

(2014) 08 CAL CK 0114

Calcutta High Court

Case No: C.A. No. 570 of 2013 and C.P. No. 116 of 1996

Jaypee Trading Co. Ltd.

APPELLANT

Vs

The Official Liquidator

RESPONDENT

Date of Decision: Aug. 29, 2014

Citation: (2015) 1 CHN 709 : (2014) 187 CompCas 35

Hon'ble Judges: N. Patherya, J

Bench: Single Bench

Advocate: Aniruddha Roy, Surajit Nath Mitra, Arindam Mukherjee and Deepak Jain, Advocate for the Appellant; Jishnu Chowdhury and Amitra Basu, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Patherya, J.

By this application the applicant herein seeks to disclaim the subject premises in Mysore and for completion of sale by execution of deed of conveyance.

2. The case of the applicant is that the company, Remington Rand of (India) Limited went into liquidation on 6th December, 1999. Prior thereto, the company and the applicant herein entered into an agreement dated 1st April, 1995 for sale of the factory as a going concern alongwith the land for Rs. 1.70 crore. It was agreed that the sum of Rs. 8 lakhs advanced by the applicant to the company would be adjusted towards the consideration money. Between 1996 and 1998 a sum of Rs. 1.10 crores was paid by the applicant to the company. Thereafter, further sums were paid and all that was required to be paid by the applicant to the company was Rs. 29 lakhs.

3. Pursuant to the said agreement of April 1995 on 10th February, 1999 the company and the applicant entered into an agreement whereby possession of the factory premises was handed over by the company to the applicant herein. On 25th March, 1999 a further agreement for lease subject to renewals was executed between the parties, for 10 years commencing from 1st April, 1999. All payments

were made to the company by draft and in spite of letters written by the applicant to the official liquidator, since 2001 no reply was given by the official liquidator nor steps taken to execute the Deed of Conveyance. It is only by letter dated 21st June, 2013 that the Official Liquidator has informed the applicant that necessary directions be sought from the Hon"ble Court as the subject premises is not in its possession but in the possession of the applicant.

4. The only defence taken by the Official Liquidator in its affidavit is that of Section 531 of the 1956 Act. Section 536(2) of the 1956 Act is not mandatory but is discretionary and will not apply to the facts of this case. To allege an agreement to be void, the same must be pleaded. Similarly it must be shown that the transaction is not in good faith or for valuable consideration. Both of these are absent in the instant case. The conduct of the parties be must also be looked into. Reliance is placed on 74 Co. Cases 89, 78 Co. Cases 490 and [N. Subramania Iyer Vs. The Official Receiver, Quilon](#), for the proposition that the burden of proof lies on the OL in case of challenge to transaction by him. The initial agreement between the parties is dated 1st April, 1995 while CP 116 of 1996 in which the order of winding up was passed on 6th December, 1999 was filed on 15th March, 1996.

5. By virtue of the MOU dated 10th February, 1999 possessory right was vested in the applicant and by the lease agreement of 25.03.1999 the applicant was given to run the factory for 10 years on and from 1st April, 1999. Sums aggregating to approx Rs. 1.19 crore has been paid by the applicant, therefore, orders be passed as sought.

6. In opposing the said application the Official Liquidator submits that the agreement for sale is dated 1st April, 1995 the terms whereof have been breached by the applicant. It is only to cover the breach that the agreement of 1999 was executed. The said agreement of 1999 is hit by S. 536(2) of the 1956 Act and is void.

7. The execution of the 1999 agreement was necessary as the sale was not completed within the time specified although time was the essence of the agreement dated 1st April, 1995. Under the agreement of 1995 the transfer was to be effected by 31.12.1998. In the application no prayer has been sought to validate the void agreement of 1999. There is also no pleading to that effect. Although the application has been filed u/s 535 of the 1956 Act and although disclaimer has been sought but the said cannot be allowed as no right, title or interest vests with the applicant. By the 1999 agreement the applicant seeks to extend the time prospectively. 3 years from 1999 would expire in 2001, and no proceeding in 2013 will lie. Reliance is placed on 140 Co. Cases 754 to expound the meaning of the term "disposition".

