

**John D'Silva and Ors. Vs. Neosonic Electronics Ltd. and Ors.**

**John D'Silva and Ors. Vs. Neosonic Electronics Ltd. and Ors.**

**SooperKanoon Citation :** [sooperkanoon.com/367476](http://sooperkanoon.com/367476)

**Court :** Mumbai

**Decided On :** Mar-13-2007

**Reported in :** 2007(4)BomCR334; [2008]141CompCas897(Bom)

**Judge :** R.S. Dalvi, J.

**Acts :** [Companies Act, 1956](#) - Sections 2(13), 175 and 634A; Code of Civil Procedure (CPC) - Sections 15

**Appeal No. :** Chamber Summon Nos. 1060 and 1061 of 2006 in Execution Application No. 270 of 2006 in Company Petiti

**Appellant :** John D'Silva and Ors.

**Respondent :** Neosonic Electronics Ltd. and Ors.

**Advocate for Pet/Ap. :** L.R. Castelino and; Amit Sheth, Advs.

**Disposition :** Petition dismissed

**Judgement :**

**R.S. Dalvi, J.**

1. The petitioners in the above company application seek to execute the order dated June 8, 2004, of the Company Law Board (CLB) under the provisions of Section 634A of the [Companies Act, 1956](#), through this Court as the executing

court since the company against which the order is passed has its registered office within the jurisdiction of this Court and its life-time director, respondent No. 2 in the company petition, resides within the jurisdiction of this court. The applicant-company has taken out the above chamber summons being Chamber Summons No. 1061 of 2006 for raising the attachment and staying the execution. The lifetime director being respondent No. 2 has taken out another chamber summons for setting aside the warrant of attachment and staying the execution.

2. It is the case of the applicant-company (which is a company other than respondent No. 1 company in the company petition) that it is the owner of the premises sought to be attached and that the first respondent-company in the company petition is not the owner and does not own the property and, therefore, the property of the applicant-company cannot be attached in execution of the order/decreed of the Company Law Board in favour of respondent No. 1 company in the above company petition. It is the case of respondent No. 2 to the company petition, the life-time director of respondent No. 1 company, that the order is passed only against the company and not against him and hence, the warrant of attachment issued be set aside and the execution be stayed.

3. Certain events and dates that have transpired with regard to the flat which is attached as also with regard to the conduct of the director of respondent No. 1 company in the above petition require to be considered.

4. The attached flat is shown to have been purchased initially under an unregistered agreement for purchase of the said flat by the wife of respondent No. 2, from one Ramesh Shah, on June 14, 1977. The flat has since stood in the name of the wife of respondent No. 2 in the records of the society. The document for the said flat is an agreement on a stamp paper of Rs. 5, which is not registered. Of course, at that time, the document for purchase of flat in the co-operative society was not required to be compulsorily registered. However, since the document has remained unregistered, the execution specifically by the wife of respondent No. 2, cannot be seen. The transfer has taken place from one Ramesh Shah to the wife of respondent No. 2, who is Geeta Shah. The relationship between the parties is not known or shown. Whether the consideration shown in the consideration clause

of the document came from her funds and whether she had any funds, independent of her husband, is also not shown. In fact, it cannot be seen whether the consideration shown in the document represents an adequate consideration, which would have been the market value of the flat at the time of the transaction. All that can be seen from the document is that it was executed in June, 1977, since the share certificate for the flat shows an entry to that effect. The wife of respondent No. 2 is shown as an owner of the attached flat and is shown to have continued such ownership until the year 2000 from the next entry in the share certificate.

5. The second entry in the share certificate shows that the flat is transferred to her son, Dhawal Shah on September 13, 2000. The document of transfer in the year 2000 is not produced. A mere entry in the share certificate cannot confer title upon the son of respondent No. 2 as the owner of the said flat. The said son is the co-director of respondent No. 2. He is shown to have transferred the said flat to the applicant in Chamber Summons No. 1065 of 2006 under a registered but inadequately stamped deed of transfer dated August 10, 2000. An entry of the said transfer is made in the share certificate for the said flat on August 11, 2005, i.e., five years after the purported transfer.

