

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.R. RAMACHANDRA MENON
&
THE HONOURABLE MR. JUSTICE ANIL K. NARENDRA

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

Co. Appeal No. 15 of 2015 () IN Co. Appl. 245/2015

AGAINST THE ORDER IN Co. Appl. 245/2015 IN REPORT No. 7 IN CP NOS. 9, 14 & 15/2011
of HIGH COURT OF KERALA DATED 18-11-2015

APPELLANT(S)/9TH RESPONDENT:

M.K. VIJAYAKUMARAN PILLAI
EX. MANAGING DIRECTOR
M/S. BUSINESS BENEFITS COMPANY LTD.
RESIDING AT NO. 124, RETNA GIRI, ASRAMAM P.O.
KOLLAM.

BY ADV. SRI. K. RAVIKUMAR

RESPONDENT(S)/APPLICANT & RESPONDENTS 1 TO 8:

1. VARUN RAJ PILLAI
S/O. M.K. RAJENDRAN PILLAI, RAJA VILASAM, PANANGADU P.O.
KULANADA VIA. PATHANAMTHITTA.
2. M/S. BUSINESS BENEFIT COMPANY LTD (IN LIQUIDATION)
TRANSWORLD TOWERS, BUSINESS LANE, BEACH ROAD
KOLLAM - 691 001 REPRESENTED BY OFFICIAL LIQUIDATOR.
3. PRAMENDRAN
RAVI MANDIRAM, PRAYAR SOUTH, ALUMPEEDIKA P.O. OACHIRA
KARUNAGAPPALLY, KOLLAM DISTRICT-691 320.
4. INDIAN BANK
REPRESENTED BY THE CHIEF MANAGER, NIRMALA BUILDING
METTUKADA JUNCTION, THYCAUD, THIRUVANANTHAPURAM.
5. MR. SAHUL HAMEED
PUTHEN PURAYIL BUILDING, VAIKOM, KOTTAYAM DISTRICT.
6. MADHAVAN S. PILLAI
S/O. M.K. SUNDARAN PILLAI, SOBHANA MANDIRAM, ASHRAMAM
KOLLAM 691 320.
7. SMT. KADEEJA
PALAMOOTTIL VEEDU, MANAYIKULANGARA,
KOLLAM.

8. M.S.SOBHANAN PILLAI
EX-MANAGING DIRECTOR
M/S. BUSINESS BENEFITS COMPANY LTD
RESIDING AT NO.591, SREEVAS, ASHRAMAM P.O.
KOLLAM.

9. M.K.SUNDARAN PILLAI
EX-MANAGING DIRECTOR
M/S.BUSINESS BENEFITS COMPANY LTD.
RESIDING AT NO.710, SOBHANA MANDIRAM, ASRAMAM P.O.
KOLLAM.

BY ADV. SRI.K.MONI
SRI.S.EASWARAN
SRI.S.SANAL KUMAR
SRI.P.SANJAY
SRI.N.VIMALAN

THIS COMPANY APPEAL HAVING COME UP FOR ADMISSION ON 21-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMACHANDRA MENON & ANIL K.NARENDRA, JJ.

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**Company Appeal No.15 of 2015**

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Dated, this the 21st day of December, 2015

JUDGMENT

Anil K. Narendran, J.

The appellant is the 9th respondent in Company Application No.245 of 2015 in Report No.7 in C.P.Nos.9, 14 and 15 of 2011 before the learned Company Judge of this Court, an application filed by the 1st respondent herein, seeking an order to release land having an extent of 22.38 cents, comprised in Re. Survey No.106, Block No.175 of Kollam East Village, and the building situated therein, in his favour. The learned Company Judge, after hearing both sides, disposed of Company Application No.245 of 2015 by order dated 18.11.2015, with the following directions;

- (a) The property which is the subject matter of this petition will stand attached by this Court, subject to decision to be taken by the Debt Recovery Tribunal on the application filed by the 2nd respondent to set aside the sale;
- (b) The office will intimate the fact of attachment to the Sub Registrar concerned.
- (c) The Official Liquidator will hand over possession of the

property to the petitioner herein within a month.

