

(2008) 12 GUJ CK 0047

In the Gujarat High Court

Case No : C.P. No. 261 of 2004 and C.A. No. 73 of 2007

Ashok Keshavlal Shah

APPELLANT

Vs

Official Liquidator of Kengold (India) Ltd.

RESPONDENT

Date of Decision : 29-12-2008

Acts Referred:

Companies Act, 1956 — Section 391, 394, 394(3), 446, 536

Citation : (2011) 165 CompCas 85 : (2011) 109 SCL 153

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

Bench : Single Bench

Advocate : Anal S. Shah, for the Appellant; Nandish Chudgar for the AMCO Bank and Mrugesh Jani for the Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The applicant has taken out this judge's summons praying for a direction to the Official Liquidator to regularise and execute sale document in favour of the applicant in respect of the premises, i.e., 2nd Floor, Atmaram Chambers, Ahmedabad (T. P. S. No. 19, Final Plot No. 42 Paiki, Plot No. 5 of Usmanpura), belonging to M/s. Growmore Solvent Ltd., a company amalgamated in M/s. Kengold (India) Ltd. (in liquidation). The applicant has also prayed for the direction to the Official Liquidator not to transfer, alienate or deal in any manner with the said property.

2. An affidavit is filed by the applicant in support of the judge's summons. Mr. Anal S. Shah, learned advocate appearing for the applicant has submitted that the applicant was dealing in oil seeds in the name and style of M/s. A. Vinodchandra and Company, which is a proprietorship concern. The applicant was dealing in various kinds of oil seeds. M/s. Kengold (India) Ltd. and M/s. Growmore Solvent Ltd., were dealing in solvent and various type of oil seeds. The applicant had supplied to M/s. Growmore Solvent Ltd., oil seeds regularly up to the year 2002. At the end of the financial year 2002, in the running accounts of the applicant, an amount of Rs. 43,37,068 was shown due from M/s.

Growmore Solvent Ltd., and M/s. Kengold (India) Ltd., were merged under the order of this court. It is further submitted that despite repeated requests, M/s. Growmore Solvent Ltd., was unable to pay the amount due to the applicant. Hence, a committee was constituted for settling the dues of various debtors of M/s. Growmore Solvent Ltd. On 13-5-2002, the office bearers of M/s. Growmore Solvent Ltd., had executed an agreement to sell, possession note and power of attorney, by which the applicant had handed over the office premises in question. The account was settled towards consideration of the said office premises for an amount of Rs. 8,11,001. In view of these facts, the total consideration of the office premises is already paid from the due amount from the company, which is amalgamated in the company in liquidation, to the applicant. He has, therefore, submitted that the agreement to sell is after payment of full consideration and the possession note is executed in favour of the applicant. The applicant had thus become legally entitled to have occupation, possession and ownership of the premises in question. A suit for declaration being Civil Suit No. 213 of 2005 in the City Civil Court, Ahmedabad was instituted by the applicant. In the said suit, notice was issued and the suit is pending decision.

3. Mr. Shah has further submitted that after passing of the entire amount of consideration to M/s. Growmore Solvent Ltd., the property was purchased by the applicant and all the rights and titles are transferred to the applicant. The applicant had become the owner of the premises in question. The sale in favour of the applicant is taken valid and during the existence of the company, prior to passing of any winding up order. It was the earlier commercial transaction by which the property in question was transferred in favour of the applicant. He has, therefore, submitted that the sale deed is required to be executed in favour of the applicant and hence, the Official Liquidator may be directed to execute the sale deed in favour of the applicant.

4. On notice being issued on Ahmedabad Mercantile Co-operative Bank Ltd. (AMCO), Mr. Nandish Chudgar, the learned advocate appeared and an affidavit-in-reply is filed on 1-3-2007, on behalf of the bank. It is stated in the said affidavit that the applicant is claiming to be the owner and occupier of the property in question by virtue of the alleged agreement to sell, possession note and general power of attorney allegedly executed by M/s. Growmore Solvent Ltd., in favour of the applicant on 13-5-2002. It is further stated that the said alleged documents are much subsequent in time, from the date of first deed of mortgage executed by the said company in favour of AMCO Bank, i.e., on 1-11-1999. Hence, any transfer of the said property by the company in favour of any person after the execution of mortgage deed is per se, illegal, more particularly, when the same is executed without obtaining written consent of the mortgagee. Hence, the applicant cannot claim any right, title or interest of whatsoever nature, upon the said property by virtue of any alleged documents, which are seriously disputed and objected by the AMCO Bank. It is further stated that the alleged transfer is in violation of the provisions of the Transfer of Property Act, 1882, the Bombay Stamp Act, 1958 and the Registration Act, 1908. AMCO Bank is the secured

