

Shaan Zaveri and 3 ors. Vs. Gautam Sarabhai Private Limited

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Court : Gujarat

Decided On : May-15-2009

Reported in : [2009]150CompCas499(Guj); [2010]97SCL351(Guj)

Judge : K.A. Puj, J.

Acts : [Companies Act, 1956](#) - Sections 466, 488, 518, 518(1) and 518(5)

Appeal No. : Company Application No. 44 of 2009

Appellant : Shaan Zaveri and 3 ors.

Respondent : Gautam Sarabhai Private Limited

Advocate for Def. : Mrugesh Jani, Adv.

Advocate for Pet/Ap. : S.N. Soparkar, Sr. Adv. and; A.S. Vakil, Adv.

Judgement :

K.A. Puj, J.

1. The present Company Application has been filed, pursuant to the special resolution passed at the meeting dated 11.02.2009 of the contributories of Gautam Sarabhai Private Limited ('the Company') for permanently staying the voluntary liquidation of the Company and there upon seeking discharge of the liquidators. The Company was in voluntary liquidation in terms of the special resolution

passed at the meeting of its shareholders held on 20.01.1970. By the present application, the applicants also seek to revive and restart the Company in terms of the clauses of its Memorandum of Association and Articles of Association and to permit the shareholders of the Company to elect the members of the board of Directors.

2. The Company was incorporated under the Indian Companies Act VII of 1913 and was registered with the Registrar of Companies, Bombay. The objects for which the Company was established have been stated in paragraph 3 of the application.

3. The Company had in March 1947 purchased a immovable property at Mount Pleasant Road, Mumbai which was let out upto December 1950. Thereafter, the said immovable property was demolished and the area of the land was opened up. The land came to be leased to one Malabar Hill Cooperative Housing Society Limited (for short 'the Society') for a period of about 21 years and 7 months. Initially the lease was fixed at Rs. 1333/- per month and from April 1954 the same was fixed at Rs. 4000/-. The Society was to put up apartments on the open land and at the end of the lease period the land together with the superstructure was to be handed over to the Company. Though the superstructure came to be constructed, the Society paid rent to the Company only upto July / August 1954.

4. In view of the disputes between the Company and the Society, the Company filed a suit against the Society, in the Small Causes Court, Mumbai for recovery of arrears of rent. Leave came to be granted on condition that the Society should deposit Rs. 1 lac. The said order was confirmed by the Supreme Court.

5. In view of some further disputes, the Society also initiated proceedings before the Registrar of Cooperative Societies, Maharashtra and Arbitrator appears to have been appointed. However, the said order appointing the Arbitrator was stayed by the Bombay High Court.

6. The Society also appears to have filed a further suit for recovery of arrears of rent.

7. In the year 1966 and 1967, one of the Directors of the Company - Dr. Vikaram Sarabhai resigned and the other Director Mr. Ambalal Sarabhai passed away.

8. On the settlement talks between the Company and the Society being successful in / around December 1968, the same came to be executed in writing (Annexure-B, pages 133-159) on the following principal terms:

the Company was to be paid arrears of rent from 1954 to 1955. the Company was to convey to the Society the reversionary right, title and interest in the leased land for the consideration of Rs. 20,55,000/-. on execution of the Agreement, the suits filed by the Company in the Small Causes Court, Bombay against the Society were to be withdrawn. the Society also agreed and undertook to pay to the Company such additional amounts in case the Society carried out further construction of flats.

9. The Society failed to pay the balance amount of consideration including the amount of Rs. 3 lacs as per the agreement dated 18.12.1968 towards sale of the reversionary right. Simultaneously, the Company had a liability of more than Rs. 5 lacs to the Life Insurance Corporation of India under the preliminary mortgage decree. The Company had failed to pay any dividend on its equity as well as on preference shares and the Company's only source of income was the immovable property which was subject matter of litigation. On such considerations, it appears that the then Directors of the Company decided to take the Company into voluntary liquidation and called for an extra ordinary general meeting on 22.12.1969. It was decided to pass the following resolutions:

RESOLVED THAT an Extraordinary General meeting of the shareholders of the Company be called on 20th January 1970 at the Calico Mills Premises, Outside Jamalpur Gate, Ahmedabad, to consider and if thought fit, to pass the following resolution as a Special Resolution.

