

(2011) 11 DEL CK 0033
In the Delhi High Court
Case No : Co. Petition 50 of 1984

S. Chand and Co.

APPELLANT

Vs

M/s Bharat Carpets Ltd.

RESPONDENT

Date of Decision : 24-11-2011

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 391, 392, 393(1), 394, 428
Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 — Regulation 27(1), 28(1)
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 — Section 2

Citation : (2012) 171 CompCas 367

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Rajiv Bahl, Advocate for Official Liquidator, Ms. Prema Priyadarshini, Advocate for Propounders, Mr. A.K. Thakur, Advocate with Mr. Aqub Ali, Advocate for applicant, Mr. Akhilesh Gupta, Bharat Gupta, Advocate for Objector, Mr. R.N. Gupta and Guptajee Charitable Trust, Mr. S.M. Saxena, Advocate for Mr. Puneet Gupta ., for the Respondent

Final Decision : Allowed

Judgement

Manmohan, J.

CO. APPL. 1876/2011 IN CO. PET. 50/1984

1. Present application has been filed by the propounders of the Scheme u/s 536(2) of the Companies Act, 1956 (for short "Act") read with Rule 9 of the Companies (Court) Rules, 1959 seeking validation of purchase of shares after the winding up order dated 18th May, 1987. It has further been prayed in the application that the Official Liquidator be directed to make necessary amendment in the Company's Register of Members.

2. Mr. S.M. Saxena, learned counsel for Mr. Puneet Gupta and five others,

submits that the contributories have no right to sell the shares of company in liquidation as by virtue of Sections 391 to 392 of the Act, only by way of a Scheme of Arrangement, can the contributories transfer their shares.

3. Mr. Saxena further submits that Court's permission should have been sought prior to the execution of the Memorandum of Understanding between the applicants-propounders and the objector/transferor.

4. Mr. Saxena further points out that his clients have already revoked the transfer as the same was void being violative of Section 536(2) of the Act and further as adequate consideration had not been paid to the transferors. He states that the price of the shares paid by the applicant- transferee is extremely low. He points out that some of the shares have been sold by a lady who is beyond 80 years of age.

5. He lastly submits that as the applicants-propounders are not shareholders or creditors of the company and therefore, they have no right to maintain the Scheme of Arrangement.

6. Mr. Bharat Gupta, learned counsel for Mr. R.N. Gupta states that the transfer agreements executed by his clients are void as they have not received any consideration from the applicant transferee. He points out that in the present application, the applicantspropounders has sought transfer of 20350 shares of late Mr. B.N. Gupta held by Mr. R.N. Gupta as his legal heir and 3500 shares held by Guptajee Charitable Trust.

7. Mr. A.K. Thakur, learned counsel for Mr. Akhilesh Gupta candidly states that his client has not revoked the Memorandum of Understanding by virtue of which shares have been transferred to the applicants/propounders. He, however, states that as the company in liquidation was a listed company since incorporation, SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997 (for short "SEBI Takeover Regulations, 1997") apply and, therefore, the present share transfer agreements insofar as they are inconsistent with the SEBI Takeover Regulations, 1997are void.

8. He further submits that by virtue of Section 393(1)(a) of the Act, notice of the meeting to consider the Scheme of Arrangement should be issued to each of the shareholders existing as of today on the Register of Members.

9. At the outset, Ms. Prema Priyadarshini, learned counsel for the applicants-propounders states that the applicants-propounders are bona fide purchasers having purchased the shares of company in liquidation for valuable consideration. She states that the applicantspropounders are entitled to have the share transferred in their names as they have purchased the same in good faith with intent to revive a company in liquidation.

10. She points out that nearly all the objectors, namely, Mr. R.N. Gupta, Mr. Puneet Gupta and Mr. Akhilesh Gupta belong to one family who have filed their objections five years after execution of share purchase agreement/MoU/deeds of

arrangement dated 10th March, 2006. She states that the objections filed are not only belated but also malafide as the same have been filed only to extort more money from the applicants-propounders under threat of scuttling the revival scheme pending before this Court.

11. Ms. Prema Priyadarshini submits that shares are personal property of a contributory and there is no specific prohibition in the Act restraining a contributory from selling its shares.