6. The said transfer deed is registered on December 29/30, 2000, in the name of one Mahendra Purohit, who is not a party to the said transaction. The deed of transfer is subject to the tenancy rights of M/s. Crystal Audio Ltd., in which respondent No. 2 as well as his son Dhawal Shah are directors. This fact is evident from the certified true extract of the balance-sheet of M/s. Crystal Audio Ltd., issued by the Registrar of Companies under No. 3403 of 1994 showing the annual report of the company of the year 1998 in which respondent No. 2 is shown as the chairman and managing director and has signed the annual report in such capacity. From the said document it can be seen that the registered office of Crystal Audio Ltd., is at Crystal Estate, Plot No. 80, Waliv, Taluka Vashi, District Thane, Maharashtra. Consequently, the tenancy created in favour of Crystal Audio Ltd., is not for the office of the said company but is seen to be for the residence of the directors of the company, including respondent No. 2 who is the chairman and managing director of that company.

7. It can, therefore, be seen that the attached flat belongs to respondent 7 No. 2, who was the director of respondent No. 1 company, against whom the order of the Company Law Board has been passed. By virtue of the aforesaid documents, respondent No. 2 has sought to show his lack of legal interest and the interest of his wife and son instead. However, that exercise has been unsuccessful inasmuch as the certified extract of Crystal Audio Ltd, shows the tenancy for residential flat of the directors and the unmaintainable interest of the applicant-company under the agreement which is subject to such tenancy right.

8. It will be worthwhile to consider the conduct of respondent No. 2 from 8 the events that have transpired since the hearing of the company petition.

9. The company petition came to be filed on September 26, 2000. The transfer deed showing the transfer of the attached flat from Dhawal Shah, son of respondent No. 2, to the applicant-company in Chamber Summons No. 1061 of 2006, is dated August 10, 2000, a month prior to the filing of the petition. However, the document has been registered three months after the filing of the petition on February 29/30, 2000. Interestingly, an entry in the name of Dhawal Shah, son of respondent No. 2, has been made in the share certificate with regard to the attached flat on September 30, 2000, also after the filing of the company petition and before the deed of transfer is registered in favour of the applicant-company. Hence, it is seen that at the time of the filing of the company petition the applicant-company was not the owner of the attached flat. The name of Dhawal Shah has been recorded as the owner after the filing of the company petition and he has transferred the flat to the applicant-company thereafter, pursuant to its registration. The deed of transfer dated August 10, 2000, the date prior to the company petition being filed is, therefore, of no consequence. The transfer relates to the date after the filing of the company petition.

10. The company petition came to be heard on June 8, 2004. The petitioners as well as respondent No. 2 were present in person. The petitioners were represented by their advocates also. Respondent No. 2 appeared and argued personally. An order came to be reserved until July 21, 2004. Respondent No. 2 resigned from the company as the director on July 15, 2004.

11. Clause 23 of the articles of association of the company shows that respondent No. 2 shall be the 'chairman' of the company during his lifetime and thereafter the person nominated by him in writing during his lifetime or in his testimonial papers would be the chairman of the company. Respondent No. 2 is the first director of the company shown in the subsequent clause of the memorandum of association of the company. A director of the company, as defined in Section 2(13) of the [Companies Act, 1956](#), is a 'director' of a company includes any person occupying the position of director by whatever name called. The first director is essentially the founder of the company. It is not disputed that respondent No. 2 represented the company as its director in the company petition. As a private limited company, respondent No. 1 is entitled, by a provision in its articles of association, to have a life-time director. That would be none other than respondent No. 2. The concept of a 'life-time chairman' is unknown to corporate law. A chairman is not defined in the [Companies Act, 1956](#). A reference to a chairman is found only in Section 175 of the Companies Act, which deals with a chairman of general meetings. A chairman refers to a member or a director chairing a meeting. The Act confers no other role upon a chairman. There can be no chairman for life. Such nomenclature can, therefore, be used only to denote a director as a managing director. As a 'life-time chairman', respondent No. 2 would be entitled to chair all the board meetings during his life-time. Respondent No. 2 is, therefore, a director ('life-time director') though called a chairman ('life-time chairman'). Consequently his resignation, a week after the hearing of the company petition and a week before the order thereunder came to be pronounced leaves much to be devised to test its bona fides. As a permanent director of the company, his resignation from the company is of no consequence. He continues to be the chairman and consequently director of the company until the articles are amended, which has not been done.

