

(2012) 05 DEL CK 0027

In the Delhi High Court

Case No : Co. App. No. 6 of 2012, Co. App. No. 9 of 2012 and Co. App. No. 10 of 2012

Guptajee Charitable Trust

APPELLANT

Vs

Bharat Carpets Ltd. and Others
 Puneet Gupta Vs UCC
Builders Pvt. Ltd. and Others
 Shobha Somani and
Others Vs Maharani Paints (India) Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 01-05-2012

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 108, 391, 441, 536(2)
Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
— Regulation 27(1), 28(1)

Citation : (2012) 4 AD 381 : (2012) 3 BC 84 : (2013) 176 CompCas 354 :
(2012) 190 DLT 110

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : T.K. Ganju, Mr. A.K. Thakur, Mr. Aditya Ganju and Mr. S.M. Saxena,
for the Appellant; Abhinav Vashist Ms. Prema Priyadarshini for propounder and
Mr. Rajiv Bahl, for O.L., for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri (Acting Chief Justice)

1. The respondent Bharat Carpets Ltd. (hereinafter referred to as "the company") is a company under liquidation. Provisional winding up order was passed on 23.8.1984 in CP No. 50 of 1984 and final winding up order was passed on 18.5.1987. Official Liquidator was appointed who has seized all the assets and records of the company. Liquidation proceedings are still pending. There have been certain attempts to revive/rehabilitate the company and scheme u/s 391 of the Companies Act (hereinafter referred to as "the Act") is pending before the Company Court which has been filed by M/s. UCC Builders Pvt. Ltd./Respondent No. 2 and M/s. Maharani Paints (India) Pvt. Ltd./Respondent No. 3 herein. All the

appellants are the propounder/ex management of the company. They claimed that process of rehabilitation u/s 391 of the Act does not offer any compromise or arrangement to the creditors and members of the company. However, no such claim has been filed by them so far. The respondent No. 2 and 3 (hereinafter referred to as the propounder of the scheme) had moved application u/s 536 (2) of the Act read with Rule 9 of the Companies (Court) Rules, 1959 seeking validation of purchase of shares after the winding up order dated 18.5.1987. In this application, the case set up by the propounder was that a Share Purchase Agreement/MoU/Deeds of Arrangement dated 10.3.2006 was executed between the original share holders and propounders which is a composite agreement for purchase of shares and for settlement of liabilities of company in liquidation. According to the propounders, vide this agreement, they had purchased 223600 number of shares out of 3,50,000 equity shares of the company which represents 63.89% of equity. According to them, respondent No. 2 holds 17650 (50.19%) shares whereas respondent No. 3 holds 47950 (13.70%) shares of the company. In the application filed u/s 536(2) of the Act, it was further averred by the propounders that Mr. Puneet Gupta, one of the erstwhile Directors/shareholders who was also a party to the MoU, had maliciously sent revocation notice dated 10.4.2011 i.e. after a lapse of more than five years of the MOU/Deeds of Arrangement seeking to unilaterally revoke the MoU/Deeds of Arrangement dated 10.3.2006. Allegations were also made against other erstwhile Directors/shareholders who had sold the shares vide said MoU. It was stated in detail as to how the respondent Nos.2 & 3 had purchased the shares from time to time from the erstwhile shareholders by the execution and share transformation issued in their favour. Prayer was, therefore, made to validate the transfer of shares as per the details given in the said application in favour of the propounders and to direct the Official Liquidator to make necessary amendments in the captioned company register. Since admittedly, the transfer took place after commencement of the winding up, sub-Section (2) of Section 536 states that such a transfer of share is void. In case, the transfer is made after the winding up orders passed by the Court, then it can only be validated by the Court. It means that the transfer is treated as void but the Court which has passed the winding up order has given the power to validate the transfer. The erstwhile shareholders (appellants herein) were put to notice of the filing of that application. Official Liquidator also entered appearance in the proceedings. As far as OL is concerned, he filed his reply affidavit inter alia stating that every document annexed with the application with regard to the purchase of the equity shares of the propounder of the scheme appeared to be legal and proper fulfilling the mandatory requirement of transfer and purchase of equity shares. He also stated that the Court had the power to valid the transfer of shares in favour of the propounders. The appellants, however, objected to the relief claimed by the propounders. The learned Single Judge examined the ambit and scope of Section 536(2) of the Act. The company Court referred to the judgment of Calcutta High Court in the case of In Re: J. Sen Gupta Private Ltd., (In Liquidation), wherein the said Court has observed as under:

12. It seems to me, therefore, upon considering various authorities on this subject that the following principles are doubtless applicable to sub-sec (2) of Sec. 536 of the Companies Act, 1956:

1. The Court has an absolute discretion to validate a transaction.
2. This discretion is controlled only by the general principles which apply to every kind of judicial discretion.
3. The Court must have regard to all the surrounding circumstances and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the Court under Sec. 536(2) to say that the transaction is not void.
4. If it be found that the transaction was for the benefit of and in the interests of the company or for keeping the company going or keeping things going generally, it ought to be confirmed."