12. She also submits that the applicants have the locus standi to file the present application for validation of transfer of shares as well as to file a revival scheme as, according to her, the applicantspropounders are de facto deemed contributories. In this connection, she relies upon Section 428 of the Act which defines the word "contributory". The said Section reads as under:-

428. Definition of "contributory"-The term "contributory" means every persons liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid up; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.

13. According to Ms. Prema Priyadarshini, share purchase agreement/MoU/deeds of arrangement dated 10th March, 2006 executed between the original shareholders and the applicants- propounders is a composite agreement for purchase of shares and for settlement of liabilities of the company in liquidation. She submits that by virtue of the aforesaid documents, the applicants-propounders have stepped into the shoes of the contributories. In this connection, she relies upon the agreement dated 10th March, 2006 executed between the petitioning-creditor and the applicants- propounders wherein petitioning-creditor gave up all their claims against the company in liquidation and assigned all their rights to the propounders including the present applicants. She points out that at that stage Mr. R.N. Gupta was a co-propounder along with M/s. UCC Builders Pvt. Ltd. and M/s. Maharani Paints Pvt. Ltd. She also relies upon the Deed of Arrangement dated 10th March, 2006 executed between Mr. R.N. Gupta and his wife who are the present objectors wherein Mr. R.N. Gupta and his wife are referred to as former management and the present applicants are referred to as proposed management. Under this Deed of Arrangement, the former management had unequivocally and irrevocably agreed to amongst other to sell the shares of the company in liquidation to the proposed management along with all transfer forms and indemnity. Consequently, Ms. Prema Priyadarshini states that it does not now lie in the mouth of Gupta family members to say that applicantspropounders are not competent to either file the present application or a revival scheme.

14. Ms. Prema Priyadarshini submits that the intent of Section 536 of the Act is not to validate the transfer of shares prior to execution of the Agreement to sell.

She points out that normally a transferee will approach a Company Court for transfer of shares only after completion of all formalities including execution of the agreement to sell.

15. Ms. Prema Priyadarshini contends that present objectors had entered into the share purchase agreement/MoU/deeds of arrangement with "open eyes". According to her, in the present case, the executed contract between the parties is complete in all respects. She points out that pay orders against the MoU dated 10th March, 2006 had been received by Mr. R.N. Gupta as legal heir of Mr. B.N. Gupta and as Trustee of Guptajee Charitable Trust. In this connection, she refers to copy of MOU and Share Certificates of Guptajee Charitable Trust at pages 159-227 of present application and indemnity bond and receipt at pages 706-708 of the present application confirming the receipt of consideration by Mr. R.N. Gupta. She also points out that after receipt of full consideration, Mr. R.N. Gupta had handed over the original share transfer certificate to the applicants-propounders which is apparent from the photocopies of the same filed on record by the applicants at pages 709 to 884.

16. She submits that SEBI Takeover Regulations, 1997 do not apply to the company in liquidation as at the moment it is not a listed company. In this connection, she refers to the definition of "target company" in Section 2(o) of the SEBI Takeover Regulations, 1997 which reads as under:-

2. Definitions

(o) "target company" means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired;

17. She further states that Delhi Stock Exchange had suspended trading in the shares of company in liquidation in July, 2001.

18. In view of the aforesaid, Ms. Prema Priyadarshini prays that this Court may validate the transfer of shares in favour of the applicants-propounders and in cases where share certificates are not accompanied with the transfer deed, direct the Official Liquidator to transfer the said shares in the name of the applicants-propounders on the basis of share purchase agreement/MoU. She further prays that where shares certificates are not available, a direction be given to Official Liquidator to issue share certificates in the name of applicants-propounders.

19. Mr. Rajiv Bahl, learned counsel for the Official Liquidator has drawn my attention to the reply-affidavit filed by the Official Liquidator to the present application. In the said reply, it has been averred as under:-

4. That Propounders of the Scheme have stated in their application that they had duly purchase 223600 Nos (63.89%) of equity shares out of Rs. 3,50,000 equity shares of BCL of Rs. 10/- each fully paid up. Propounder M/s UCC Care Pvt. Ltd. (Formerly known as UCC Builders Pvt. Ltd.) holds 175650 Nos. (50.19%) shares of BCL and M/s. Maharani Paints Pvt. Ltd. holds 47950 (13.70%). The details of shareholding of Propounders of the scheme is given in the tabular form which is

annexed with the application as Annexure "A".

