
(2012) 04 DEL CK 0162
In the Delhi High Court
Case No : CO. App. 28 of 2012

Smt. Benu Berry		APPELLANT
	Vs	
Jvg Finance Ltd. (Under Lqdn.)		RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:

Companies Act, 1956 — Section 531A, 536(2)
Transfer of Property Act, 1882 — Section 53A

Citation : (2013) 113 CLA 515 : (2012) 172 CompCas 546

Hon'ble Judges : A.K. Sikri, Acting C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Prabhjit Jauhar and Mr. Karan, for the Appellant; Rajiv Bahl, Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the order dated 23.01.2012 of the Company Judge dismissing the Company Appeal (SB) 37/2009 preferred by the appellant against the order dated 17.03.2006 of the Committee constituted by the learned Company Judge vide order dated 22.07.2004 in Company Petition No. 265/1998 to verify the claims preferred before the Official Liquidator relating to the immovable properties of M/s JVG Finance Ltd. (under liquidation). The appellant had preferred a claim with respect to Flat bearing No. 202, admeasuring 882 sq. ft. on the Second Floor in B-Wing of Panch Mukhi Cooperative Housing Society Ltd. on the plot of land bearing C.T.S. No. 1202/A of Yari Road, Panch Marg opposite Fisheries Institute, Versova village, Andheri (West), Mumbai-400061.

2. It is not in dispute that the flat aforesaid was owned by and in possession of the company in liquidation. The company was ordered to be wound up on 05.06.1998 and the Official Liquidator was appointed as the Provisional Liquidator of the company and directed to take charge of the assets of the company.

3. The appellant claims, that the company in liquidation had engaged one Smt. Anita Jain, carrying on the business of an advertising agency in the name and style of Flying Colours, for its promotional work and the company in liquidation owed a sum of Rs. 1.25 crores to the said Smt. Anita Jain for the work done for the company in liquidation and in part payment of which cheques for Rs. 30,00,000/- issued had also been dishonored ;that the company in liquidation, to clear the part of the debt owed by it to the said Smt. Anita Jain vide deed dated 23.03.2001 agreed to sell the said flat to the said Smt. Anita Jain; that pursuant to the said "sale", the Housing Society recognized Smt. Anita Jain as the bonafide owner of the flat in question; that Smt. Anita Jain vide Agreement to Sale dated 13.12.2001 agreed to sell the said flat to the appellant; that pursuant to the said "sale", the flat stood mutated in the name of the appellant; that the appellant since then i.e. since June, 2002 has been paying the Housing Society's charges and other dues of the said flat; that it was only in the month of September, 2003 that the Official Liquidator for the first time intimated the order aforesaid of liquidation and attempted to take possession of the flat and whereupon the appellant with the support of Smt. Anita Jain made the claim before the Committee aforesaid.

4. The Committee vide its order dated 17.03.2006 (supra) dismissed the claim of the appellant observing/finding/holding:

(i) that while Smt. Anita Jain claimed to have paid Rs. 1,77,71,888/- to various publications in December, 1996, January and February, 1997 and April to August, 1997 on behalf of the company in liquidation, the Statement of Account of the company in liquidation showed that a sum of Rs. 1,86,65,603/- had been paid to M/s Flying Colours between 05.11.1996 to 25.03.1997;

(ii) that the payments from the company in liquidation to M/s Flying Colours / Smt. Anita Jain were amounted more than claimed by Smt. Anita Jain to be due from the company in liquidation;

(iii) that the records of company in liquidation further showed that Smt. Anita Jain have been receiving regular payments of her dues from the company in liquidation;

(iv) that thus the dues from the company in liquidation to Smt. Anita Jain were not clearly established and the transaction in favour of Smt. Anita Jain Could not be said to be a bonafide one;

(v) that Smt. Anita Jain had closed the business of advertising agency in or about January, 1999 due to non payment of outstanding bills by the company in liquidation;