- (d) The petitioner herein will possess the said property subject to the attachment made by this Court and subject to the final orders to be passed by the Debt Recovery Tribunal on the application to set aside the sale.
- (e) The petitioner herein is directed that he shall not hand over possession of the property to anybody, or commit any act of waste in the property. The attachment made by this Court will continue only subject to decision taken by the Debt Recovery Tribunal regarding the validity and enforceability of the sale.

It is challenging the aforesaid order passed by the learned Company Judge, the appellant is before us in this appeal filed under Section 483 of the Companies Act, 1956.

2. We heard the arguments of the learned counsel for the appellant, the learned counsel for the first respondent, the learned counsel for the Official Liquidator representing the 2nd respondent company in liquidation and also the learned Standing Counsel for the 4th respondent Bank.

3. By an order dated 8.11.2011 in C.P.Nos.9, 14 and 15 of 2011 this Court ordered M/s.Business Benefit Company Ltd., (hereinafter referred to as 'the company in liquidation') a company registered under the Companies Act, 1956 (hereinafter referred to

as 'the Act') to be wound-up and the Official Liquidator attached to this Court has been appointed as the Liquidator of the said company, with the direction to take charge of its assets and effects. Pursuant to the said order, the Official Liquidator took possession of various assets, including the land having an extent of 22.38 cents comprised in Re.Survey No.106, Block No.175 of Kollam East Village, with a multi-storied building namely, 'Transworld Tower' bearing building Nos.KC XVII/3557, KC XVII/3558 and KC XVII/3559, in which the registered office and the branch office of the company in liquidation and also the corporate office of another company, namely, M/s.Transworld Hire Purchase India Ltd. were stated to have been functioning. The said property was taken possession on 2.4.2012.

4. The pleadings and materials on record would indicate that, the 8th respondent herein is the Ex-Managing Director and the appellant and the 9th respondent herein are the Ex-Directors of the company in liquidation. Similarly, the 9th respondent was the Managing Director and and the appellant and the 8th respondents are the Directors of M/s.Transworld Hire Purchase India Ltd. (hereinafter referred to as 'Transworld HPIL') and M/s.Transworld

Credit and Investment Company (P) Ltd. (hereinafter referred to as 'Transworld CICPL'). Out of these, Transworld HPIL is ordered to be wound-up by order dated 21.5.2014 of the learned Company Judge in C.P.Nos.40 of 2011, 55 of 2011 and 2 of 2012 filed by its creditors.

5. On 17.5.2012, the Official Liquidator received a letter from the 1st respondent herein, stating that 22.38 cents of land in Re-Survey No.106, Block No.175 of Kollam East Village with the multi-storied building 'Transworld Tower' is not an asset of the company in liquidation, but that of Transworld HPIL. The said property was mortgaged to the Indian Bank, the 4th respondent herein, for availing loan. In order to recover the loan amount outstanding, the 4th respondent Bank initiated recovery proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') and the property was put for sale. In the sale conducted by the Authorised Officer of the 4th respondent Bank, the 1st respondent herein bid the property for ₹3,20,00,000/- and the sale was also confirmed in his favour. On payment of the entire sale consideration, the 1st respondent

was issued with a Sale Certificate dated 1.10.2011 and possession of the property was also handed over to him. Therefore, the 1st respondent requested the Official Liquidator to release the said property to him, since it is not an asset of the company in liquidation.

6. On receipt of the aforesaid letter, the official liquidator sent a reply requesting the 1st respondent to furnish the full address and other particulars of the building, pursuant to which the 1st respondent furnished the particulars vide his letter dated 7.6.2012. In the meantime the 8th respondent herein vide his letter dated 7.6.2012 informed the Official Liquidator that Transworld HPIL is one of the group companies of the company in liquidation and that he has filed C.P.No.49 of 2011 before this Court seeking an order to wind-up Transworld HPIL, under Section 433(c) and (f) of the Act, and that the appellant herein has filed C.P.No.48 of 2011 under Section 237 of the Act, seeking an order to investigate the affairs of Transworld HPIL. The 8th respondent has also stated that, the Head Office of the company in liquidation was functioning in Transworld Tower and the records are still lying there. Hence the Official Liquidator was requested to retain the premises and to take

steps to cancel the sale effected by the 4th respondent Bank.

