(2009) 08 GUJ CK 0012

In the Gujarat High Court

Case No : Company Application No''s. 172 and 582 of 2008

In Re: Shefali Doshi

Date of Decision : 06-08-2009

Acts Referred:
Companies Act, 1956 — Section 531, 531A

Citation : (2010) 100 SCL 84

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : A.S. Vakil, for the Appellant; R.M. Desai, for the Respondent

Judgement

Jayant Patel, J.—Company Application No. 172 of 2008 has been preferred by the Official Liquidator for seeking recovery of the mesne profit at the rate of Rs. 30 per sq.ft for the office premise and at the rate of Rs. 10 per sq.ft for parking space per month from 1-9-1999 till 29-5-2007 from the respondent No. 1 therein who was claiming to be the tenant of the property and also from respondent No. 2 who is claiming the rights as under MoU.

2. Company Application No. 582 of 2008 has been preferred by the applicant who is respondent No. 2 in Company Application No. 172 of 2008 for declaration that the transaction between applicant and the company in liquidation as per the Memorandum of Understanding (hereinafter referred to as "MoU") dated 1 -9-1999 is not void against the Liquidator and it is prayed to declare the said transaction as valid within the meaning of Sections 531 and 531A of the Companies Act, 1956 (hereinafter referred to as "the Act").

3. Heard Mr. Vakil, learned Counsel for Ms. Shefali Doshi - applicant, Mr. Roshan Desai for Official Liquidator in both the applications and Mr. T.S. Nanavati, learned advocate for respondent No. 1 in Company Application No. 172 of 2008.

4. As the facts are interconnected and common questions arise, they are being considered by the present common order.

5. The following facts are not in dispute:

(A) It appears that the company in liquidation had filed nine civil suits for recovery of various amounts against the builder and the developer, namely, Devland Developers Private Limited and others for recovery of the huge amount running into crores of rupees. In the said suits ultimately the consent decree came to be passed by the City Civil Court dated 18-8-1999 whereby the right for disposal of Office Premises Nos. 102 to 107 situated at Devpath Complex, C.G. Road, Ahmedabad, inter alia, was entrusted by the defendant in the said suit in favour of the company. As per the said decree, the charge was also created over the said property and the relevant recital in the consent decree is on Clause No. 12(c)(d) which reads as under:

(c) The defendants 1 and 2 agree that a decree for creation of charge by the Hon''ble Court be passed for the decretal amount of Rs. 43,99,994 together with running interest thereon at the rate of 24 per cent per annum over the office premises Nos. 2 to 8 adm. 2024 sq.ft. in aggregate on the 1st Floor and Cellar admeasuring 10,000 sq.ft. in "Devpath" complex, B/h. Lal Bungalow, Ellisbridge, Ahmedabad.

(d) The defendants 1 and 2 further agree that a decree for creation of charge for the decretal dues be also passed over the property of Farm House in village Isanpur (Mota) of District, Sub-District Gandhinagar and comprised in Survey No. 1370/1, Block No. 1319 admeasuring 16.1726 hectares (161726 sq.mtrs.).

(B) It is not in dispute that the consent decree was passed by the City Civil Court. Therefore, pursuant to the said decree, two rights came to be invested in favour of the company in liquidation; first was right to dispose of the property and the second was the creation of the charge.

(C) It appears that thereafter on 1-9-1999, the MoU was entered into between the applicant of Company Application No. 582/2008 and the company in liquidation in respect to the said office premises Nos. 102 to 107, and the copy of the said MoU is produced at page 22. Since the applicant and one Mr. Apurva Doshi had invested amount of Fully Convertible Debentures of the company in liquidation for Rs. 5,75,000 with interest Rs. 2,42,000, total Rs. 8,17,000 was to be paid by the company in liquidation, the said premises of the offices were transferred by way of transferring the right for disposal of the property in favour of the applicant.

(D) There is no material on record to show that pursuant to the MoU, a conveyance deed was executed in favour of the applicant of Company Application No. 582/2008 conferring title in favour of the applicant.

(E) It appears that the title clearance certificate came to be issued by one Solicitor at the instance of the applicant.

(F) It also appears that there is recital in the MoU for entrustment of the possession of the Office Premises Nos. 102 to 107 by parties to MoU, namely, company in liquidation as well as Devland Developer as a confirming party.

(G) The pertinent aspect is that the applicant in the present application nowhere has made any pleading or statement on oath that the actual physical possession came to be entrusted pursuant to the MoU and since then the applicant remained in possession of the said premises.