8. Counsel for the petitioner in reply submits that the 1999 agreement has not been challenged by the Official Liquidator. Article 54 of the Limitation Act will come to the aid of the applicants. The Official Liquidator. is aware of the agreement between the

parties and, therefore, has requested the ex-directors to furnish Sale Deed/Transfer Deeds. Two valuations were made before sale of the immovable asset and under valuation cannot be alleged. Time was never the essence of the contract. The 3rd agreement of March, 1999 is not hit by Section 536 of the 1956 Act as it was nothing but an extension of the 1st agreement. There is no return of money. That the agreement is mala fide must be proved by the Official Liquidator which is absent in this case. Therefore, orders be passed.

9. Having considered the submissions of the parties by agreement dated 1st April, 1995 the company agreed to sell to the applicant its land and factory at Mysore as a going concern on "as is where is and whatever there is basis," for Rs. 1.70 crores. A sum of Rs. 8 lakhs had been advanced by the applicant to the company and the said sum was to be adjusted towards the consideration money. Part payment was also made by the applicant but that was not all it was to do. As per clause 13 of the 1995 agreement the sale was to be completed by 31st December, 1998 unless mutually agreed by the parties. In case the company failed or refused to complete the transaction the applicant was entitled to seek specific performance of agreement. Admittedly, the company went into liquidation on 6th December, 1999. In 1998 there is no complaint by the applicant alleging refusal on the part of the company to execute the agreement. On the contrary in February 1999 a MOU was executed between the company and the applicant whereby the time to complete the sale was extended till payment of arrear statutory liabilities. Time to make payment of the consideration price was also extended.

10. On the basis of the said MOU a lease agreement was executed in March 1999 for a period of 10 years subject to renewals. Possession of the land and factory of the company was given by the company to the applicant at an annual lease rent of Rs. 7.50 lakhs, to be paid on running of the factory. All steps for making the factory operational lay with the applicant. The statutory liabilities was to be paid by the applicant. The factory was purchased by the applicant as a going concern but no step was taken by it to make the factory operational. The lease period of 10 years expired in 2009 but no step was taken by the applicant seeking renewal either. The 1995 agreement contemplated payment of statutory dues and workers dues by the applicant on delivery of possession and although the applicant is in possession no payment of statutory dues has been made. In fact, Clause 17 of the 1995 agreement entitled the applicant to sue the company for specific performance of the agreement. Article 54 of the Limitation Act permits the filing of a suit for specific performance of a contract within 3 years from either the date fixed for performance or where no date is fixed then 3 years from refusal of performance.

11. Admittedly as per the 1995 agreement the agreement was to be performed by 31st December, 1998. A letter was written by the applicant to the Official Liquidator in 2001 calling upon him to execute the Deed of Conveyance. The said letter was received by the Official Liquidator but no reply was given nor step taken by the

Official Liquidator to execute the conveyance, therefore, it was incumbent on the applicant to file a suit within 3 years from 2001 as per Article 54 of the Limitation Act. Without doing the same the applicant in 2005 and 2009 once again called upon the Official Liquidator to execute the conveyance. There is no receipt of the 2005 or 2009 letters by the Official Liquidator. Therefore, the receipt of communication of the 2011 letter will not aid the applicant as it took no steps 3 years after 2001, i.e., in 2004.

12. The winding-up petition was filed on 15th March, 1996 and the MOU and lease agreement are dated February 1999 and March 1999. Admittedly, by the said agreement possession and lease have been granted. This will amount to variation of the terms of the 1995 agreement and disposition of property and will therefore be hit by Section 536(2) of the 1956 Act. This will render the MOU of February 1999 and the lease agreement of March 1999 void. Although a plea was taken by Counsel for the applicant that Section 536 is not mandatory but discretionary in nature and the said issue has not been raised by the Official Liquidator, the said cannot be supported as Section 536(2) of the 1956 Act makes it clear that any disposition of property after commencement of winding-up proceedings "shall" be void. Assuming that the said issue has not been raised by the Official Liquidator, the language of the section itself renders such disposition void as the same is without jurisdiction and non-est in the eye of law.

13. [N. Subramania Iyer Vs. The Official Receiver, Quilon](#), is not applicable to the facts of the instant case as the application is barred by laws of limitation. The Official Liquidator has in the affidavit filed by it specifically stated that the issuance of letter dated 21st June, 2013 is a mistake and ought not to be considered. The issue of limitation has also been specifically pleaded by the Official Liquidator in its affidavit.

14. 74 Company Cases 89 and 78 Company Cases 409 are distinguishable on facts as in the reported decisions Section 531 and Section 531A of the 1956 Act were being considered which is not so in the instant case.

15. In view of the aforesaid this application fails and is dismissed.