
(2005) 05 GUJ CK 0008
In the Gujarat High Court

Case No : Company Application No's. 197, 198, 199 and 200 of 2004

Ankil Members Association

APPELLANT

Vs

Vijaysinh Jadeja, (Liquidator)

RESPONDENT

Date of Decision : 13-05-2005

Acts Referred:

Companies Act, 1956 — Section 318, 391, 392, 393, 394
Income Tax Act, 1961 — Section 2(47)
Transfer of Property Act, 1882 — Section 53A

Citation : (2005) 05 GUJ CK 0008

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : K.S. Nanavati and Keyur Gandhi, for Nanavati Associates, for the Appellant; Jitendra Malkan, for the Respondent

Final Decision : Allowed

Judgement

K.A.Puj, J.

1 The point involved in all these four applications is similar one and hence, all these four applications are being disposed of by this common judgment. For the sake of convenience, the facts are taken from Company Application No. 197 of 2004. Except the change in the name of the companies in each of these four applications, there is no other change and applicants are same as well as Liquidator appointed for all the four companies is also same.

2. The applicants have taken out Judges Summons in all these four applications requesting this Court to issue appropriate order, direction under the provisions of Section 518 of the Companies Act, 1956 for revival of the Companies in liquidation, in view of unanimous Resolutions dated 20.04.2004 passed by all the Shareholders / Contributories i.e. the applicants herein and the Creditors of the Companies for their revival, in the interest of justice and equity.

3. An affidavit in support of the Judges' Summons taken out in Company

Application No. 197 of 2004 is filed by Shri Parshottambhai Patel, an authorised representative of the applicants. It is stated therein that the applicants are the contributories / shareholders of Tulsi Farms Pvt. Ltd. The said Company was incorporated as a private limited Company on 20.03.1995 and was issued the certificate of incorporation by the office of the Asst. Registrar of Companies, Gujarat. Since there was no business, the Board of Directors of the Company decided to wind up the Company by following the procedure for voluntary winding up under the Act. The Board of Directors accordingly made a declaration of solvency as required u/s 488 of the Act and delivered the same with the office of Registrar of Companies for registration in prescribed form i.e. Form No. 149. Thereafter, the members of the Company passed Special Resolution as required by the Act resolving to wind up the Company as the members voluntary winding up. The said Resolution was also filed with the Registrar of Companies in Form No.23. The Company also resolved to appoint the respondent No. 1 as Liquidator of the Company for the purpose of winding up. The notice of the Resolution came to be published in the local daily, namely, Asian Age. The Liquidator so appointed took necessary steps u/s 494 of the Act for distribution of the assets of the Company to the shareholders who are incidentally also the only Creditors of the Company. The Company has only two Shareholders, who are the applicants and these applicants are also the only Creditors of the Company. The distribution of the assets of the Company has only been made on paper and there has been no actual distribution of assets. The Liquidator has convened the meeting u/s 497 of the Act and prepared final statement of accounts. A copy of final statement has been submitted by the Liquidator to the Registrar of Companies as also to the O.L. as required under the Act by a communication dated 04.02.2003.

4. It is further stated that though the statement of accounts was submitted by the Liquidator way back on 04.02.2003, no steps were initiated by the O.L. for submitting the final report before this Court. In the meanwhile, on account of long delay, the Shareholders/Creditors of the Company decided to again revive the Company. The applicants accordingly requested the Liquidator by communication dated 09.03.2004 to convene a meeting of the shareholders and creditors for passing necessary resolution for revival of the Company. In the said communication, it was stated that there has been no actual transfer of property on account of the pendency of the report by the O.L. Hence, there has been no effective change in the assets of the Company. It is further stated that apropos to the request made by the applicants, the Liquidator fixed 20.04.2004 as the date for convening the meeting of shareholders/creditors of the Company. The Liquidator also published a public notice dated 18.03.2004 in the local daily, namely, Asian Age intimating about the meeting to be held on 20.04.2004. A copy of the notice of the meeting was also delivered at the office of the Registrar of Companies and the O.L. on 05.04.2004.