12. The entry relating to the transfer of the flat in which respondent No. 2 and his son resided as directors of Crystal Audio Ltd., another company of respondent No. 2, is made only on August 11, 2005, after respondent No. 2 resigned as the director of respondent No. 1 company and after passing of the order of the Company Law Board.

13. Interestingly, at the time of the filing of the petition, the applicant-company is not shown at the address, at which the flat is attached. A parcel containing the court proceedings addressed to the applicant-company by the petitioners sent as late as in September, 2006, has been directed to another address, which is stated to be the present address of respondent No. 2. The parcel has been returned to petitioner No. 1 and has been produced before the court in sealed condition. This shows the control respondent No. 2 exercises over the company, his alleged resignation on July 15, 2004, notwithstanding.

14. All these aspects show the true nature of various companies, including 14 respondent No. 1 company against whom the order/decreed of the Company Law Board has been passed and its life-time chairman/director, respondent No. 2.

15. It is urged on behalf of the petitioners that since respondent No. 1 company as well as respondent No. 2, its life-time chairman and director, are essentially one and the same and respondent No. 2 has sought to wash his hands off, his financial liabilities as the agent of the company in his capacity as the director, and since respondent No. 2 is the permanent chairman and director of the company, the corporate veil of the company needs to be lifted. Upon such lifting, the aforesaid stark reality has emerged. It is seen that respondent No. 2 has sought to incorporate various companies and shown back-dated documents conferring ownership rights upon the companies in which he himself resides and consequently seeks to defeat and delay the execution in favour of the petitioners under the order/decreed of the Company Law Board, which has remained unchallenged. It is also urged on behalf of the petitioners that since the liability under the decree is on a member/shareholder, respondent No. 2, as the director of the company, is personally liable also for the satisfaction of the decree, which is passed against respondent No. 1 company.

16. The petitioners' advocate has relied upon a judgment in the case of Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad : AIR 2005 SC809 , in which after considering various judgments laying down the fiduciary duties of the directors towards the minority shareholders, including a case of Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. : [1981]3SCR698 , it

has been held that the directors owe a fiduciary duty to the shareholders in respect of transactions relating to issue of shares. It is further held that if a director makes a pecuniary benefit for himself to the detriment of the shareholders and do not act in the interest of the company, on a wrong principle or with an oblique motive or for a collateral purpose, the actions of the directors are liable to be set aside as mala fide. It is contended that in this case the acts of respondent No. 2 in causing documents of transfer of properties in fact belonging to him, but showing them in the names of his wife and son and transferring them in the names of other companies floated by him so soon as the company petition was filed as well as his conduct of resigning from the company where he was a permanent director shows the oblique motive and collateral purpose. His action is, therefore, mala fide. In paragraph 63 of the judgment upon reliance being placed in the Needle Industries case : [1981]3SCR698 , it has been held that power of the directors to issue additional capital shares resulting in pecuniary gain through ulterior motive makes them answerable to the shareholders. It is observed in paragraph 68 of the judgment upon reliance being placed in the case of Bajaj Auto Ltd. v. N.K. Firodia : [1971]2SCR40 , that the directors are in a fiduciary position, both towards the company and towards every shareholder.

