

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 1st May , 2012

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CO.APP. No.24/2012

NATIONAL INSTT. OF TECHNOLOGY TRUST ...Appellant

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mohit Singla, Adv.

Versus

OFFICIAL LIQUIDATOR

..... Respondent

Through: Mr. Rajiv Bahl, Adv.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW,J

1. This appeal under Section 483 of the Companies Act, 1956 impugns the order dated 23rd January, 2012 of the learned Company Judge dismissing Co.Appl. No.732/2008 and Co.Appl. No.341/2009 preferred by the appellant in Co. Pet. No.75/2002, for winding up of M/s Koshika Telecom Ltd.

2. The petition for winding up of M/s Koshika Telecom Ltd. was filed on 8th February, 2002, Provisional Liquidator was appointed and the final winding up order passed on 2nd August, 2005.

3. The appellant claims to have entered into an agreement dated 30th September, 2002 with the Company in liquidation for purchase of land *ad-measuring* 30,350 sq. ft. situated at Microware Tower, Hardoi Road, Lucknow, Uttar Pradesh, of the Company in liquidation. Co.Appl.

No.732/2008 was filed by the appellant for direction to the Official Liquidator to release the said land and to execute Sale Deed in respect thereof in favour of the appellant; alternatively permission to file a suit for specific performance of the agreement to sell dated 30th September, 2002 against the Company in liquidation was sought. Co. Appl. No.341/2009 was filed for stay during the pendency of the Co.Appl. No.732/2008 of sale of the said land of the Company in liquidation by the Official Liquidator. The appellant claims to have paid the entire sale consideration of Rs.47 lacs to the Company in liquidation, in or around November, 2002.

4. The learned Company Judge has dismissed the application aforesaid solely on the ground that the agreement to sell relied on by the appellant was of a date after the filing of the winding up petition and was thus unenforceable under Sections 531 & 531A of the Act. It was further held that the ignorance, even if any of the appellant, of the pendency of the winding up petition was of no avail and would not validate the transaction in question.

5. This appeal came up first before us on 16th March, 2012. Finding the agreement to sell relied on by the appellant to be unregistered, it was put to the senior counsel for the appellant as to how the same was enforceable. Attention of the senior counsel for the appellant was invited to the amendment in the State of Uttar Pradesh, where the land is situated, to the Registration Act, 1908 making registration of such an agreement to sell compulsory. The senior counsel had then sought an adjournment to study the matter.

6. The senior counsel for the appellant has today been unable to controvert that:-

- (i) the land being situated in the State of Uttar Pradesh, the law as applicable in Uttar Pradesh would apply;
- (ii) as per the law in Uttar Pradesh, the agreement to sell was required to be compulsorily registered and is not so registered;
- (iii) that an unregistered agreement to sell cannot even be received as evidence of a contract in a suit for specific performance, as per amendment in State of Uttar Pradesh, to Section 49 of the Registration Act.

7. The senior counsel for the appellant however contends, firstly that what the appellant is seeking is a direction for execution of the Sale Deed and which can be executed even in the absence of an agreement to sell; it is only in the alternative that permission to sue for specific performance is sought. Secondly it is submitted that even if the agreement to sell, for the reason of being unregistered, cannot be received as evidence in a suit for specific performance, the appellant can lead other evidence of such an agreement.

8. We are unable to find any merit in the first contention aforesaid. The claim of the appellant for execution of the sale deed in its favour with respect to the said land is predicated on the agreement to sell. Once it is found that there is no legal, valid agreement to sell, the appellant cannot independently thereof seek a direction to the Official Liquidator to sell to itself any property of the Company in liquidation and which are to be sold by public auction for discharging the debts of the Company in liquidation.

9. The second argument aforesaid of the senior counsel for the appellant is also contrary to the very tenets of the Indian Evidence Act, 1872 and the Registration Act, 1908. Section 91 of the Evidence Act prescribes that when the terms of a contract or any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract or disposition of property except the document itself. Thus once the Registration Act as applicable to the State of Uttar Pradesh prescribes an agreement to sell to be in writing and registered, the only evidence which can be given of such an agreement is the registered agreement itself and none other. The appellant thus cannot be heard to urge that notwithstanding the agreement to sell being not registered it is entitled to give other evidence of such an agreement. Section 92 of the Evidence Act also excludes oral evidence of such agreement.