5. The meeting of the shareholders/creditors of the Company came to be held on 20.04.2004. The shareholders/creditors in their respective meetings unanimously resolved to revive the Company by superseding the earlier resolution passed for

voluntary winding up of the Company. By the said resolution, the applicants also requested the Liquidator to move appropriate proceedings with the Registrar of Companies and O.L. for withdrawal of the winding up proceedings and for revival of the Company. The Liquidator in turn sent a communication dated 07.05.2004 to the Registrar of Companies as also to the O.L. informing that the Company is required to be revived in view of the resolutions passed by the shareholders and creditors of the Company. However, since there being no response from the office of the Registrar of Companies or the O.L., the applicants were informed that the applicants must move an appropriate application before this Court seeking appropriate orders and directions for revival of the Company and hence, the present applications have been filed by the applicants for revival of the four different companies.

6. This Court has issued notice on 28.06.2004 and also permitted the applicants to join the O.L. as well as the Registrar of Companies as party - respondent in these applications. While issuing the notice, the Court has observed that on receipt of the communication dated 03.02.2003 along with necessary documents, the O.L. was supposed to prepare his final report and to submit it before the Court. However, the report has not been prepared and hence, the applicants have moved the present applications for revival of the Company. The Court has, therefore, directed the two newly added parties to state as to whether these letters have been received by them in February, 2003 and what actions they have taken pursuant to the said letters. The applicants were also directed to furnish the names and addresses of their members and they were further directed to produce all annexures of their letter dated 03.02.2003 addressed to the O.L.

7. After filing of the aforesaid applications and after issuance of the notice by this Court, the applicants have filed further affidavit on 24.08.2004 in support of the Judges' Summons. It is stated therein that the applicant Companies were unable to develop the lands owned by the Companies as there were sitting tenants on the subject land for many years. Recently, settlement has taken place between the tenants and these Companies, under which the tenants have already vacated the subject land on condition of payment of amounts of settlement to them. The applicants who are the contributories had contributed the amounts of payment which are made to the tenants. Individual agreements have been executed with the tenants and huge amount aggregating to Rs.1,64,11,000/- has been paid by cheques to the tenants. All the tenants have vacated the subject premises after receiving the amount from the applicant Companies. A detailed list of tenants containing the details of cheque numbers and the amount paid to them is produced on record along with the said affidavit. It is further stated that the subject land is to be developed by the applicant Companies after obtaining necessary approvals from the competent authorities. However, before getting such approvals, the Companies are required to be revived. The development of the subject land would generate huge employment opportunities as also business growth for the applicant Companies. It is, therefore, stated that under the

changed circumstances, the applicants may be permitted to revive the Companies. Despite issuance of the advertisement inviting objections against revival of the Companies, no objection from any quarter has been received and hence, no prejudice is likely to be caused to any person if the applicant Companies are revived. If the applicant Companies are revived, it would add to the general growth of business, besides generating huge employment opportunities. The contributories have invested huge amounts and they have resolved unanimously to revive the Companies. The Companies do not have any Secured Creditor and no prejudice will be caused to any person, institution or body if the Companies are revived.

8. The O.L. has filed his report on 30.08.2004 wherein it is stated that on receipt of the proposals for taking the Company in voluntary liquidation, he is supposed to file a suitable report before this Court u/s 497 of the Act. However, he is under statutory obligation before submitting the report to verify that the record and books of accounts maintained by the concerned Company before going into voluntary liquidation and in particular after coming into voluntary liquidation, to examine the relevant statutory books of accounts / records / other registers maintained by Ex-Management / Voluntary Liquidator, to ensure that there is no contravention / violation of any provision of the Act. It is further stated that on scrutiny of the documents submitted in this regard by the Voluntary Liquidator, the O.L. has written a letter dated 06.05.2003 calling upon them to submit the various documents stated in the said letter. The O.L. has also written a letter dated 06.05.2003 to the Registrar of Companies for seeking confirmation as to whether he has got any objection for the proposal being submitted by the Voluntary Liquidator for dissolution of the Companies. The O.L. has also written a letter dated 10.06.2003 to the Income Tax Department for seeking confirmation as to whether the Department has got any objection or there are any outstanding dues towards the department by the Companies in voluntary liquidation.