(H) It appears that the company in liquidation thereafter entered into the Rent Note dated 15-9-1999 in favour of one Decimal Systems Private Limited for giving the premises on rental basis comprising of Office Nos. 102 to 107 admeasuring 1300 sq.ft for the monthly rent of Rs. 1,300 per month. Not only that but thereafter the said tenant Decimal Systems Private Limited preferred HRP Suit No. 1063 of 2000 before the Small Cause Court, Ahmedabad, seeking declaration that they are the tenants of the suit premises bearing Nos. 102 to 107 and the defendant be restrained from interfering with the possession of the plaintiff. In the said suit a statement has been made at para 2 of the plaint that the tenant has paid the rent up to March 2001 and the receipts are produced by separate list. Thereafter ex parte ad interim injunction came to be granted and in the written statement filed by the company in liquidation the factum of giving premises on rental basis as well as the possession was admitted. It appears that thereafter on 22-11-2000, the said tenant plaintiff of the said suit withdrew the civil suit unconditionally.

(I) It appears that on 21-10-1999, a winding-up petition came to be filed before this Court of the company in liquidation and on 21-10-2000 the petition came to be admitted and the appointment of the Provisional Liquidator was made. Thereafter on 20-3-2001, the final winding-up order was passed by this Court and the Provisional Liquidator was appointed as a Liquidator. Vide order dated 20-7-2001, this Court directed the Official Liquidator to take over the possession of the assets of the company in liquidation. It is the case of the applicant that thereafter up to 9-3-2006 no steps were taken by the Official Liquidator to take over the possession.

(J) On 9-3-2006, an agreement is said to have been executed by the applicant with one Jayantibhai Somabhai Patel for transferring the rights of the applicant in Office Premises Nos. 102 to 106 and the pertinent aspect is that as per the said agreement, the possession is said to have been given to one Jayantibhai Somabhai.

(K) In January 2007 the Official Liquidator had filed Company Application No. 117 of 2007 against the so-called tenant Decimal Systems Pvt. Ltd., and prayed that the Hon''ble Court be pleased to declare the rent note is illegal and not binding to the Official Liquidator and the permission was prayed to take over the possession of the office premises Nos. 102 to 107.

(L) On 13-4-2007, a representation was made by the so-called tenant Decimal Systems Pvt. Ltd., that they are in actual occupation of the Office Premises No. 107 only and the Court found that it was nothing but a fraud and, therefore, directed to hand over the possession of Premises No. 107 to Official Liquidator on or before 19-4-2007 which has been handed over by Decimal Systems Pvt. Ltd. to Official Liquidator. The Court also recorded that the Decimal Systems Pvt. Ltd., is not in possession of Office Premises Nos. 102 to 106.

(M) Thereafter Jayantibhai Somabhai Patel had preferred application No. 224/07 before this Court for protecting his right, which this Court vide order dated 8-5-2007 did not accept the application and ultimately granted three weeks'' time to Jayantibhai Somabhai Patel to hand over the possession on or before 29-5-2007. It appears that thereafter the possession was handed over.

(N) This Court vide order dated 10-5-2007 in Company Application No. 117 of 2007 also directed the so-called tenant Decimal Systems Pvt. Ltd., and Jayantibhai Somabhai Patel to pay mesne profit at the rate of Rs. 5 per sq.ft., for the office premises which remained in occupation of the respective persons. The Decimal Systems Pvt. Ltd. contended that they were in possession of the office premises No. 107 only and they are ready and willing to pay mesne profit at the rate of Rs. 5 per sq.ft. per month from 15-9-1999 till actual handing over the possession of the office premise No. 107. It was directed to pay mesne profit at the rate of Rs. 5 per sq.ft from that date till the possession was surrendered, whereas, so far as Jayantibhai Somabhai Patel is concerned, since it was his case that he was entrusted the possession vide agreement dated 9-3-2006 he had to pay the amount from that date till the actual surrendering the possession to the Official Liquidator. Both the amounts have been deposited with the Official Liquidator. But as this Court observed in the order dated 10-5-2007 that the dispute with regard to the possession of the Office Premises Nos. 102 to 106 for the period from September 1999 to 2006 will be decided by the Court after the Official Liquidator would file a separate report, hence, the Official Liquidator has preferred Company Application No. 172 of 2008 for recovery of the mesne profit at the rate of Rs. 30 per sq.ft. as referred to hereinabove. The applicant herein under these circumstances has also preferred present application for declaring that the transaction is not fraudulent transaction as per Section 531 of the Act.