creditor of the company in liquidation and more particularly, qua the property in question and also the property situated at Block Nos. 254 (paiki) + 289 + 293 + 294 + 295 aggregating to 75,473 sq. mts. of Mouje Chharodi, Taluka Sanand, District Ahmedabad and, therefore, the said property is required to be put to sale by constituting the sale committee and the sale proceeds be disbursed to AMCO Bank.

5. The Official Liquidator has also filed his report on 22-7-2008. Mr. Mrugesh Jani, the learned advocate appearing for the Official Liquidator has submitted that by an order dated 16-6-2005, passed by this court in Company Petition No. 261 of 2004, the company was ordered to be wound up and the Official Liquidator attached to this court was appointed as the liquidator of the company with all usual powers under the provisions of the Companies Act, 1956. He has further submitted that M/s. Growmore Solvent Ltd., was amalgamated with the company in liquidation by an order dated 23-12-1999, passed by this court in Company Petition No. 76 of 1999 with Company Petition No. 75 of 1999 and, therefore, the said company was dissolved pursuant to the amalgamation order dated 23-12-1999. Therefore, the document executed on 13-5-2002, by the applicant with M/s. Growmore Solvent Ltd., are void ab initio since the said company did not exist on 13-5-2002. The office premises in question is mortgaged to AMCO Bank on 4-5-1999. Hence, the transfer of possession of the said property by an erstwhile company in favour of the applicant is per se illegal. Mr. Jani has, therefore, submitted that the application moved by the present applicant deserves to be rejected reserving liberty to the applicant to lodge his claim, if any, with the Official Liquidator with the affidavit of proof of debts, along with all documentary evidence towards his claim against the company in liquidation which shall be dealt with by the Official Liquidator as per the provisions of the Companies Act, 1956. The Official Liquidator has also sought permission to sell the said office premises by issuing advertisement inviting offers from the intending purchasers in consultation with AMCO Bank, the sole secured creditor of the company in liquidation.

6. Pursuant to the report filed by the Official Liquidator, affidavit-in-rejoinder is filed by the applicant dated 24-12-2008. Based on this rejoinder as well as in reply to the contentions raised by the Official Liquidator, Mr. Anal Shah, the learned advocate appearing for the applicant, in rejoinder, has submitted that this court has passed an order on 23-12-1999, in Company Petition No. 76 of 1999 with Company Petition No. 75 of 1999 sanctioning the scheme of reduction and reorganisation of share capital of Kengold (India) Ltd., and scheme of amalgamation of Growmore Solvent Ltd., with Kengold (India) Ltd. While sanctioning the scheme, this court has directed that certified copy of the order be delivered to the Registrar of Companies within 30 days of the receipt of the same. Though the certified copy of the order dated 23-12-1999, was delivered to the Registrar of Companies on 28-2-2000, the same was taken on record and given effect to by the Registrar of Companies only on 1-5-2003. As per the knowledge of the applicant, pursuant to passing of the order of amalgamation on

23-12-1999, IDBI which was one of the secured creditors of the company filed its objection before the Registrar of Companies and due to such objection of the secured creditor, the Registrar of Companies did not take on record the order passed by this court u/s 391/394 of the Companies Act, 1956.

7. Mr. Shah has further submitted that the applicant was neither aware about filing of Company Petition No. 76 of 1999 with Company Petition No. 75 of 1999 for amalgamation nor about passing of the aforesaid order dated 23-12-1999, by this court, at the time of entering into and executing the agreement to sell and other documents on 13-5-2002. M/s. Growmore Solvent Ltd., has continued its business till April 2003, i.e., the date when the order dated 23-12-1999, was taken on record by the Registrar of Companies and was given effect to. He has, therefore, submitted that M/s. Growmore Solvent Ltd., has continued its business even after 23-12-1999 and had contracted liability. Hence, it cannot be said that the agreement to sell dated 13-5-2002 and the ancillary documents executed by and between the applicant and M/s. Growmore Solvent Ltd., which had the effect of settling to an extent the liability of the said company, are void ab initio. Moreover, since M/s. Growmore Solvent Ltd., has contracted liability even after 23-12-1999, the company in liquidation becomes liable for the same, in view of the order of amalgamation.