9. It is further stated that in response to his letter dated nil, the applicants submitted the details vide letter dated 03.07.2003. On scrutiny of the said details, the O.L. has made certain observations and addressed another letter on 03.09.2003 to the Voluntary Liquidator. On getting substantial compliance being done, he has prepared and finalised the report. However, letter from the I.T. Department was actually silent as to whether they have got any objection on the proposed dissolution. Accordingly, another letter was sent to the I.T. Department on 10.10.2003 in response to which the I.T. Department vide its letter dated 24.10.2003 informed the O.L. that the Department has no objection to the proposal being made by the O.L. before this Court. On the basis of the documents furnished and on proper scrutiny and examination of such documents, the O.L. was on the verge of submitting the report before this Court. However, before he could submit his report, a public notice dated 18.03.2004 was published in the local daily to consider the proposal for revival of the Company and since then the matter was accordingly held up from his end. Lastly,

the O.L. has submitted that looking to the summary of progressive correspondence and chronological events stated by him in his report, his office earnestly and in active co-ordination with the applicants was trying to get the necessary documents / information / clarifications which are precondition and incidental for preparation and submission of the report of the dissolution of concerned company before this Court.

10. An affidavit is filed by the Assistant Registrar of Companies on behalf of respondent No. 3 on 20.09.2004. It is stated therein that in liquidation, assets shall be sold and sale proceeds will be distributed to the creditors / members. The assets itself are not required to be distributed amongst creditors / members. The final meeting was held and company filed a final statement of account in Form No. 156 u/s 497 of the Companies Act, 1956 on 11.02.2003 and registered in the office of ROC which shows that amount realised from sale of assets were Rs.2,31,04,000/- and amount distributed to Creditors was also Rs.2,31,04,000/-. All these receipts and payments must be in the form of cheques or demand drafts and not by paper transactions. Once Form No. 156 is filed and registered, it is not open for the liquidator to state after expiry of about 1 and half years that it is incorrect. It is not permissible under the law to withdraw the registered document in view of Section 628 of the Act. The only action which was left was the filing of report of O.L. for final dissolution of the Company u/s 497 of the Act. Simply because there was delay in filing the said report, it is not open for the applicants to canvass that the Company has not gone into liquidation. It is further stated that a Company including the Company which is under voluntary liquidation can approach the Court u/s 391 to 394 of the Act for approval of any such Scheme of arrangement between the Company and the member or Creditor of the Company. Section 518 deals with question arising in the winding up or matter relating to the powers to be exercised if the Company is in liquidation. It is not the matter relating to winding up but relating to arrangement for revival of the Company.

11. The applicants have filed rejoinder on 27.09.2004 to the reply filed by the Assistant Registrar of Companies. It is stated therein that the final statement as submitted in Form No. 156 u/s 497 of the Act on 11.02.2003 was subject to the approval and sanction by this Court. However, the O.L. did not submit the requisite report before this Court for more than a year and half and therefore, sanction of the Court was infact never obtained. In the meanwhile, the shareholders and the Creditors of the Company unanimously decided by passing Resolutions to revive the Company. The assets of the Company are in fact, not distributed as the final sanction of the Court was awaited. There is no cash transaction. In fact, as per the original proposal, the Company had decided to distribute amongst the contributories and unsecured Creditors. Hence, there is no question of arguing that the actual distribution of the sale proceeds of the assets was taken place.