6. It may be recorded that both the applications were disposed of by this Court (Coram: K.A. Puj, J.) vide order dated 12-1-2009 and the application of the applicant for validation of the transaction was rejected and the mesne profit at the rate of Rs. 5 per sq.ft was ordered. The applicant herein preferred O.J. Appeal No. 3 of 1999 and the Division Bench of this Court vide order dated 18-3-2009 set aside the order of learned Single Judge and has remanded the matter to the learned Company Judge. The relevant observation of the Division Bench are that two questions are required to be considered: (1) whether the right for disposal of the premises acquired by the company can be said as an asset of the company; and (2) whether its transfer to the appellant and one another was hit by Section 531 of the Act.

7. As the decree of the civil court was not placed, the Division Bench further directed to consider the same. Hence, the matter once again comes up for consideration before this Court.

8. The first aspect for which the emphasis is made by learned Counsel Mr. Vakil is that right of disposal or the charge created as per the decree without there being any registration of such charge under the Transfer of Property Act cannot be termed as the assets of the company.

9. Even if it is considered the same would result into permitting the applicant to blow hot and cold at the same time. The rights of the applicant if any as per the MoU flows from the decree of the civil court in Civil Suit No. 2138/98 for which the reference is also made in the MoU in the beginning itself. Therefore, if the company in liquidation had not acquired any rights for disposal of the property, pursuant to the decree, the applicant, consequently, would also not get any rights whatsoever. The attempt made by the learned Counsel for the applicant to contend that the owner of the property was also party to the MoU, can hardly be of any help to the applicant in supporting the acquisition of the rights. The obvious reason is that there was no debt recoverable by the applicant from the owners of the property or the developer of the property but it was on account of the so-called investment of convertible debenture from the company by way of repayment transferred the rights in favour of the applicant were agreed to be transferred. Therefore, if the contention of the learned Counsel for the applicant is accepted that the rights for disposal should not be termed as assets of the company, the same would frustrate the very basis of the MoU which is sought to be validated. Same situation will arise for the charge created pursuant to the decree. It is not a matter of only transferring the rights for disposal of the property but it is coupled with the conjoint stipulation of creation of the charge for recovery of the amount outstanding of the company in liquidation from the defendant who was the owner of the property.

10. The contention that the right as per the consent decree which creates charge over the property cannot be termed as the property of the company in liquidation because it was not registered under the Indian Registration Act by documents or by registration of the decree, even if to be examined, it does appear that as per the consent decree the charge is created over the property and the right expressly provided enabling the realization of the dues of the plaintiff. The said aspect is apparent from Clause No. 12C as referred to hereinabove. Therefore, two things are admittedly undertaken : one is creation of charge as per the consent decree and second is the order passed by the Court based on such consent decree. It is true that had it been a case where a charge over the property is created without intervention of the Court, in absence of any registration, it may not be termed as valid. But, if the declaration made before the Court is further endorsed by the Court as made enforceable under the consent decree which is otherwise executable as per law, it cannot be said that no interest whatsoever is created of the company in liquidation over the property. Once the interest is created and such interest is enforceable, it can be said that the rights accrued as per the consent decree in the property were assets of the company and such rights were for disposal of the property acquired by the company.

11. Further, it is not a case where mere charge is said to have been created in the consent decree with the condition for giving right to realize the money therefrom. But it further appears that the actual physical possession was also handed over to the company in liquidation and based on the same the company in liquidation had entered into the Memorandum of Understanding with the applicant for which the validation is sought in the present application. Therefore, when the consent decree is already acted upon prior to the winding up of the company, it is not possible to accept the contention of the learned Counsel for the applicant that the right for disposal in the premises acquired by the company was not an asset of the company. Hence, the said contention is rejected with the finding that the right for disposal of the premises acquired by the company was an asset of the company.

12. The aforesaid takes me to examine the second aspect for validation of the transaction u/s 531 of the Act. Section 531 of the Act for ready reference reads as under:

531.(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly:

Provided that, in relation to things made, taken or done before the commencement of this Act, this sub-section shall have effect with the substitution, for the reference to six months, of a reference to three months.

(2) For the purpose of Sub-section (1), the presentation of a petition for winding up in the case of a winding up by [the Tribunal], and the passing of a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond to the act of insolvency in the case of an individual.