5. That propounders of the scheme have annexed with their application details of the purchase of equity shares supported by several documents such as Memorandum of Understanding/Deed of Arrangement, Share purchase agreements, share transfer forms, share certificates, affidavits, receipts and Indemnity bond.

6. That every documents annexed with the application with regard to the purchase of equity shares by the Propounders of the scheme appears to be legal and proper fulfilling the mandatory requirements of transfer of purchased equity shares.

7. That this Hon"ble Court has power to validate the transfer to shares referred to in the paragraphs of Application in favour of Applicants.

(emphasis supplied)

20. Having heard the parties at length, this Court is of the view that the primary issue that arises for consideration in the present proceedings is the scope and ambit of Section 536(2) of the Act. The said Section reads as under:-

536. Avoidance of transfers, etc. after commencement of winding up-.

Xxxx xxxx xxxx xxxx

(2) In the case of a winding up by [the Tribunal], any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall [unless the Tribunal] otherwise orders, be void.

21. The Calcutta High Court in In Re: J. Sen Gupta Private Ltd., (In Liquidation), while dealing with Section 536(2) of the Act 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."

22. The Gujarat High Court in *The Sidhpur Mills Company Limited*, (1987) 1 Comp. L.J. 71 (Guj.) has stated as under:-

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 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).

23. Keeping in view the aforesaid judgments as well as the explicit language of Section 536(2) of the Act, this Court is of the view that it 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. In the opinion of this Court, while validating a share transfer agreement, the Company 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. But, however, before doing so the Company Court must be satisfied that there was clear intent on the part of the purchasers to transfer the shares in question.

24. In fact, a bare reading of Section 536(2) of the Act itself makes it abundantly clear that it permits transfer of shares and alteration in the status of shares after a winding up order has been passed, provided the permission of the Company Court is obtained. This Court in *H.L. Seth Vs. Wearwell Cycle Company (India) Ltd. and Others*, has held that the Company Court has the jurisdiction u/s 536(2) of the Act to validate the transfer of shares which take place after the winding up order has been passed as the winding up process is still continuing and the company in question has not yet been dissolved. Consequently, in the present case, the contributories without entering into a scheme of arrangement can still sell their shares.

25. Further, in the opinion of this Court, the Act does not mandate that sanction of the Company Court should be obtained prior to execution of an agreement to sell. If the law were to be interpreted, as submitted by Mr. Saxena, then in many cases, the Court's permission would prove to be an exercise in futility as the parties may not subsequently enter into a binding agreement. There is nothing in

the Act which prohibits the Company Court from granting post facto sanction.

26. Moreover, in the present case, the company in liquidation went to liquidation in 1984 and the final winding up order was passed on 18th May, 1987, that is much prior to coming into force of SEBI Takeover Regulations, 1997. In the opinion of this Court, as respondent-company has been in liquidation for the last 27 years, there is no question of its shares being listed on any recognised stock exchange on the date when the alleged sale agreement/MoU/deed of arrangement were executed. This Court can also take judicial notice of the fact that trading at Delhi Stock Exchange has been suspended for last nearly ten years.

27. In any event, Chapter VII of the SEBI (Delisting of Equity Shares) Regulations, 2009 (for short "SEBI Regulations, 2009") while dealing with small and de-listed companies like the present one, states that in case of pendency of a winding up proceeding, its shares shall be dealt with in accordance with the 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.

28. In view of the aforesaid SEBI Regulations, 2009, this Court is of the opinion that SEBI Takeover Regulations, 1997, do not apply to the present transfer of shares.

29. In fact, after hearing the parties at length this Court is of the view that the present objectors who were the initial promoters and their family members of the company in liquidation had entered into share purchase agreement/MoU/deed of arrangement with the present applicants-propounders in the year 2005-2006, at a time, when the liabilities were far in excess 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 with the applicants-propounders by virtue of which they agreed to transfer their shares to the applicants-propounders for valuable consideration. In the opinion of this court, there was no

misrepresentation on the part of the applicants-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 late Mr. B.N. Gupta) former Managing Director of company in liquidation.