12. It is further stated that after having awaited for a year and half, as no

response was received from the office of the O.L., the Companies worked out settlement with tenants who in turn vacated the subject land after accepting the compensation from the applicants. Under the provisions of the Act, it is permissible for the applicant Companies to revive the Companies subject to permission of this Court. Section 628 of the Act has no relevance to the facts of the case as there is no question of withdrawal of any document by the applicants from the office of the Registrar of Companies as contained in the affidavit-in-reply. It is further stated that besides approaching this Court under the provisions of Sec. 391 to 394 of the Act, it is also permissible for the applicants to move this Court by invoking powers of this Court u/s 518 of the Act. The provisions contained in Section 518 may be read together with the provisions of Section 466 of the Act. This Court is empowered under the provisions to stay the winding up proceedings permanently and permit the revival of the Company. The applicants have complied with all the requirements contained in Section 391 of the Act. Section 391 of the Act stipulates passing of resolution by 3/4th majority whereas the Company in fact has passed resolution by complete majority. In other words, all the shareholders and creditors of the Company have unanimously resolved to revive the Company. The Company has complied with all the stipulations and conditions as enumerated in Section 391 of the Act.

13. The O.L. has filed one more report on 09.12.2004 wherein it is stated that although it prima facie appears that there may not be any bar in the Income Tax Act or Stamp Act for revival of the Company, but on the review of entire arrangement as it exists between the applicants and the Companies, the arrangement seems to have been made to circumvent the provisions of Income Tax Act / Capital Gains Tax and Stamp Act and, therefore, having regard to the complexity of the matter, the O.L. was of the view that to examine the applicability of the Provisions of Income Tax Act and Stamp Act and breach of any other legislation, he has proposed that he may be permitted to engage a firm of Chartered Accountant or Tax Consultant. It appears from the record that though the O.L. has sought the permission for appointment of the Chartered Accountant, no such permission has been granted by the Court.

14. The applicants have filed further affidavit on 29.03.2005 along with which a Certificate dated 22.03.2005 issued by the firm of C.A. Yogesh Shah and Associates, has been attached wherein it is stated that there is neither transfer nor distribution of assets of any of the Companies in liquidation and, therefore, there is no liability under the Income Tax Act by way of Income Tax or Capital Gains Tax. There is no liability of Stamp Duty either at the time when the resolutions of voluntary winding up have been passed or at the time when the resolutions for revival have been passed which call for levy of any Stamp Duty under the provisions of Bombay Stamp Act and, therefore, there is no evasion of revenue.

15. The applicants have filed further affidavit on 12.05.2005 along with which list of members of the applicant Association along with copies of Memorandum of

Association are annexed. Since the pleadings between the parties have been completed, the applications were taken up for final hearing.

16. Mr. K.S. Nanavati, learned Senior Advocate appearing with learned advocate Mr. Keyur Gandhi for the applicants in all the four applications has submitted that Section 487 of the Act deals with effect of voluntary winding up on status of Company. It states that in the case of a voluntary winding up, the Company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up of such business, provided that the Corporate State and Corporate powers of the Company shall continue until it is dissolved. He has further submitted that Section 497 of the Act empowers the O.L. to submit his report to the Court to the effect that the affairs of the Company have not been conducted in a manner prejudicial to the interest of its members or to public interest and on filing of such report to the Court, the Company shall be deemed to be dissolved. In the present case, undisputedly, the O.L. did not take any steps after receiving the report from Liquidator appointed by the Company. The O.L. has not filed any report in this Court as per the provisions of Section 497(6) of the Act. Accordingly, the Companies were never dissolved. The applicants in the meanwhile have resolved unanimously to revive the Companies. There has been no physical distribution of the assets which is also an undisputed fact. He has, therefore, submitted that the applicants are well within their rights to move such applications for revival of the Company and the same may be revived in view of the fact that no prejudice is going to be caused to any of the parties. In support of his submission, Mr. Nanavati has relied on the decision of the Delhi High Court in the case of VOLUNTARY LIQUIDATOR, DIMPLES PVT. LTD. V. REGISTRAR OF COMPANIES 1978 (48) COMP CAS 98 wherein it is held that the power to stay the winding up of a Company u/s 466 of the Companies Act, 1956, in the case of Companies which were wound up by the Court, could also be exercised when a Company was in voluntary liquidation: and that since the Management wanted to revive the Company and there was no impediment whatsoever, the winding up proceedings should be stayed altogether.