2. The company Court also took note of following discussion in The Sidhur Mills Company Limited, (1987) 1 Comp. L.J. 71 (Guj.) by the Gujarat High Court in the following manner:

12. It is trite position in law that the commencement of winding-up proceedings relates back to the presentation of the petition (see: section 441 of Companies Act, 1956). It should be recalled that the winding-up petition in which the order was made was company petition No. 9 of 1979 which was presented on 22.2.1979. The winding-up order was made by this Court on October 18, 1979. In the circumstances, therefore, any transfer of shares of Siddhpur Mills Co. Ltd. made after the presentation of the winding-up Co. would be void unless as otherwise directed by the Court. The Court has an absolute discretion as to validating the transaction after presentation of the winding-up petition. The discretion is to be exercised on recognized principles which guide the exercise of judicial discretion generally with particular attention to the interest of the company. The Court can validate such impugned transaction in those bona fide cases which demand protection of equitable consideration. (See B.B. Khanna v. S.N. Ghose 1976 Tax L.R. 1740)."

3. From the aforesaid judgments, principle of law culled out is that the company Court has the discretion to validate transfer of shares executed after passing of the winding up order, but the said discretion is not an untrammelled one, as it has to be exercised on sound judicial principles. The Court has to keep in view all surrounding circumstances and if it finds that same is a bona fide transaction for the benefit of the company, then the same should be validated. While doing so, the Company Court also must be satisfied that there was clear intent on the part of the purchasers to transfer the shares in question. It was not necessary to obtain prior sanction of the Company Court before execution of an agreement to sale and post facto sanction could be granted. The Company Judge has also referred to Chapter VII of the SEBI (Delisting of Equity Shares) Regulations,

2009 (for short "SEBI Regulations, 2009") which states that in case of small and delisted companies where winding up proceedings are pending, its shares shall be dealt with in accordance with law applicable to those proceedings. Regulations 27(1) and 28(1) of the SEBI Regulations, 2009 are reproduced herein below:-

Special Provisions in case of small companies

27.(1) Where a company has paid up capital upto one crores rupees and its equity shares were not traded in any recognized stock exchange in the one year immediately preceding the date of decision, such equity shares may be delisted from all the recognized stock exchanges where they are listed, without following the procedure in Chapter IV.

Delisting in case of winding up, derecognition, etc.

28.(1) In case of winding up proceedings of a company whose equity shares are listed on a recognized stock exchange, the rights, if any, of the shareholders of such company shall be in accordance with the laws applicable to those proceedings.

4. On that basis, the opinion is formed that SEBI Takeover Regulations, 1997 would have no application to the present transfer of shares. On the basis of the aforesaid principles, the company Court examined the facts of the case at hand. It observed that since company was in liquidation for last 27 years, there was no question of its shares being listed on any recognized stock exchange on the date when the alleged sale agreement/MoU/deed of arrangement were executed. It was more so when trading at Delhi Stock Exchange has been suspended for last nearly ten years. As per the Company Judge, the appellants who were initially promoters and the family members of company in liquidation had entered into the said MoU, etc. with the propounders in the year 2005-06, i.e., at a time when liabilities were far in excess of the assets of the company and secured creditors were making efforts to recover their debts from personal properties of the initial promoters, i.e., Mr. R.N. Gupta and his family members. It was at that stage that the original promoters voluntarily entered into share purchase agreement/MoU/deed of arrangement for valuable consideration. There was no misrepresentation on the part of the propounders as the original shareholders were fully aware of all facts regarding the company in liquidation as they were all family members of Mr. R.N. Gupta (son of Mr. B.N. Gupta) former Managing Director of company in liquidation. So much so, they have even filed CA Nos.376-379/2006 and 593/2006 seeking permission of this Court to convey their shares in the company in liquidation in favour of the propounders. In the said application, categorical averments were made by all these appellants in their individual applications that they had consented to sell their share holding in favour of the respondent Nos.2 & 3 and these applications were supported by affidavits as well. Even MoU dated 10.3.2006 categorically stated that these appellants had consented to sell their share on consideration of percentage of face value in favour of the propounders and receipt was also executed having received the amount. Subsequent to the