RESOLVED THAT the Company be wound up voluntarily and that Mr. Gautam Sarabhai and Mr. C.C. Kapadia be and are hereby appointed Liquidators for the purpose of such winding up with powers to each one of them to exercise all the powers of liquidators and that the remuneration of such liquidators for their

services in winding up be fixed at Rs. Nil.

10. At the meeting of the Board of Directors of the Company it was resolved to make compliances in terms of Section 488 of the [Companies Act, 1956](#) and accordingly the needful was done. The financial position of the company as on 19.01.1970, i.e. the date immediately preceding the date on which the Company was resolved to be wound up voluntarily, is tabularized in paragraph 16 of the application. At an Extraordinary General Meeting held on 20.01.1970, it was resolved by the shareholders of the Company that the Company be wound up voluntarily and that Mr. Gautam Sarabhai and Mr. C.C. Kapadia be appointed as liquidators for the purpose of such winding up. Vide further resolution dated 18.03.1970, the said liquidators were authorized to complete the same of the reversionary right, title and interest of the Company in the land, hereditament and premises in favour of the Society by accepting balance purchase price of Rs. 16,30,020/-. The reversionary interest in the land was conveyed to the Society by a registered deed dated 10.03.1971 (Annexure-D, page 163-181). The Company did receive the sum of Rs. 18,38,319/- towards balance amount of consideration together with interest from the Society. The first distribution of assets of the Company amongst its shareholders has been noted in the Extraordinary General Meeting dated 30.03.1971.

11. It appears that thereafter by an agreement dated 16.10.1970 (Annexure-E), there was an agreement between the Society and the Company that as and when the Society decides to construct additional flats on the existing building, the Society will give to the Company and / or its nominee first option to acquire half the number of flats out of the total number and that the Company shall have first choice in the selection of flats. However disputes arose between the Company and the Society as to the area of FSI and the price payable by the Company to the Society. The said disputes after a lapse of almost 13 years came to be referred to the Cooperative Court, at Mumbai as Case No. C. No. II/202 of 1983. The said proceedings continued upto the year 2001. Around 30.04.2001 consent terms (Annexure-F) came to be filed in the said Cooperative Court which provided:

that the rights of the Company over 1989 Sq. Ft. of FSI came to be settled (subject to the approval of the building plans utilizing the said FSI by the concerned local authorities), for sharing the value of the FSI between the Society and the Company in the proportion of 33.34% and 66.66% respectively, for a mechanism to determine the pricing of FSI, that the Company has preemptive right to repay the FSI and use it provided the Company parts with 33.34% of the price so discovered or Rs. 30 lacs whichever is higher.

12. From the record, it appears that the order of the Cooperative Court based on the consent terms dated 30.04.2001 was challenged by one of the members of the Society by filing a writ petition before the Bombay High Court. However, the same came to be disposed of in terms of consent terms dated 24.10.2001 (Annexure-G).

13. The Company while preparing its financial statements as on 19.07.2001 has included its rights in the FSI at a cost of Rs. 1,69,065/- and is shown as 'value of outstanding still to be realized other than bank balance and deposit at call'. In the financial statement (Annexure-H), the rights have been estimated to realize Rs. 60 lacs.

14. By an application made in March 2004, a firm of architects have submitted plans to the Municipal Corporation proposing usage of FSI in the Society. The said application is under process and consideration of the Municipal Corporation.

15. The Company could not be wound up completely pending the realization of the value of the FSI. It is in the said circumstances, as aforesaid, a special resolution came to be passed at the Extraordinary General Meeting of the contributories of the Company held on 11.02.2009 (Annexure-K) wherein it was resolved that subject to the provisions of the Companies Act and the directions of this Court (which the liquidators of the Company shall seek) the special resolution to voluntarily wind up the Company passed at the Extraordinary General Meeting dated 20.01.1970 be rescinded and the winding up be permanently stayed or recalled.

16. The present application has been filed in the aforesaid circumstances for permanently staying the voluntarily liquidation of the Company, discharging the

liquidators, reviving and restarting the Company and for other reliefs.

