came to the same view that lifting of Corporate Veil is very much needed and permitted in the instant case as the promoters/ directors of a company diversify the business in various field by creating several independent entities, call it subsidiaries, with the constitution of common directors and at

some point of time if the Group gets financially stressed due to default in repayment of debt, at that juncture a right of recourse is required to be adopted. That is why, the right recourse shall be to examine the necessity of 'Consolidation' as there is a clear case of principal-agent relationship. Section 221 (Agent's lien on principal's property) and Section 222 (Agent to be indemnified against consequences of lawful acts) of the Indian Contract Act, 1872 can also be involved in this instant application. The Invoicing & Payment Terms in Agreement dated 19.05.2014 between the Prime Contractor (Albanna Engineering LLC) and Subcontractor (Albanna Engineering (India) Pvt. Ltd) clearly states that:

“M/s. Albanna engineering LLC, shall raise the invoice on Client based on the measurement sheet provided by the Sub Contractor. The sub-contractor shall subsequently raise invoice on Albanna LLC for the duly accepted measurement sheet by the Client.”

As already pointed out, the management and ownership of these companies are same. We have also come to a conclusion that there is no other fall-back mechanism for recovery of dues from the parent company unless they are not ready to settle the dues. It is evidently interconnected, interwoven and interlaced to much greater extent. As there is no revenue for M/s Albanna Engineering (India) Private Limited, the due amount could not

be recoverable. So, we are of the view that the obligations of each other are also intermingled and is treated as one single economic entity.

- xiv. In the backdrop of aforesaid discussion, it has to be held that the assets and properties, including any claim, interest therein, of Albanna Engineering LLC (Dubai) held through M/s Albanna Engineering (India) Private Limited will have to be said to be the property of the Corporate Debtor, for the purpose of the present CIRP. Further, we have concluded that the bank guarantee of parent company for completing the work for BPCL is done by M/s Albanna Engineering (India) Private Limited (sub-contractors), wherein the applicants, i.e., Sanghvi Movers Limited, MNB Nair, Kerala Metal Distributors and Brothers Engineering are the service providers and material suppliers for engineering projects for BPCL. Therefore, the assets held by them can be said to be “its” assets i.e., the assets of present Corporate Debtor, which is under the CIRP. Further, the Hon’ble High Court Order in the writ petition filed by the parent company may not come in the way of our passing any order in the instant application. The order as informed to us, clearly directed the parent company to get all the injunctions/ garnishee order lifted in the civil courts. Further, as per the agreement between the parent company and the Corporate Debtor, the agreement will be construed and enforced in accordance with the laws of India including its recognition of

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applicable law, as mentioned under clause 17(2) of the agreement.

- xv. The Applicants in MA/25/KOB/2020 in IBA/38/KOB/2019 have pleaded for invocation of 'Bank Guarantees', given by the parent company to Respondent no. 4. In this connection we are conscious of the fact that these guarantees are performance guarantees. Section 126 of the Indian Contract Act defines a 'contract of guarantee' as:

“a contract to perform the promise, or discharge the liability, of a third person in case of his default.”

However, there is a slight variation in 'financial guarantee' and 'performance guarantee'. Whereas a financial guarantee promises repayment of money, in case of non-completion of the contract by client, a 'performance guarantee', on the other hand provides a promise of compensation in case of inadequate or delayed performance of a contract. In other words, in both financial guarantee and performance guarantee, the liability of the bank is reduced to financial compensation only. In the instant case also, the Banks will compensate the Respondent no.4 for non-performance by way of financial payments only. The pleadings of the applicant are to invoke Bank Guarantees, so that the parent company cannot get away from its obligations towards the contractors/ suppliers engaged by the Corporate Debtor to execute the contract of the parent company, which is a 100% wholly owned subsidiary of AELLC. We are convinced

with these arguments taking into account that there are no worthwhile assets in the name of Corporate Debtor in India to fall back. Further, we have already gave an interim order dated 11.03.2020 in MA/23/KOB/2020 directing the respondent no.4 not to pay any amounts due from it to the parent company.

- xvi. Circumstances being above, the Corporate Insolvency Resolution Process was initiated and moratorium was passed on 25.10.2019, therefore, it prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor or its parent company, including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority. Section 14 read with Section 238 of Insolvency & Bankruptcy Code, 2016 is applicable.