execution of these MoUs, the propounders after acquiring the share settled the dispute with all the secured creditors, viz., HFC and UCO bank by entering into one time settlement with them. A sum of Rs. 183 lacs was paid to UCO Bank by the propounders. Thereafter, the propounders even invited claims from unsecured creditors and agreed to repay the amounts to the said unsecured creditors with 10% simple interest till the date of winding up order and thereafter at the rate of 5% simple interest till the date of repayment. It is only after the debts of secured creditors had been settled that the members of Gupta family had second thoughts and they withdrew the applications filed by them with liberty to refile those applications in case they were so advised in future. Based on these facts and events, the learned Single Judge held that the appellants are stopped from contending that they had either received no consideration and/or consideration mentioned in the share purchase agreement or MoU. In any case, the agreements/MoU etc. were binding on the appellants. The objection of the appellants that the documents had been obtained by fraud or misrepresentation by suppression of material facts or any other reason has been brushed aside observing that in that event there should have been the agreement set aside through Court and unless they do so it is not permissible to go behind the agreement and ignored as void documents. It is so held by the Supreme Court in the case of Subodh Kumar Gupta Vs. Shrikant Gupta and Others, in the following manner:

On the averments in the plaint taken at their face value the case set up by the plaintiff is that after his father left Mandsaur his two brothers joined hands, manipulated the accounts and siphoned away the funds belonging to the partnership firm. The entire dispute is in relation to what happened at Mandsaur. Secondly, it must also be remembered that even according to the plaintiff after his father returned to Mandsaur there was some talk of settlement of the dispute and consequently an agreement was executed on 26th November, 1992 at Bhilai by which the partnership was dissolved and it was agreed that the liabilities would be settled within one month. Now this agreement was executed outside the territorial jurisdiction of the Chandigarh Court. Unless this agreement is set aside there is no question of the Chandigarh Court entertaining a suit for dissolution of the partnership and rendition of accounts. The plaintiff cannot wish away the agreement by merely suing that it is a void document. He cannot rest content by alleging that the document has no efficacy in law and must, therefore, be ignored. If it is the case of the plaintiff that this document was obtained by fraud or misrepresentation by suppression of material facts or for any other like reason he must have the agreement set aside through Court and unless he does that he cannot go behind the agreement, ignore it as a void document and proceed to sue for dissolution of the partnership and rendition of accounts. It is not a matter of the volition of the plaintiff to disregard the document as void and proceed to ignore it altogether without having it declared void by a competent Court. It, therefore, appears clear to us that no part of the cause of action arose within the territorial jurisdiction of the Chandigarh Court.

5. Vide impugned order, the learned Company Judge has allowed the transfer of share treating the transaction bona fide for the benefit of the company in liquidation entering the respondent Nos. 2 and 3 in the Register of Members. The permission is, however, given to the appellant to raise a dispute prior to filing a second motion petition in case they wish to challenge the factum of transfer of share agreement. On the scheme propounded by the propounders, notices were issued to the share holders and the creditors which was scheduled for 11.2.2012 which was earlier scheduled for 17.12.2011.

6. Challenging that order, the present appeals are filed which were listed for admission on 08.2.2012. However, as the counsel for the respondents appeared on caveat as well as counsel for the Official Liquidator was also present, with the consent of the counsel for the parties, arguments were finally heard on that date itself. There was no stay of the proposed meeting of shareholders and creditors and we presume that this meeting must have taken place.

7. Mr. T.K. Ganju, learned Senior counsel and Mr. S.M. Saxena, learned counsel appeared for one or the other appellants to make submissions in these appeals. The main plank of attack of the learned counsel for the appellants was that predicated on Section 108 of the Act, it was submitted that as per Section 108 of the Act, the transfer of shares/registration in the Membership Register could not be ordered except on production of instrument of transfer. Further Section 108 of the Act required previous approval of the Central Government as the proposed acquisition by respondent os.2 & 3 exceeded 25% of the paid equity share capital by the company. Judgments of the Supreme Court in the case of Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others, was pressed into service wherein the Court held as under:

16. The provision contained in Section 108 of the Act states that "a company shall not register a transfer of shares...unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee has been delivered to the company along with the certificate relating to the shares or debentures or if no such certificate is in existence along with the letter of allotment of the shares." There are two provisos to section 108 of the Act. We are not concerned with the first proviso in these appeals. The second proviso states that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law. The words shall not register" are mandatory in character. The mandatory character is strengthened by the negative form of the language. The prohibition against transfer without complying with the provisions of the Act is emphasised by the negative language. Negative language is worded to emphasise the insistence of compliance with the provisions of the Act. (See *State of Bihar v. Mahawjadhira Sir Kahemshwar Singh of Darbbhanga and Ors.* (1) *The State of Bihar Vs. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others*, (2) *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, and

unreported decision dated 18 April, 1976 in Criminal Appeal No. 279 of 11975 etc. Additional District Magistrate, Jabalpu v. Shivakant Shukla (3). Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative.