13. It is not in dispute that the date on which the MoU is entered into, is falling during the said period which is covered u/s 531 of the Act. Therefore, the aspect which may be required to be considered is as to whether any fraudulent preference is given or not frustrating the rights of the other creditors of the company in liquidation. The pertinent aspect is that on the date when MoU is entered into the company had already floated convertible debentures and payments of such debentures were payable. All those debenture holders whose debenture had become due were entitled to the payment. In the affidavit of the Official Liquidator, it has been stated that since the company did not discharge the obligation of payment as per the debentures, various debenture holders had approached before the Company Law Board and the direction was given by the Company Law Board to make the payment to such debenture holders. But, in

spite of the same, no payment was made by the company to those debenture holders. No material is produced by the applicant before this Court to show that she had also approached before the Company Law Board and the directions were given by the Company Law Board. Therefore, as against the debenture holders in whose case the order was already passed by the Company Law Board, the applicant in capacity as the debenture holder was on a lower footing for enforcement of the rights. Even if such aspect is considered it can be said that a preference was given in favour of the applicant who was a mere debenture holder as against the other debenture holders whose payment had become due and additionally the order was also passed by the Company Law Board to honour the obligation to make the payment.

14. Further, in the MoU itself it has been mentioned that only few debentures had become due on the date when MoU was entered into and not the debentures which were otherwise to become due in April and August 2000. The date of MoU is 1-9-1999. Whereas, the debentures of Rs. 1,25,000 were to become due after the said date. In spite of the fact that the debenture had not become due, the same is considered for making set off of payment in the MoU in favour of the applicant. The aforesaid is an additional ground showing that an intended preference is made in favour of the applicant by the Directors of the company in liquidation to the extent of tendering payment by set off though had not become due.

15. Further, it has also been stated that the agreement of MoU is made in presence of Shri D.D. Mehta, who himself remained as President of the company in liquidation for a long time and just few days before the MoU, it is stated that he had ceased to be the President of the company in liquidation.

16. The aforesaid totality of the circumstance goes to show that the preference is made for payment in favour of the applicant by way of MoU and the same is by way of an intention to transfer the assets of the company by way of extraneous consideration consequently resulting into frustrating the rights of other creditors.

17. Mr. Vakil, learned Counsel appearing for the applicant, relied upon the various decisions to contend that the burden is upon the Official Liquidator to show that there is fraudulent preference and unless it is satisfactorily demonstrated before the Court by way of extraneous consideration or by way of preference by frustrating the rights of the other creditors, the transaction cannot be termed as fraudulent preference and deserves to be validated.

18. Even if such principles are considered, it would not carry the case of the applicant further in view of the peculiar circumstance as referred to hereinabove and the document of MoU itself speaking for the payment by way of set off against the assets of the company though had not become due on the date when the transaction was entered into coupled with the other circumstances of the order passed by the Company Law Board as well as the involvement of Shri D.D. Mehta, who remained as President of the company for a long time, in any case

just prior to the date of MoU. Therefore, it appears to the Court that it is a case where the transaction would be hit by the provisions of Section 531 of the Act and not a case which calls for exercise of discretion for validation of such transaction.

19. The aforesaid leads me to record the conclusion that the company application No. 582 of 2008 deserves to be rejected and, hence, rejected.

20. The another aspect to be considered now is of Company Application No. 172 of 2008 preferred by Official Liquidator for mesne profit. The basis of the application is that the possession of the property was with the applicant of Company Application No. 582 of 2008 and she has unlawfully retained the same until she handed over the possession to one Shri Jayantibhai Patel, who was directed to deposit the amount of mesne profit with this Court as per the earlier order passed by this Court in the respective proceedings.

21. In order to examine the basis of the application, the aspect of possession may assume relevance. Applicant of Company Application No. 582 of 2008 has nowhere stated that the possession of the premises was handed over pursuant to MoU when a specific query was raised during the course of the hearing of Company Application No. 582 of 2008 and the present application. Mr. Vakil, learned Counsel for the applicant, has not been able to make any clear statement as to whether actual physical possession of the premises was handed over or not. But, he only stated that the possession must have been given because unless the possession was given, the applicant could not have sold the premises to Shri Jayantibhai. However, he was unable to make a positive and clear statement that as per MoU whether possession was handed over or not.

22. In this regard, the perusal of the MoU shows that there is no reference to the actual physical possession entrusted by the company in liquidation to the applicant. It only refers to the understanding arrived at between the parties to the MoU. Had the actual physical possession handed over by the company in liquidation to the applicant of Company Application No. 582 of 2008, the company in liquidation would not have entered into the transaction of rent note in favour of Decimal Systems Pvt. Ltd. for all the Office Nos. 102 to 107. The said aspect is apparent from the rent note produced and the said rent note is further substantiated by the statement made in the plaint by Decimal Systems Pvt. Ltd. and also the pleadings by way of reply submitted before the Court in the proceedings of the suit preferred by Decimal Systems Pvt. Ltd. being MRP No. 1063 of 2000. It is not the case of the Official Liquidator that such rent note or the written statement by the company in liquidation was concocted. The aforesaid circumstance of rent note and of written statement filed on behalf of company in the proceedings of the suit make it clear that after MoU, the company continued to be in possession of the office premises and, therefore, had given on rental basis to the Decimal Systems Pvt. Ltd. It is true that the advertisement was issued at the time of title clearance certificate by M/s. Jani & Co. Solicitors stating that the office premises Nos. 102 to 106 are in possession