8. Mr. Shah has further submitted that the Official Liquidator of the company in liquidation, pursuant to the orders passed by this court, from time to time, disbursed the amount to AMCO Bank with respect to its dues and consequently, AMCO Bank has been paid its dues as per the Companies Act, 1956 and hence, the charge of the AMCO Bank, which was subsisting on the property in question does not survive. This being so, the agreement dated 13-5-2002, entered into by the applicant has now become enforceable and cause of action has now arisen in favour of the applicant. He has, therefore, submitted that the said agreement is legally valid and enforceable and since the Official Liquidator is in charge of the affairs of the company, is bound to comply with the terms and conditions of the said agreement.

9. Mr. Shah has further submitted that since civil suit being Civil Suit No. 213 of 2005 for declaration is pending in the City Civil Court, the applicant be permitted to proceed with the said suit and the present application should also be treated as an application u/s 446 of the Companies Act, 1956. Lastly, he has submitted that AMCO Bank was the sole secured creditor of the company and at present, since the secured creditor has been paid its dues, it does not have any right or interest over the property in question. On various occasions, this court has directed publication of notices in the newspaper inviting claims against the company in liquidation. Despite such publication, as on date, no claims are pending against the company in liquidation. The applicant, as on March 31, 2002, was entitled to an amount of Rs. 43,37,068 from M/s. Growmore Solvent Ltd., and that the agreement to sell was executed for settlement of part of the debt that it owed to the applicant and hence, in the absence of any other claim

pending against the company in liquidation, it would be prudent that instead of the property in question being sold in auction and the payment be then directed to be made to the applicant after consuming considerable time and incurring considerable expenses, this court may under the provisions of section 536 of the Companies Act, 1956, direct the Official Liquidator to execute the sale deed in favour of the applicant as per the agreement to sell dated May 13, 2002.

10. Mr. Shah has alternatively submitted that the applicant may be permitted to lodge his claim with the Official Liquidator along with the documentary evidence, against the company in liquidation.

11. After having heard learned advocates appearing for the respective parties and after having gone through their pleadings, the court is of the view that since the agreement to sell was executed on 13-5-2002 and before that the company, namely, Growmore Solvent Ltd., was already amalgamated with Kengold (India) Ltd., on 23-12-1999 and the certified copy of the said order was filed with the Registrar of Companies, the said Growmore Solvent Ltd., ceased to remain in existence and the agreement entered into by the said company thereafter is null and void and no cognisance of the said agreement can be taken by the court. Even otherwise, the submission made by Mr. Shah that the Registrar of Companies has taken the said order on record in March 2003, and till that date, the company remained in existence has no substance as the provisions of section 394(3) are very clear which says that the certified copy of the order shall be filed with the Registrar of Companies within 30 days from the date of the order and even otherwise, the effective date is mentioned in the scheme itself. So, the scheme came to be enforced with the effective date and hence, even on this count, the agreement to sell which was executed on 13-5-2002, should not be considered as legal, valid or enforceable agreement. Hence, the applicant is not entitled to any relief from this court seeking direction to the Official Liquidator to execute the sale deed in favour of the applicant.

12. As stated by Mr. Mrugesh Jani, learned advocate appearing for the Official Liquidator, the Official Liquidator has already taken possession of the property in question and the same is put to sale. This court has passed an order on 15-6-2006, in O.L.R. No. 30 of 2006 and possession was taken by the Official Liquidator on 27-6-2006. It is true that AMCO Bank was the sole secured creditor. However, its dues are already paid off as stated by the applicant and is confirmed by Mr. Chudgar. However, that will not make the applicant entitled to claim the execution of sale deed in his favour on the basis of the agreement to sell which is absolutely illegal and unenforceable agreement. If the applicant has to recover any amount from the Growmore Solvent Ltd., and as per the scheme, if the liability is undertaken by Kengold (India) Ltd., and after the said company goes into liquidation, the only remedy available to the applicant is to lodge his claim before the Official Liquidator with proof of debt and the Official Liquidator, after satisfaction of the dues of the secured creditors and workers, if any surplus remains, in that case, the applicant's claim would be considered by the Official

Liquidator along with others.

13. In the above view of the matter, the relief prayed for by the applicant in the present application is not granted. The application is accordingly rejected. However, the applicant is permitted to lodge his claim with the Official Liquidator along with an affidavit as well as necessary proof of debt.