7. C.P.No.49 of 2011 filed by the 8th respondent herein was a Company Petition filed under Section 433(c) and (f) of the Act, seeking an order to wind-up Transworld HPIL, alleging misappropriation of funds, mismanagement and also suspension of the business activities of the company for more than one year. The 1st respondent herein (Shri.Varun Raj Pillai) was made party to C.P.No.49 of 2011 (as 3rd respondent) on the specific allegation that, the 9th respondent herein, who was the Managing Director of Transworld HPIL, colluded with the officials of the Indian Bank and brought the Head Office premises (Transworld Tower) for a far lower price in favour of a person with whom the marriage engagement of his second daughter had taken place. C.P.No.48 of 2011 filed by the appellant respondent herein, under Section 237(a)(ii) of the Act, was for a declaration that the affairs of Transworld HPIL ought to be investigated by an Inspector appointed by the Central Government, alleging bogus allotment of shares for several lakhs, misapplication and misappropriation of the loan availed by Transworld HPIL for ₹10,00,00,000/- from the Indian Bank, irregularities in the sale of the assets of Transworld

HPIL in connivance with the officials of the Indian Bank, etc. By order dated 3.7.2012, the learned Company Judge dismissed C.P.No.48 of 2011 as not pressed, recording a memo dated 22.6.2012 filed by the learned counsel for the petitioner that, the petitioner is not interested in prosecuting the case since the matter is settled amicably between the parties. Similarly, by another order dated 3.7.2012, C.P.No.49 of 2011 was dismissed as withdrawn, without prejudice to the right of the petitioner to file a fresh petition.

8. In view of the letter dated 7.6.2012 of the 8th respondent, the Official Liquidator sought confirmation from the 1st respondent as to whether any books and records of the company in liquidation are still lying in Transworld Tower. In reply to that letter, the 1st respondent by letter dated 28.7.2012 informed the Official Liquidator that no books and records connected with the company in liquidation are lying in the said building and that the said property is in no way connected with the company in liquidation. After the dismissal of C.P.Nos.48 of 2011 and 49 of 2011, the 8th respondent and another Director of the company in liquidation sent a letter dated 23.7.2012 to the Official Liquidator

requesting him to release possession of the land and the building Transworld Tower to the 1st respondent, stating that, the request made on 7.6.2012 to retain possession of the said property was made on a misunderstanding that the funds of the company in liquidation were utilised for acquiring it in the name of Transworld HPIL.

9. The learned counsel who was appearing for the petitioners in C.P.Nos.14 of 2011 and 15 of 2011, the Company Petitions in which the company in liquidation was ordered to be wound-up, vide his letter dated 6.8.2012 informed the Official Liquidator that, the 8th respondent herein in his counter affidavit filed in C.P.No.9 of 2011 has disclosed that, an amount of ₹2,50,00,000/- was transferred from the company in liquidation to Transworld HPIL for developing its business and that, the total amount diverted from the company in liquidation to Transworld HPIL would come to more than ₹6,00,00,000/-, which has not been repaid by Transworld HPIL. Further, some of the properties of Transworld HPIL which were mortgaged to the Indian Bank were sold at reduced price, thereby cheating the creditors of the company in liquidation and also the creditors of Transworld HPIL.

Therefore, it was requested that the key of the building should not be surrendered to the Managing Director of Transworld HPIL or anybody else until the entire amount due to the company in liquidation is realised from Transworld HPIL.