17. Heard Mr. S.N. Soparkar, Senior Advocate with Mr. A.S. Vakil, Advocate for the Applicants. Mr. Soparkar has submitted that the circumstances which were prevailing at the time when it was proposed to voluntarily wind up the Company (i.e. 22.12.1969) have materially changed as on date (i.e. 11.02.2009) when it was resolved that the special resolution to voluntarily wind up the Company be rescinded and the winding up be permanently recalled. The said material change has been enumerated by Mr. Soparkar as follows:

18. That, the Malabar Hill Co. Op. Hsg. Society Ltd. has paid full amount of consideration i.e. Rs. 20.55 lacs for conveying the reversionary right, title and interest in the land earlier leased to it by the Company.

19. That, the Company has not been called upon to pay for the contingent liability towards Life Insurance Corporation of India for the sum of about Rs. 5,41,966/- in terms of the preliminary mortgage decree passed by the High Court at Bombay in the year 1968. And whereas on 10.3.1971, the Company conveyed the right, title and interest in the reversionary interest in the land to the Society by a registered conveyance deed.

20. That, the Company did not have obligation for the dues of the creditors to be paid for, from the year 1971 onwards.

21. That, the Company has redeemed its Preference Share Capital in full in the year 1971 itself.

22. That, the Company is entitled for a valuable right in the form of 'FSI' in Darshan Apartment of the Society. That, it is possible to encash this right or to acquire, utilize it for the commercial usage by the Company.

23. That, the Company, if be revived, value of the 'FSI' in Darshan Apartment can be leverage to restart its business as per the object clause of its Memorandum of Association.

24. That, the Contributories / Equity Shareholders of the Company have expressed their willingness to subscribe to the equity share capital of the Company as may be determined by the reconstituted board of directors (subject to the provisions of Companies Act 1956).

25. On the aforesaid basis, it is submitted by Mr. Soparkar that this Court has the power and must stay the voluntary winding up of the Company. Reliance is placed upon Sections 466 and 518 of the [Companies Act, 1956](#). It is also submitted that the material / documents on record is adequate proof for this Court to record satisfaction that the voluntary winding up of the Company should be permanently stayed. Mr. Soparkar has accordingly submitted that the application deserves to be granted.

26. On notice being issued to the liquidator attached to this Court, the liquidator has filed his report dated 4.4.2009. In the said report it has been stated by the Official Liquidator as follows:

In fact, the Official Liquidator comes into picture in respect of the companies in voluntary liquidation, only after realization of all assets and distribution amongst the creditors and contributories gets concluded, and a final meeting of contributories is held and all the books and records of the Company are submitted to the Official Liquidator by the voluntary liquidators for his scrutiny and examination for submitting a report to this Hon'ble Court for dissolution of the company. In this case, that stage has not yet come and therefore, the Official Liquidator does not have any information or records to verify and to comment on the proceedings of the voluntary liquidation and the manner in which the voluntary winding up of the Company has been conducted by its liquidators.

27. The main controversy in the case turns on whether this Court has the power to stay a voluntary winding up. The power of this Court in relation to a winding up order passed by itself is contained in Section 466 of the Act, which gives power to the Court on an application either of the Official Liquidator or a creditor or a contributory to pass an order staying the proceedings either altogether or for a limited time. The present application is preferred by liquidators and / or contributories of the Company. Section 518(1) and (5) of the Act reads as under:

518 (1): The liquidator or any contributory or creditors may apply to the Court - (a) to determine any question arising in the winding up of a company; or

(b) to exercise, as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

518(5) :- A copy of an order staying the proceedings in the winding up, made by virtue of this section, shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the Registrar who shall make a minute of the order in his books relating to the company.

27. The wide language in which this provision is framed seems to suggest that the powers of the Court in relation to winding up proceedings which are exercisable while a Company is being wound up by the Court, can also be exercised in the course of voluntary winding up. Thus the question for consideration is whether the power to stay the winding up exercisable under Section 466 in relation to the Companies being wound up by the Court, can also be exercised when a Company is in voluntary winding up. This Court is of the view that though the aforesaid question is required to be answered in the affirmative, mere consent of the party is not enough but the Court should also consider all other circumstances. There is no doubt that the Court thus possess the power to stay winding up even when it is a case of voluntary winding up. There must however be facts justifying the stay. The language of Section 466 is && 'on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed.' Thus what is required to be ascertained is whether in the facts of the present case, the winding up ought to be stayed or the Company should be finally wound up / the resolution to voluntarily wind up the Company should not be interfered with. In the aforesaid context in so far as the pleadings in the present application and material for the purposes of this application are concerned, the same are contained in paragraph 30 (i) to (vii) reproduced. The Company has now become entitled to a valuable right in the form of FSI in Darshan Apartment of the Society, which it is possible for the Company to encash or to utilize, acquire for commercial usage, the Company if revived, the value of the FSI in Darshan Apartment can be leverage to restart its