(vi) that even if the version of the appellant was to be believed, the same amounted to the company in liquidation giving a preferential treatment to one of the creditors i.e. Smt. Anita Jain;

(vii) that the documents executed by the company in liquidation in favour of

Smt. Anita Jain with respect to the said flat were without any date and not registered and the stamp thereon was of 12.03.2002;

(viii) that the appellant in support of her plea of having paid the price of Rs. 22,00,000/- for the said flat to Smt. Anita Jain had produced a letter of the Citi Bank qua clearance of cheques from the account of the appellant to the account of Smt. Anita Jain for Rs. 9,00,000/- and Rs. 10,71,975/- on 14.02.2002 and 16.02.2002 respectively;

(ix) that the Agreement to Sell in favour of the appellant was on a stamp paper bearing the date of 31.10.2001; thereafter on 14.02.2002 i.e. one day after the transaction in favour of Smt. Anita Jain the balance stamp duty was paid;

(x) the aforesaid also showed collusion between the appellant, Smt. Anita Jain and the company in liquidation;

(xi) that after the company went into liquidation on 05.06.1998, no transfer of its assets could have been made;

(xii) that thus the transfer of the flat of the company in liquidation was after the order of liquidation and the transfer was void;

(xiii) that even otherwise there was no registered document of transfer of title;

(xiv) that the transaction was aimed at saving the flat from the hands of the official liquidator;

(xv) all the aforesaid also showed that the transfer in favour of the appellant was not fair and genuine;

(xvi) that in case the appellant felt that she had been cheated by Smt. Anita Jain, she could take her remedy in that regard.

The Committee thus concluded that the alleged transfer of the flat in favour of Smt. Anita Jain was not bonafide; even if it was bonafide, it amounted to preferential treatment and thus could not be recognized; the transaction was to deprive the general public by depriving official liquidator from realizing the assets of the company in liquidation.

5. The learned Single Judge has dismissed the appeal preferred by the appellant against the order aforesaid of the Committee, relying upon the detailed orders dated 23.08.2011 and 01.12.2011 passed in Company Application No. 1633/2011 and Company Application No. 2349/2011 respectively. Vide the said orders, it was held:

(a) that the Reserve Bank of India (RBI) had vide order dated 18.10.1997 prohibited the company in liquidation from accepting deposits or alienating any assets without prior written permission of the RBI, except for the purpose of repayment of deposits;

(b) that this Court also vide order dated 05.06.1998 had restrained the company

in liquidation, its Directors, servants and agents from disposing of, alienating and / or parting with possession of any of the assets of the Company;

(c) that the sales / transfer / alienation in violation of the aforesaid orders were to defeat the rights of creditors of the company in liquidation;

(d) it is settled law that the Court will not allow the assets of a company in liquidation to be disposed of at the pleasure of the Company and allowing such a sale / alienation will be violative of the fundamental principle of equality amongst the creditors;

(e) execution of any Sale Deed in disobedience of interim order is a nullity - reliance in this regard was placed on Krishna Kumar Khemka Vs. Grindlays Bank P.L.C. and others, , Satyabrata Biswas and others Vs. Kalyan Kumar Kisku and others, and on Surjit and others Vs. Harbans Singh and others etc. etc., besides on judgments of various High Courts including of this Court in Praveen Garg Vs. Oriental Bank of Commerce and Another,

(f) that the discretion vested in the Court u/s 536(2) to say that the transaction is not void ought to be exercised when the transaction was for the benefit of and in the interest of the company or for keeping the Company going or keeping things going generally - reliance in this regard was placed on In Re: J. Sen Gupta Private Ltd., (In Liquidation), and on In Re: The Sidhpur Mills Company Ltd. 1987 (1) CLJ 71 Gujarat;

(g) that once a winding up order is passed, the creditors acquire a right to have the assets of the Company realized and distributed among them pari passu and any single creditor cannot be allowed to steal a march over the other creditors of the company - reliance in this regard was placed on J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others,

6. This appeal came up before us first on 23.03.2012 when after substantial hearing, we enquired whether there was any relationship between the ex-management of the company in liquidation particularly Sh. V.K. Sharma earlier the Managing Director of the company in liquidation and Smt. Anita Jain. The counsel for the appellant as well as the counsel for the official liquidator appearing on advance notice took time to enquire in this regard.