30. It is pertinent to mention that present set of objectors, namely, Mr. R.N. Gupta, Mr. Puneet Gupta and Mr. Akhilesh Gupta had filed applications in this Court bearing CA Nos. 376-379/2006 and 593/2006 seeking permission of this Court to convey their shares in the company in liquidation to the present applicants-propounders. The relevant portion of one such application filed by Mr. Puneet Gupta is reproduced herein below -

4. Applicant has consented to sell his share holding in Bharat Carpets Limited to M/s. UCC Builders" (directly or to its designated organization), on a consideration of agreed percentage of the face value of shares held by him. Likewise M/s UCC Builders (directly or to its designated organization) have agreed to purchase the same by virtue of agreement dated 20-02-2006. Anx-1.

5. In consideration of the payment by "UCC Builders" of the sum of Rs. 29450/- (Rupees Twenty Nine Thousand Four Hundred Fifty Only) only representing the compromise money owing on account of Principle/interest/cost/expenses and claims whatsoever whether of shares/deposit or otherwise against the Company.

(a) Applicant has agreed to discharge/discharged the Official Liquidator/Principal debtor/sureties not discharged of all principle/interest/cost/expenses and claims whatsoever whether of shares/deposit or otherwise against the Company against all amounts at.

(b) present lying with by the Official Liquidator or future acquisitions.

(c) Seeks permission of the Hon"ble Company Court for payment to him in (a) above.

(d) Seeks permission of the Hon"ble Company Court for transfer of shares in the name of "UCC Builders" or their nominee.

6. The applicant submits that share transfer Form along with share certificates in respect of 3700 equity shares of Rs. 10/- each for transfer of said shares in favour of the transferee have been given to the said UCC Builders as the consideration has already been received by the applicant.

Xxxx xxxx xxxx xxx

PRAYER:

It is prayed that the property in the said shares be conveyed by the Official Liquidator unto the transferee UCC Builders Pvt. Ltd. or its designated organization. The amount of consideration received in lieu of the deposit may be treated as consent for the proposed application u/s 466/391 to 394 of the Companies Act, 1956.

31. The affidavit in support of the said application reads as under:-

AFFIDAVIT IN AFFIRMATION

I, Puneet Gupta son of Shri R.N. Gupta C-152, Sector50, Noida (U.P.) do hereby solemnly affirm and say

1. That I am authorized to sign the present application.

2. That the contents of para 1 to 6 of the application are true to the best of knowledge, information and/or belief and such statements contains full accurate position and nothing has been withheld.

DEPONENT

VERIFICATION

I solemnly affirm this 21st day of March, 2006 that the contents of the affidavit are true to the best of my knowledge and belief and nothing contained therein is false or withheld.

New Delhi

DEPONENT

32. The MoU dated 10th March, 2006 executed by Mr. Puneet Gupta is also reproduced herein below -

4. "Puneet" has consented to sell his share holding in Bharat Carpets Limited to "UCC Builders" (directly or to its designated organization), on a consideration of agreed percentage of the face value of shares held by him. Likewise constituents have agreed to purchase the same.

5. "UCC Builders" have agreed to pay the amount of Rs. 29450/- lump sum, wherein

Now the parties collectively and individually in consideration of the mutual covenants and undertakings contained in this MOU, agreed as under:

1. In consideration of the payment by "UCC Builders" of the sum of Rs. 29450/- (Rupees Twenty Nine Thousand Four Hundred Fifty Only) (Consisting of Rs. 10950/- on account of purchase of shares @ Rs. 5/- per share and Rs. 18500/- being 15% of the deposit amount) representing the compromise money owing on account of Principle/interest/cost/expenses and claims whatsoever whether of shares/deposit or otherwise against the Company (which "Puneet" hereby acknowledges as having received) Anx-1.

"Puneet" hereby irrevocably

(a) Discharges the Official Liquidator/principal debtor/sureties not discharged of all principle/interest/cost expenses and claims whatsoever whether of shares/

deposit or otherwise against the Company against all amounts at present lying with by the Official Liquidator or future acquisitions.

(b) Seeks permission of the Hon"ble Company Court for payment to him in (a) above. Anx-2.

(c) Seeks permission of the Hon"ble Court for transfer of shares in the name of "UCC Builders" or their nominee. Anx-2.