of the applicant of Company Application No. 582 of 2008. But the pertinent aspect is that though there is no sale deed whatsoever, the title clearance certificate has been issued as marketable. Therefore, it appears that the recital in the advertisement at the time of title clearance certificate cannot be given weightage as against the rent note and the pleadings and the proceedings of the Court of HRP No. 1063 of 2000. Further, it appears that the basis of the sale entered into between Shri Jayantibhai Patel and the applicant is MoU entered into between the company in liquidation and the applicant. Considering the possession as that of the applicant, the transaction of sale is stated to have been entered into. The company in liquidation is not party to such transaction, therefore, the same at the most can be said of misconception. Not only that but when the representative of the Official Liquidator took over the possession, at the first instance the same was resisted by Decimal Systems Pvt. Ltd. and thereafter subsequently by Shri Jayantibhai Patel. This shows that the actual physical possession after MoU remained with the company in liquidation and, therefore, company in liquidation had given on rental basis the premises to Decimal Systems Pvt. Ltd. and the same is further supported by the pleadings in the suit proceedings. It may also be recorded that in the observations made by this Court hereinabove, while recording the reasons for Company Application No. 582 of 2008, this Court has also recorded that MOU has not been acted upon by entrustment of the possession to the applicant in view of the aforesaid factum of entering into the rent note with Decimal Systems Pvt. Ltd. and the pleadings in the suit proceedings. Therefore, under these circumstances, if the company remained in possession of the office premises, may be that it might have given on rented basis to Decimal Systems Pvt. Ltd., the applicant had no possession of the property as per MoU nor such possession was entrusted by the company in liquidation in furtherance to MoU. Therefore, when the possession was not with the applicant, the claim made by the Official Liquidator for mesne profit against the applicant cannot be granted. So far as Decimal Systems Pvt. Ltd. is concerned, as such the rights, were as of the tenant and the landlord, as per the rent agreement. If a strict view is taken it may not attract the amount exceeding the agreed amount of rent. However, it appears that during the course of the earlier proceedings, Decimal Systems Pvt. Ltd. has not resisted the said aspect but restricted its possession only for office No. 107 and for the said period it has also paid the mesne profit at the rate of Rs. 5 per Sq. Feet. So far as Jayantibhai Patel who was wrongly given possession of the premises by applicant of Company Application No. 582 of 2008 is concerned, he has also deposited the amount of mesne profit at the rate of Rs. 5 per Sq. Feet. Under these circumstances, it appears to the Court that the claim for the amount of mesne profit against the Decimal Systems Pvt. Ltd. exceeding the rental amount and the amount as already ordered by this Court which has been deposited by it, for the office No. 107 as mesne profit does not deserve to be granted. So far as respondent No. 2 is concerned, as observed earlier, as the possession was not entrusted after MoU but was retained by the company in liquidation itself, the claim for mesne profit cannot be sustained. As regards Shri Jayantibhai Patel is concerned no claim is made by Official Liquidator but in any case, he has already deposited the amount of mesne profit as ordered by this Court earlier.

23. It also deserves to be recorded that this Court at the time when directed for mesne profit to Decimal Systems Pvt. Ltd. as well as Shri Jayantibhai Patel had provisionally assessed the mesne profit at the rate of Rs. 5 per Sq. Feet. No other evidence is produced by the Official Liquidator to show the calculation of the mesne profit so as to support the claim of Rs. 30 per Sq. Feet for the office and Rs, 10 per Sq. Feet for parking, more particularly, when provisionally the same was assessed by the Court at the rate of Rs. 5 per Sq. Feet.

24. Under the above circumstances, the application preferred by the Official Liquidator does not deserve to be granted. Hence, the same is dismissed. The aforesaid shall be without prejudice to the rights of the Official Liquidator to recover the rent as per the rent agreement from Decimal Systems Pvt. Ltd. from the date of written statement in which the pleadings are made for payment of the rent up to that particular date till the possession was found with Shri Jayantibhai Patel. Of course, it will be for the Official Liquidator to examine the record of the company as to whether any rent has been credited or not and it would also be open to Decimal Systems Pvt. Ltd. to show as to whether any payment is already made or not.

25. Both the applications are disposed of accordingly. Order accordingly.