7. When the matter was taken up today for hearing, the counsel for the appellant categorically stated that enquiries had been made and he was instructed to state that there was no relationship between Smt. Anita Jain and Sh. V.K. Sharma. However subsequently when the counsel for the Official Liquidator appeared, he informed that Sh. V.K. Sharma on enquiry had informed that he had got married to Smt. Anita Jain in the year 2005. The counsel for the appellant could not dispute the said fact. On enquiry as to why he had made a categorical statement that there was no relationship, he states that he was not aware of the said fact. However, what we find disturbing is that had the appellant not been able to find about the relationship, the statement that "on enquiry it had been found that

there is no relationship" ought not to have been made.

8. Be that as it may, we have otherwise looked into the matter. The counsel for the appellant has argued that the learned Company Judge erred in not considering that the appellant was a bonafide purchaser for value and in proceeding on the premise that the transaction was void merely for the reason of having been effected after the order of winding up. It is contended that it was incumbent upon the Company Judge to record a finding whether Smt. Anita Jain was a bonafide creditor of the Company or not and that the preference shown to Smt. Anita Jain as a creditor could have been held to be bad only if found to be fraudulent and of which there is no finding. It is contended that the subject transaction is in good faith and for valuable consideration within the meaning of Section 531A and 536 (2) of the Companies Act, 1956 and is not a nullity. It is further argued that the appellant had paid the then prevalent market price for the flat. The appellant in this regard has also filed an additional affidavit along with documents being the Sale Deeds of the other flats and valuation reports with respect to the property.

9. The purported transfer of the flat aforesaid in the present case is admittedly after the order of winding up and appointment of provisional liquidator. Upon such happening the ex-management of the Company which is alleged to have transferred the flat, lost any right to act on behalf of the Company or to transact any of the properties of the Company. The transfer thus claimed by the appellant has not been affected by any person authorized to do so. Section 531A of the Companies Act deals with transfers within a period of one year before the presentation of a petition for winding up and has no application to the facts of the present case. Section 536(2) declares transfers of the property of the company after the commencement of winding up as "void" unless otherwise ordered.

10. The question which thus arises is as to in what cases the Court should order the transfer effected (of the property of the company), after the commencement of winding up as otherwise then void. The learned Company Judge in this regard has already referred to J. Sen Gupta Private Ltd. (In Liquidation) (supra) and The Sidhpur Mills Ltd. (supra). We find that the Supreme Court in Pankaj Mehra and Another Vs. State of Maharashtra and Others, o have laid down the, "test of whether the transfer was under compulsion of circumstance or other commercial compulsion to enable the company in liquidation to run its business". We further find a Division Bench of the Bombay High Court in Shri Laxman Yeswant Prabhudesai Vs. NRC Ltd. (2010) 2 Comp. LJ 380 to have, after noticing a large volume of case law on the subject deduced that the transaction undertaken by company in liquidation can be validated if u/s 536(2) under compulsion of circumstances, in order to save or protect the company, provided evidence is produced about such compulsion; it was further held that the assets of the company (in liquidation) cannot be disposed of at the mere pleasure of the company and only such disposal shall be validated which is found to be for the

benefit and interest of the company; it is for enabling the company to continue as a going concern and to protect the interest of the shareholders and creditors, that power of validation u/s 536(2) should be exercised. We also find a Division Bench of this Court to have in H.L. Seth Vs. Wearwell Cycle Company (India) Ltd. and Others, observed the test to be applied for validating a transaction in exercise of powers u/s 536(2) is of "good faith in the ordinary course of trade, for the benefit of the company". Similarly in Reserve Bank of India Vs. Crystal Credit Corporation Ltd., the following principles for exercise of powers u/s 536(2) were laid down.