17. Mr. Nanavati has further relied on the decision of the Karnataka High Court in the case of V.B. PUROHIT V. GADAG & JAMBUKESHWARA AND ANOTHER 1984 (56) COMP CAS 360 wherein it is held that the Company had a lease of limestone quarry with great potential and it had estimated that the limestone for quarrying was in the region of 27 Million tons with an estimated reserves of 50 Million Tons, that increased production of cement was in the national interest and that since the shareholders had resolved to revive the Company and make one more effort to start a cement factory, such opportunity should not be denied to the shareholders. The voluntary winding up proceedings, at whatever stage they were, were ordered to be stayed and the shareholders were allowed to elect a new board of directors to achieve the object for which the Company had been incorporated. 18. Based on the peculiar facts of the case and more particularly, non-filing of the report by the O.L. before this Court as required u/s 497(6) of

the Act and considering the ratio laid down by the decisions of the Delhi High Court as well as Karnataka High Court, Mr. Nanavati has strongly urged that the prayers made in these four applications should be granted and the Companies may be ordered to be revived.

19. The O.L. has objected to the prayer being granted in favour of the applicants. He has submitted that as per the provisions contained in Section 2(47) of the Income Tax Act 1961, even if the documents are not registered but when the conditions specified u/s 53A of the Transfer of Property Act are satisfied, ownership in property is construed as transferred and capital gains tax is attracted. In the present transaction, it seems that the applicant has not subjected this transaction to tax under Income Tax Act. It seems quite illogical and unreasonable to make payment of Rs.1,64,11,000/- to tenants even when the Company is left with no assets as per the account of Liquidator as on 25.12.2002. In such circumstances, investigation should be made to ascertain how these payments have been made when the decision to revive the Company was not taken in general meeting.

20. The O.L. has further submitted that the applicants have tried to avoid the liability under Stamp Act and Income Tax Act as once the property is disposed off or distributed to creditors towards their dues, the applicants are now trying to repossess the said land for development. Since the creditors and shareholders are the same persons, they are twisting the transactions to their needs. In support of his submission, he has relied on the decision of the Hon"ble Supreme Court in the case of Narendra Bahadur Tandon Vs. Shankar Lal (since deceased) by Lrs, wherein it is held that once a company is dissolved it ceases to exist. The Liquidator cannot represent a non-existing company or discharge any duty or perform any function on its behalf without express legal authority. A voluntary liquidator has no legal authority, after dissolution of the company, to execute a sale deed to complete a transaction entered into earlier in respect of the leasehold interest of the Company in certain land. On dissolution of the Company, the leasehold interest in the land vested in the Govt. by escheat or bona vacantia, since there was no provision in the deed of lease for passing of the interest to the lessee in the event of the Company being wound up.

21. After having heard learned advocates appearing for the applicants and the O.L. and after having considered the relevant pleadings of the parties as contained in their affidavits and counter affidavits and reports and after having perused the necessary documents produced before the Court along with their pleadings, the Court is of the view that necessary stage which requires the Companies to be voluntarily wound up and dissolved has not yet been reached as the O.L. has not filed any report before this Court as required u/s 497(6) of the Act. In absence of any such report, it cannot be said that the Company is already dissolved. Section 497(6) of the Act clearly stipulates that from the date of the submission of the report to the Court, the Company shall be deemed to be dissolved and Section 487 of the Act makes it abundantly clear that the