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19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See Mellis v. Shirley. L.B. A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between, contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see that acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited Act, that contract will be unenforceable. In (the latter class, one has to consider what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See St. John Shipping Corporation v. Joseph Rank (7) 1957 C.B. 267. (See also Halsbury's Laws of England Third Edition Vol. 8, p/141).

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23. The provisions contained in Section 108 of the Act are for the reasons indicated earlier mandatory. The High Court erred in holding that the provisions are directory.

8. It was submitted that this view has been reiterated by the Supreme Court in the case of Smt. Claude-Lila Parulekar Vs. Sakal Papers Pvt. Ltd. and Others,

9. It was, thus, submitted that the provisions contained in Section 108 were held to be made mandatory and their requirement could not be dispensed with.

10. It was also argued that once the appellants had revoked/cancelled the Mou/ Agreement, etc. on the ground that it was void u/s 536(2) of the Act, after such revocation, it was not permissible for the propounders to file any such application.

11. Another submission was that the appellants as contributors were contemplating filing of scheme as there was no scheme for them before the Court. It was submitted that in the impugned judgment, equality principle was violated as contributors could not be differentiated. Findings of the learned Company Judge were also challenged and it was submitted that the transaction was not bona fide. It was submitted that the mala fide of the propounders were clearly spelt out by pointing out that the propounders had colluded with Mr. R.N. Gupta and his wife Veena Gupta (Ex. Director of BCL) and cornered their shares

by paying them both in cash and kind absolved them from their personal guarantees and liabilities worth Rs. 2.93 Crores from UCO bank and HFC. As per the appellants, illegal and false consideration had been shown in the MoU dated 10.3.2006 entered into between R.N. Gupta and Respondent No. 2. It was also submitted that the two appellant ladies had been duped and therefore, imprimatur of the said application was not warranted by the learned Company Judge.

12. Another submission of the learned counsel for the appellant was that the validation of transfer of these shares was not in public interest and therefore, should not have been ordered as held in *S.R. Nayak and Anr etc. v. Union of India*, 1991 SC 1420.

13. Mr. Abhinav Vashist, learned Senior Counsel appeared for the respondent/propounders and Mr. Rajiv Bahl, learned counsel appeared for Official Liquidator to refute the aforesaid submissions of the appellants. We will take note of the submissions while dealing with the arguments of the appellants.

14. Insofar as arguments based on provisions of Section 108 of the Act is concerned, we do not find much force therein. No doubt, provisions of Section 108 of the Act are mandatory in nature and principle of law laid down in *Mannalal Khetan (supra)* and *Sakal Papers (P.) Ltd. (supra)* by the Supreme Court cannot be questioned. At the same time, we find that those cases relate to the companies which were solvent and functioning and not the companies in respect of which winding up order has been passed. When we deal with the case of a company in liquidation, the applicability of Section 108 of the Act would be meaningless. This very issue came up before this Court in the case of *H.L. Seth Vs. Wearwell Cycle Company (India) Ltd. and Others*, . It was held that *Mannalal Khetan (supra)* would have no application to a company which is in liquidation. We may reproduce the discussion therein:

(25) So, we held that the court has the jurisdiction u/s 536(2) to validate the transfer of shares which had taken place in the present case after the winding-up order as the winding-up process is still continuing and the Company has not yet been dissolved. The learned counsel for the appellant has argued that the Company Court has no jurisdiction to direct any specific performance of the agreement of sale of shares and that the transaction was not complete and thus, could not be validated by the Company Judge. He has referred to *Palmer's Company Law*, 24th Edition (1937), para 4029 which state "where the winding up is compulsory or under supervision, transfers of shares during the winding up are avoided unless sanctioned by the court and the court will not, if a transfer is incomplete by reason of want of registration at the commencement of the winding up, put the buyer on the register. This observation has been based on the cases, namely, *Emerson's Case*, L.R.(1866) 1 Ch.App 433, re.: *ONWARD Building Society (supra)* *Sullivan Vs. Henderson* (1972) 116 S.J. 969 and also *Nelson Mitchell Vs City of Glasgow Bank*, 1879 6R H.L. 66. It may be that if the transaction of transfer of shares is not complete the Company Judge may in its

discretion refuse to entertain any claim for transfer of shares. But in the present case the parties had completed the transaction of transfer of shares when the share certificates and the transfer forms were duly handed over to the respondent by the appellant and his associates and full consideration which was agreed upon had been obtained by the transferors from the transferees. So, the transaction of transfer of shares was complete in the present case.