business as per the object clause of its Memorandum of Association. The contributories and the equity shareholders of the Company have also expressed their willingness to subscribe to the equity share capital of the Company as may be determined by the reconstituted Board of Directors. It is also stated that the Company has no liabilities to be paid for and the FSI is estimated to realize much more than its cost as reflected in the balance sheet of the Company (stated in paragraph 33 of the application). No dues are stated to be payable to the income tax department. Consent letters from all the contributories expressing their desire to permanently stay the winding up, revive the operations of the Company and elect the members of the Board have annexed at Annexure-L to the Application.

28. The Delhi High Court had an occasion to consider the issue as to whether the Court has power to stay a voluntary winding up altogether. In the case of *S.P. Sood v. The Registrar of Companies, Delhi* (1978) 48 Comp Cas 98 wherein the question arose as to whether the Court has power to stay voluntary winding up, as it has in relation to the winding up by the Court under Section 466 of the [Companies Act, 1956](#). Answering the question in the affirmative, the Delhi High Court has held that the wide language of Section 518(1) of the Act seems to suggest that the powers of the Court in relation to winding up proceedings, which are exercisable, while a Company is being wound up by the Court, can also be exercised when a Company is in voluntary winding up. There must, however, be facts justifying the stay. The Court further held that in the circumstances of the case and particularly in view of the fact that the Management wants to revive the Company, there seems to be no impediment whatsoever to allow the petition. The Court accordingly stayed the winding up proceedings altogether.

29. Similar issue arose before the Karnataka High Court in the case of *V.B. Purohit v. Gadag, Jambukeshwara and Official Liquidator*, High Court of Karnataka, wherein the Court has considered the following quotation from the Pennington's Company Law, 4th Edition, page 709:

Once a resolution for voluntary winding up has been passed, the members of the Company cannot rescind it and restore the Directors' power to them so as to enable the Company to carry on its business as before. But an application may be

made to the Court to stay the winding up in the same way, and with the same consequences, as if the Company were being wound up compulsorily.

30. After considering the judgment of the Delhi High Court referred to above and the observations made in Pennington's Company Law, the Court took the view that voluntary winding up proceedings at whatever stage they are can be stayed absolutely. Accordingly, winding up proceedings were stayed by the Court and shareholders are held to be free to elect a new board of Directors and do all that is necessary in order to achieve the object for which the Company has been incorporated.

31. Even in the present case, during the course of hearing, the Court has asked certain details so as to satisfy the Court that after the resolution was passed way back in 1970 for taking the Company into voluntary winding up, the Company through its voluntary Liquidator has complied with all the statutory requirements and affidavit is filed on 09.05.2009 by the Liquidator of the Company wherein it is reiterated and confirmed that there are no outstanding amounts / undisputed demands pending and /or payable by the Company to the Income-tax department. In this context, copy of income-tax returns of the Company for the last 10 years, copy of the returns filed by the Company with the Registrar of Companies for the last 10 years and copy of the assessment orders for the years issued by the Income-tax department to the Company are produced on record.

32. In the aforesaid factual background and the powers of this Court, this Court is of the opinion that it will not be detrimental to anyone if the Company is restarted.

33. In the circumstances and particularly in view of the fact that the shareholders / contributories want to revive the Company and there being no impediment whatsoever in doing so, the application is allowed. Consequently, there shall be a permanent stay of voluntary liquidation of the Company which was being carried on in terms of the special resolution dated 20.01.1970. The operations of the Company shall stand revive and restarted and the shareholders of the Company are permitted to elect members of its Board of Directors.

34. A copy of this order shall be forwarded by the company within two weeks to the Registrar of Companies, Gujarat, who shall make a minute of the order in his books relating to the company.

35. There shall be no order as to costs.

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