corporate status and corporate powers of the Company shall continue until it is dissolved. The combined reading of Section 487 and 497(6) of the Act makes it clear that the Companies' status has still not been changed and though the necessary declarations and resolutions were passed for taking the companies into voluntary liquidation, the same would not ipso facto result into dissolution of the Company as the missing stage of filing the report by the O.L. is still to be reached and before the said stage is reached, the members and contributories as well as the Creditors have unanimously decided to revive the Company. There is no impediment under any statute to prevent the members and creditors from passing such resolutions for revival of the Companies. The Delhi High Court has made it very clear that even in the case of a Company which was already wound up by the Court, power u/s 466 of the Act to stay the winding up proceedings can be exercised and since the Management wanted to revive the Company and there was no impediment whatsoever, the winding up proceedings should be stayed altogether. The applicants' case is on better footing as the Companies are not yet dissolved and before the report is filed by the O.L., the members and creditors have themselves decided to revive the Companies. Even the Karnataka High Court has taken the view that voluntary winding up proceedings, at whatever stage they were, were ordered to be stayed and shareholders were allowed to elect new board of directors to achieve the object for which the Companies had been incorporated. The decision of the Hon'ble Supreme Court relied upon by the O.L. is not applicable to the facts of the present case as in that case, the Company is already dissolved and after dissolution of the Company, it is not open for the Liquidator to exercise its power.

22. Considering the statutory provisions and the judicial pronouncements made on the subject, the Court is of the view that the members / contributories as well as creditors are well within their right to pass necessary resolutions for revival of the Company and the Court cannot withhold its approval or sanction to such revival.

23. With regard to the objections raised by the O.L. on the ground of avoidance of Capital Gains Tax as well as Stamp Duty under the Bombay Stamps Act, the Court is of the view that the status of the Companies has not been changed from the date of passing the Resolution for voluntary winding up till this date. The O.L. has not sent his report to this Court and the revival applications are pending before this Court. Thus, there is neither any transfer of assets of the Companies nor there is any distribution of assets amongst the members / contributories. The liability of Capital Gains Tax under the Income Tax Act, 1961 arises when there is a transfer of Capital Asset as defined u/s 2(47) of the Act which reads as under :-

2 (47) "transfer" in relation to a capital asset, includes, -

- (i) the sale, exchange or relinquishment of the asset; or
- (ii) the extinguishments of any rights therein; or
- (iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882);

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect to transferring, or enabling the enjoyment of, any immovable property.

24. Section 46 of the Act deals with Capital Gains on distribution of assets by companies in liquidation. It states that notwithstanding anything contained in Section 45, where the assets of a Company are distributed to its shareholders in liquidation, such distribution shall not be regarded as a transfer by the Company for the purpose of Section 45. It further states that when a shareholder on the liquidation of a company receives any money or other assets from the Company, he shall be chargeable to Income Tax under the head "Capital Gains", in respect of the money so received or the market value of the other assets on the date of distribution, as reduced by the amount assessed as dividend within the meaning of sub-clause (c) of Clause (22) of Section 2 and the sum so arrived at shall be deemed to be the full value of the consideration for the purpose of Section 48. Since the dissolution of the companies has not taken place, there is no question of transfer of assets nor there is any distribution of assets and hence, neither Section 2(47) nor Section 46 applies to the facts of the present case and there is no question of liability under the Income Tax Act on account of Capital Gains Tax. Similarly, the provisions contained in the Bombay Stamp Act are also not invoked in the present case as there was no liability of stamp duty either at the time when the resolution for the winding up was passed or at the time when the resolutions for revival was passed. The stamp duty can be attracted only when the assets are in fact transferred which is not the case in the present case and hence, there is no question of avoidance of any Stamp Duty.

25. Since the objections raised by the O.L. on account of avoidance of Capital Gains Tax and Stamp Duty as a result of the revival of the companies are not tenable and since there is no other impediment under any provisions of the Act, the prayers made in these four applications are required to be granted and they are accordingly granted. All the four applications are, therefore, allowed without any order as to costs.