17. It has been held in the case of M.A. Malik v. V.S. Thiruvengadaswami Mudaliar [1949] 19 Comp Cas 311 that a director of a company occupies a fiduciary position with regard to the members of the company and they can call upon him to account for the property over which he has control on their behalf. In that case in misfeasance proceedings a director was ordered to pay a certain sum of money which he failed to pay. It was held that he was liable to be arrested in execution of the order under Section 15(c) of the Code of Civil Procedure upon the observation that 'the director was bound in fiduciary capacity to account'. It was also observed that 'the relationship between a director and a member of the company is that of trustee and a cestui que trust'. This case goes further. An order/decreed has already been passed. Respondent No. 2 as a director is in a fiduciary position qua the petitioners, who are minority shareholders. His liability to them is, therefore, personal.

18. For whatever be the acts of oppression and mismanagement, which this Court as the executing court cannot go into, the above petition came to be filed and the aforesaid order/decreed came to be passed by the Company Law Board. Under the decree, respondent No. 1 company has been directed to reduce the paid-up share capital to the extent of shares held by the petitioners of Rs. 13.8 lakhs and pay off the amount representing the face value of their shares to them latest by October 30, 2004. Respondent No. 2, as the life-time chairman and director is the agent of the company. He must carry out the orders passed against the company since the company is only a legal body and cannot act except through its directors. Respondent No. 2 as such director has failed to carry out those directions. He, instead, resigned from the company. He has, therefore, failed to act as the company's agent. He is, therefore, liable in execution on behalf of the company, his mala fide and ulterior resignation notwithstanding. He continues during his life-time as the chairman and consequently director of the company, with a further authority to even nominate his successor. In fact, such resignation has no effect in law. No director, can wash his hands off his liability as such director, merely by resigning for acts done and liabilities incurred prior to his resignation, which may be determined and adjudicated upon after such resignation.

19. The advocate for the applicant-company relied upon an unreported judgment and order dated June 25, 2002, of the learned single judge of this Court in Summary Suit No. 1249 of 1999 in which it is held that though the judgment-debtor has affixed his name board and resided with his mother, the flat which stood in the name of the mother, could not be attached in execution. That proposition is correct. No attachment can be levied against the property rightfully and legally belonging to a person other than the judgment-debtor. In this case, despite the production of the documents on behalf of the applicant-company showing a transfer in favour of the applicant-company (but subject to the tenancy rights of another company) and the share certificate of the society with an entry showing the name of the applicant-company, upon lifting the corporate veil of respondent No. 1 company as well as the applicant-company, it is seen that the transaction is a sham transaction. It would be a travesty of justice to merely rely upon such got up documents and deny the petitioners their legitimate claim against respondent No. 1 company and its permanent chairman and director.



20. It is seen that respondent No. 2 has failed in his fiduciary duties as a trustee qua the shareholders (i.e., the petitioners). He has failed in his duty as the agent of the company also. The execution levied against him is correct. His application for setting aside the warrant of attachment in the above execution application is mala fide, mischievous and misconceived.

21. It is not open to a director such as respondent No. 2 to contend that the 21 execution order is passed only against respondent No. 1 company and not against him and hence, he is not liable or responsible thereunder.

22. In fact, he resisted the enforcement of the order/decreed before the 22 Company Law Board on the premise that he is ceased to be the director, which application has been rejected and execution has been directed to proceed as shown in exhibit B to his chamber summons itself. In this application, he seeks to set aside that order also. Neither the order/decreed dated June 8, 2004, directing the company to pay off the petitioners a sum of Rs. 13.8 lakhs, nor the subsequent order directing execution to proceed can be set aside.

23. Chamber Summons No. 1060 of 2006 taken out by respondent No. 2, who has come to court with unclean hands, is, therefore, dismissed with costs of Rs. 5,000.

24. The applicant-company in Chamber Summons No. 1061 of 2006, is also seen not to have legal right, title and interest in respect of the attached flat which it claims to have pursuant to the share certificate standing in its name since after the company petition was filed and the earlier transfers by the family members of the director of respondent No. 1 company as well as the applicant-company.

25. Consequently, that chamber summons is also dismissed with costs fixed at Rs. 5,000.