2. "Puneet" agrees to provide all assistance required by the "UCC Builders" for carrying out the intentions in 1 above and upon non performance of the MOU for any reason whatsoever shall indemnify and keep indemnified "UCC Builders" or their nominee/s against all principle/interest/cost/expense and claims whatsoever whether of shares/deposit or otherwise in the sum of Rs. 29450/-.

33. The receipt of consideration executed by Mr. Puneet Gupta is also reproduced herein below -

RECEIPT

Received with thanks a sum of Rs. 29450/- (Rupees Twenty Nine Thousand Four Hundred Fifty Only) vide Cheque/Demand Draft No. 139734 dated 10/3/06 drawn on ICICI from M/s. UCC Builders Pvt. Ltd. representing the compromise money owing on account of Principle/interest/cost/expenses and claims whatsoever whether of shares/deposit or otherwise against the Company.

34. Subsequent to execution of sale purchase agreement/MoU/deed of arrangement and filing of the present application, the applicants-propounders settled the dispute with all the secured creditors, namely, HFC and UCO Bank by entering into one time settlement with them. While Rs. 110 lacs was paid to HFC, Rs. 183 lacs was paid to UCO Bank by the applicants-propounders. Thereafter claims were also invited from unsecured creditors and applicants-propounders have subsequently 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.

35. On a perusal of the paper book, it transpires that it is only after the debts of the secured creditors had been settled that the members of the Gupta family had second thought with regard to share purchase agreement/MoU/deed of arrangement executed by them. On 20th April, 2010 the present objectors withdrew the applications being CAs 376-379/2006 filed by them with liberty to re-file the said applications for same relief in case they were so advised in future. Though the aforesaid applications were dismissed as withdrawn, it is pertinent to mention that in the said CAs 376-379/2006 and 593/2006, the present objectors had not only acknowledged the factum of execution of share agreement/MoU/deed of arrangement, but had also had accepted the fact that they had been paid valuable consideration and further that the said consideration was adequate.

36. In the opinion of this Court, in view of the aforesaid applications being CA

Nos. 376-379/2006 and 593/2006, the objectors are today estopped from contending that they had either received no consideration and/or the consideration mentioned in share purchase agreement/MoU/deed of settlement is inadequate.

37. In any event, it is settled law that objectors cannot wish away a share purchase agreement/MoU/deed of arrangement by merely stating that they are void documents. They cannot rest content by alleging that the documents have no efficacy in law and must be ignored. If it is their case that these documents have been obtained by fraud or mis-representation by suppression of material facts or any other reason, they must have the agreements set aside through Court and unless they do that they cannot go behind the agreement and ignore them as void documents. [See: Subodh Kumar Gupta Vs. Shrikant Gupta and Others,].

38. However, to ensure that the applicants-propounders do not indulge in asset stripping, it is directed that the applicantspropounders would neither sell their shareholding nor the land owned by the company in liquidation for a period of five years from the date of revival of the company, if any.

39. As this Court is of the view that the share transfer agreement/MoU/deed of arrangement executed between the objectors/other transferors and the applicants-propounders are bona fide transactions for the benefit of the company in liquidation, it validates the transfer of shares as per Annexure "A" at pages 19 to 21 of the present application in favour of the applicants-propounders. The Official Liquidator within three weeks from today is directed to enter the names of the applicants-propounders in the Register of Members even for those shares from whom either original share scripts have not been received or where share transfer forms have not been received. In case the Official Liquidator is not in possession of the original Register of Members, he is directed to open a new Register of Members.

40. However, it is clarified that if any original shareholder wishes to challenge the factum of share transfer agreement, they shall be entitled to raise a dispute prior to filing of the second motion petition. It is clarified that the aforesaid liberty has been granted so as to facilitate a title dispute by any party who may show that it had not received notice of the present application.

41. It is further directed that individual notices to the shareholders of the respondent-company existing on the Register of Members after a period of four weeks be issued by the propounders of the scheme of arrangement. To facilitate, the issuance of said notices, the meetings of shareholders and creditors scheduled for 17th December, 2011 is deferred to 11th February, 2012. The venue and time of the meeting shall remain the same.

42. With the aforesaid observations, present application stands allowed.

Co. Pet. 50/1984 & CO. APPLS. 410/2009, 2317- 2326/2011, 2328-2330/2011

List on 2nd December, 2011.