14. The relief prayed for by the 5<sup>th</sup> Respondent before the Hon'ble NCLAT was that the 5<sup>th</sup> Respondent was not made a party in the order in MA/25/KOB/2020. After hearing all the parties, the Hon'ble NCLAT disposed of the appeal setting aside the order dated 20.04.2020 remitting back MA/25/KOB/2020 for a reconsideration. It is also stated in the said order that the performance bank guarantee is to be renewed for another 6 months from the date of that order.

15. We have heard the learned counsel for the Applicant/ Operational Creditor, and all the respondents including the 5<sup>th</sup> Respondent who was the Appellant before Hon'ble NCLAT and gone through the entire documents produced by all the parties. While disposing of MA/25/KOB/2020 even

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though, the 5<sup>th</sup> Respondent was not a party, this Tribunal considered the entire gamut of the matter and passed the impugned order. It was held therein that the assets and properties, including any claim, interest therein, of Albanna Engineering LLC (Dubai) held through M/s. Albanna Engineering (India) Private Limited will have to be said to be the property of the Corporate Debtor, for the purpose of the present CIRP. Further, the Tribunal concluded that the bank guarantee of parent company for completing the work for BPCL is done by M/s. Albanna Engineering (India) Private Limited (sub-contractors), wherein the applicants, i.e. Sanghvi Movers Limited, MNB Nair, Kerala Metal Distributors and Brothers Engineering are the service providers and material suppliers for engineering projects for BPCL. Therefore, the assets held by them can be said to be “its” assets i.e., the assets of present Corporate Debtor, which is under the CIRP. Further, the Hon'ble High Court Order in the Writ Petition filed by the parent company may not come in the way of the Tribunal passing any order in the instant application. The order as informed to us, clearly directed the parent company to get all the injunctions/garnishee order lifted in the civil courts. Further, as per the agreement between the parent company and the Corporate Debtor, the agreement will be construed and enforced in accordance with the laws of India including its recognition of applicable law, as mentioned under Clause 17(2) of the agreement. It was also held that the bank guarantee produced by the 5<sup>th</sup> Respondent are the performance guarantee. Section 126 of the Indian Contract Act defines a ‘contract of guarantee’ as;

“a contract to perform the promise or discharge the liability,

of a third person in case of his default”

16. The pleadings of the Applicant are to invoke Bank Guarantees, so that the parent company cannot get away from its obligations towards the contractors/ suppliers engaged by the Corporate Debtor to execute the contract of the parent company, which is a 100% wholly owned subsidiary of AELLC. The Tribunal convinced with these arguments taking into account that there are no worthwhile assets in the name of Corporate Debtor in India to fall back.

17,. For the aforesaid detailed discussions this Tribunal do not find any error in the order passed by this Tribunal in MA/25/KOB/2020 in IBA/38/KOB/2019. Hence, by exercising the powers vested in the Adjudicating Authority under Rule 11 of NCLT Rules and Section 60(5) of Insolvency and Bankruptcy Code, we **dispose of MA/25/KOB/2020** with the following orders:

- i. The Respondent No. 4 i.e., BPCL is directed to invoke both the Bank Guarantees immediately provided by the parent company of the Corporate Debtor, i.e. Albanna Engineering LLC, immediately and to keep the proceeds in an interest-bearing fixed deposit with itself in the name and style of “Bharat Petroleum Corporation Limited-Account Albanna Engineering. Since, the Hon’ble NCLAT directed to renew the performance bank guarantee for a period of 6 months from 17.03.2021, which would be expiring only during September 2021 this Tribunal is not giving any further direction in that respect.
- ii. In the order dated 20.04.2020 there was a direction to the Respondent No. 4 BPCL, to produce the original receipt of the

- deposits before this Tribunal. The Registry reported that till date Respondent No. 4 BPCL did not produce the original receipt before this Tribunal. Hence, the Respondent No. 4 is directed to produce the aforesaid original receipt before this Tribunal, immediately at any rate within a week from the date of this order.
- iii. The Registry is directed to communicate this order to Albanna Engineering LLC, Albanna Engineering (India) Private Limited, Baharat Petroleum Corporation limited other Respondents and the Applicant by email.

Dated this the 30<sup>th</sup> day of June, 2021

Sd/-

**(Satya Ranjan Prasad)**  
**Member (Technical)**

Sd/-

**(Ashok Kumar Borah)**  
**Member (Judicial)**