10. The Supreme Court in *Bishwanath Prasad Singh v. Rejendra Prasad* (2006) 4 SCC 432 reiterated that the rule contained in Section 91(supra) is a doctrine of substantive law, namely that in the case of a written contract all contemporaneous oral expressions of the thing are merged in the writing or displaced by the writing; what it does is to declare that certain kinds of facts are legally ineffective in the substantive law; this results in forbidding the fact to be proved at all. The Supreme Court in *K.B. Saha and Sons Pvt. Ltd. v. Development Consultant Ltd.* (2008) 8 SCC 564 has also clarified that a collateral transaction within the meaning of Section 49 of the Registration Act must be independent of or divisible from the transaction to effect which the law requires registration and if a

document is inadmissible in evidence for want of registration, use thereof for the purposes of proving an important clause would not be using it for collateral purpose. If the argument of the senior counsel for the appellant were to be accepted, it would make the provisions of compulsory registration under the Registration Act redundant and otiose.

11. We thus find that the appellant, in the absence of any valid agreement can neither seek a direction to the Official Liquidator nor will any purpose be served in granting permission to the appellant to sue the Company in liquidation for specific performance when as per the admitted facts the appellant is unable to prove and/or is prohibited from proving the agreement. The Supreme Court in *Sudarsan Chits (I) Ltd. v. O. Sukumaran Pillai* (1984) 4 SCC 657 held that Section 446 (2) of the Companies Act is intended to save the Company in liquidation from expensive litigation and to accelerate the disposal of winding up proceedings and it must receive such construction at the hands of the Court as would advance the object of enacting Section 446(2) and at any rate not thwart it. Similarly in *Central Bank of India v. M/s Elmot Engineering Company* (1994) 4 SCC 159 it was observed that in granting leave under this Section, the Court has to take into consideration whether the Company is likely to be exposed to unnecessary litigation and cost. To the same effect is *Industrial Credit and Investment Corporation of India Ltd. v. Srinivas Agencies* (1996)4 SCC 165 and when we apply the said principles, the conclusion is inescapable that no purpose will be served in granting leave/permission to the appellant to sue the Company in litigation for specific performance, when the appellant has no legal or valid agreement to sell recognizable in law in its favour. Granting such a

leave/permission would merely put the Company in liquidation to unnecessary cost in defending such a suit and also delay the creditors of the Company in liquidation from the benefits of the liquidation proceedings. The Company Court, under Section 446 is to safeguard the assets of a Company in winding up against wasteful or expensive litigation; in granting leave under this section, the Company Court is to take into consideration whether the Company is likely to be exposed to unnecessary litigation and cost. It cannot also be lost sight of that the relief of specific performance is a discretionary relief and in the facts and circumstances herein, there is even otherwise, no case for exercising the discretion in favour of the appellant.

12. We may notice that Justice H.L. Gokhale speaking for the Gujarat High Court in *Y.S. Spinners Ltd. v. Official Liquidator of Shri Ambica Mills Ltd.* (2000) 100 CompCas 547 after a detailed discussion of Section 446 refused leave where the agreement to sell (leave for specific performance of which was sought) was in violation of injunction against restraining the Company from transferring or parting with its assets. It was held that such an agreement was opposed to public policy. In fact relying on *J.K. (Bombay) Pvt. Ltd. v. New Kaiser-i-Hind Spg. and Wvg. Co. Ltd.* AIR 1970 SC 1041, it was also held that once a winding up order is made, no permission can be granted under Section 446 which has the effect of creating new right or completing incomplete rights.

13. In the light of the aforesaid, need is not felt to consider the other argument of the appellant or to discuss *M/s Motorola India Ltd. v. M/s DSS Mobile Communications Ltd.* 113 (2004) DLT 176 and *Morepen*

Finance Ltd. v. Reserved Bank of India 116 (2005) DLT 129 relied upon by the appellant challenging the order of the learned Company Judge.

14. There is thus no merit in the appeal. The same is dismissed.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MAY 1, 2012
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