(26) It has been then contended after placing reliance on certain observations of the Supreme Court in *Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others*, that provisions of Section 108 being mandatory in nature no transfer of shares could be given effect to unless provisions of Section 108 of the Companies Act are complied with. The learned counsel for the appellant forgets that Section 108 could be complied with only if the company had not gone into liquidation. At present there exists no Board of Directors to which the share certificates could be presented for registration. The learned Single Judge has given ample reasons for holding that the compliance of Section 108 after the winding-up order had been made is not prerequisite for directing the registration of the transfer of shares under the orders of the court and rightly so because the Company is now under the complete supervision of the Company Court and the Official Liquidator is to manage the company under the orders of the Court. If the court in its wisdom comes to the conclusion that transfer of shares has been made between the parties validly and the said transfer shares is not going to adversely affect the public interest or the interest of the Company, there is no earthly reason why the Company Court should not declare such a transaction as valid and direct the registration of shares in the names of the transfers or their nominees in the register of the company.

15. This judgment is a complete answer to the submission of the appellant on this aspect. In the present case, what we find is that all these appellants had entered separate purchase agreement/MoU/Deed of Arrangements, etc. As per the terms of deeds/agreement, they had transferred their shareholdings in favour of the propounders. They had even accepted the payment in consideration of the said sale. From the discussion contained in the judgment of the learned Company Judge, which is already mentioned above, following pertinent aspects clearly emerge:

a) The appellants did not dispute the execution of the share purchase agreement/MoU/Deeds of arrangement which took place sometime in the year 2005-06.

b) At that time, the liabilities of the company were far in excess of the assets. Secured creditors were making effort to recover their dues from the personal properties of the initial promoters, i.e., R.N. Gupta and family. Faced with such a situation, these original promoters, i.e., the appellants had voluntarily entered into these agreements/arrangements with the propounders. It appears that not only they wanted to avoid the eminent thrust of recovery of their personal assets, but salvaged whatever they can recover in the bargain.

16. Vide these agreements/arrangements, the appellants not only agreed to transfer their shares for valuable consideration, but accepted that consideration as well by executing proper receipts. There is no dispute about the receipt of the amounts as well. So much so, CA Nos.376-379/2006 and 593/2006 were filed by some of these appellants, viz., R.N. Gupta, Puneet Gupta, Akhilesh Gupta, etc. In these applications, they sought permission from the Company Judge to convey their shares in the company in liquidation to the propounders. In these applications, specific averments were made that they had consented to sell their shares on a consideration of agreed percentage of the face value of the shares and had received such consideration and the specific amount was mentioned in the application. The applications were supported by the affidavits.

Pertinently, after the execution of the agreement/arrangements, the propounders even acted on that basis alternating their position. They settled with the major secured creditors, viz. HFC and UCO bank by entering into one time settlement and clearing their dues. They even invited the unsecured creditors and agreed to pay the amounts to the said unsecured creditors with 10% simple interest till the date of winding up order and thereafter at the rate of 5% simple interest till the date of repayment.

17. In the aforesaid backdrop, the learned Company Judge rightly observed that when the claims of the secured creditors got settled the members of Gupta family, i.e., the appellants had second thoughts. They not only withdrew the applications filed by them seeking transfer of shares in favour of the propounders, the appellants terminated the agreements thereafter. Significantly, applications were withdrawn with liberty to refile for same relief. In this backdrop, merely alleging misrepresentation on behalf of the propounders would not mean that the applicants have been able to prove the same. When we see the matter in the aforesaid perspective other arguments of the appellants stand automatically answered. We may also place on record that one of the appellants, viz., Akhilesh Gupta, even conceded that he had not revoked the MoU by virtue of which shares had been transferred to the propounders. It is more so when the appellants have been given liberty to challenge the factum of share transfer agreement prior to second motion. We, thus, do not find any merits in these appeals. The same are dismissed with costs quantified at Rs. 10,000/- per appeal.