(i) Transactions bona fide entered into and completed in the ordinary course of trade must be protected.

(ii) If the disposition is made for the purpose of preserving the business as a going concern, then also the discretion of the court must be exercised.

(iii) A disposition must not be validated merely because the party bona fide entered into the transaction.

(iv) Knowledge of the presentation of the winding up is immaterial.

A reference with benefit in this regard may also be made to M.L. Gupta and Another Vs. Ceat Financial Services Ltd., and to Kamani Metallic Oxides Ltd. V. Kamani Tubes Ltd. (1984) 56 Co. Cases 19 (Bom.) (DB).

11. Applying the aforesaid test, it can by no stretch of imagination be said that transfer of subject flat, after the order of winding up and in violation of the order restraining such transfer was under compulsion or for the benefit of the company in liquidation. The learned Company Judge has thus rightly rejected the claim u/s 536(2).

12. We are further of the opinion that no case for ordering otherwise, within the meaning of Section 536(2) of the Companies Act is made out for the following reasons:

(i) The Agreement to Sell executed by the company in liquidation in favour of Smt. Anita Jain bears the date of payment of stamp duty of 13.02.2002. The same describes the company in liquidation as the owner of the flat aforesaid and there under the Company has agreed to sell the said flat to Smt. Anita Jain for a total sale consideration of Rs. 20,00,000/- which is shown to be adjusted against Rs. 57,57,142/- recorded therein as part amount due from the company in liquidation to the said Smt. Anita Jain; the company in liquidation has also under the said Agreement handed over possession of the said flat. The Registration Act, 1908 was amended with effect from 24.09.2001 i.e. prior to the said Agreement and after the said amendment documents containing contract to transfer for consideration any immovable property for the purposes of Section 53A of the Transfer of Property Act are required to be compulsorily registered. The counsel for the petitioner upon being confronted with the same has contended that the subject flat is a Housing Society flat and it is only a share in the Society which is

transferred and which share is a movable property and does not require compulsory registration. It is contended that in Mumbai, the Housing Society flats are transferred by transfer of share in the Housing Society and which share is movable property and thus no registered document is required. However the Agreement for Sale is not of the transfer of share in the Housing Society but of transfer of flat. The said argument is thus of no avail;

(ii) The Agreement for Sale executed by Smt. Anita Jain in favour of the appellant bears the date of payment of stamp duty of 14.02.2002 i.e. of the very next date when the stamp duty was paid on the agreement between the company in liquidation and Smt. Anita Jain. The said Agreement is however purported to be ante dated on 13.12.2001. However the payments which the appellant claims to have made to Smt. Anita Jain was made only on 14.02.2002 and not on 31.10.2001 as sought to be portrayed. This alone shows collusion and an attempt to show the Agreement to be of a date different than it is borne out to be of;

(iii) The aforesaid also shows that there was in fact one transaction only of transfer of the flat from the company in liquidation to the appellant and Smt. Anita Jain was only introduced in between to give credence; the appellant having joined in such anti-dating, cannot be said to have acted bonafide;

(iv) The Agreement to Sell in favour of the appellant is again unregistered though again not of transfer of share in the Housing Society but of the flat in part performance;

(v) All the aforesaid goes against the bonafides of the appellant;

(vi) Though the counsel for the appellant has laid a lot of stress on documents obtained from the Housing Society but the same are clearly vague;

(vii) The Share Certificate of the Society has not been produced;

We therefore do not find any merit in this appeal and dismiss the same. Though we have found the appellant to be in collusion with the company in liquidation and Smt. Anita Jain but we refrain from imposing any cost on the appellant.