10. It was in such circumstances, the Official Liquidator filed Report No.7 in C.P.Nos.9 of 2011, 14 of 2011 and 15 of 2011 before the learned Company Judge seeking appropriate orders regarding handing over of the property 'Business Buildings' at Transworld Towers to the 1st respondent herein, who purchased the property in the auction conducted by the Authorised Officer of the Indian Bank. In the said report, the Official Liquidator has also stated that the company in liquidation was having only movable assets and no immovable assets, and the Official Liquidator has realised only a sum of ₹60,710/- towards sale proceeds of the movables. As per the Statement of Affairs filed by the 8th respondent (which was found to be defective on scrutiny) the gross liability of the company in liquidation is ₹8,95,18,290/- and the company is not having any immovable assets. Therefore, according to the Official Liquidator, it seems that majority of the funds of the company in liquidation have been transferred illegally to the other

company to acquire land and immovable properties in its name, as alleged by the Ex-Directors.

11. During the pendency of Report No.7, the Official Liquidator filed Report No.1 in Report No.7 seeking an order to permit him to appoint a Chartered Accountant from the panel already approved by this Court to investigate the matters as mentioned in the objections filed by the petitioner in the winding-up petition (the 3rd respondent herein), the Ex-Directors of the company in liquidation and also the allegations raised by the Secretary, Kollam Business Investors Forum, and for other prayers. The prayers sought for in Report No.1 in Report No.7 in C.P.Nos.9 of 2011, 14 of 2011 and 15 of 2011 read as follows;

- (i) To permit the Official Liquidator to appoint a Chartered Accountant from the panel already approved by this Hon'ble Court to investigate the matters mentioned in the objections filed by Sri.Remendran, the winding up petitioner, Sri.M.K.Vijayakumaran Pillai and Sri.M.S.Sobhanan Pillai, the ex-directors of the company and the allegations raised by the Secretary, Kollam Business Investors Forum.
- (ii) To direct the ex-directors of the company in liquidation and their relatives to restrict themselves from disposing off, encumbrancing or alienating or transferring possession of any of the personal property

and vehicle belonging to them, their relatives and in the name of M/s.Transworld Hire Purchase India Ltd., until further orders of this Hon'ble Court.

- (iii) To direct the ex-directors of the company in liquidation to furnish the present address and other details regarding the ownership of the vehicles and properties as furnished by the Investor's Forum and Sri.Remendran's objection.
- (iv) To direct the ex-directors of M/s.Transworld Hire Purchase India Limited not to alienate or transfer the properties belonging to the company to anyone until further orders of this Hon'ble Court.
- (v) To permit the Official Liquidator to pay the remuneration to the Chartered Accountant from and out of the funds of the company in liquidation.

12. By order dated 28.1.2015 the learned Company Judge appointed Shri.Babu A. Kallivayalil & Company, Chartered Accountants, 2nd Floor, Manchu Complex, Cochin-682011, as the Chartered Accountant to investigate the matter mentioned in the objections filed by the 3rd respondent herein, the ex-directors of the company in liquidation and also the allegations raised by the Secretary, Kollam Business Investors Forum. The Chartered Accountant was directed to file report to the Official Liquidator and also before the Company Court within 4 months. Since the learned counsel appearing for both parties submitted that they have no

objection in allowing prayer Nos.(ii) to (iv), those prayers were also allowed by order dated 28.1.2015. The investigation by the Chartered Accountant pursuant to the order passed by the learned Company Judge dated 28.1.2015 is progressing.

13. In view of the order passed by the learned Company Judge dated 28.1.2015 in Report No.1 in Report No.7 in C.P.Nos.9 of 2011, 14 of 2011 and 15 of 2011 allowing prayer Nos.(ii) to (iv) the Ex-Directors of the company in liquidation and their relatives are restrained from disposing of, encumbering, alienating or transferring possession of any of their personal assets and also the assets in the name of Transworld HPIL until further orders. The Ex-Directors of the company in liquidation are directed to furnish the details regarding the ownership and possession the vehicles and properties as furnished by the 3rd respondent herein and also the Investors Forum. The Ex-Directors of Transworld HPIL are also restrained from alienating or transferring the properties belonging to Transworld HPIL to anyone until further orders. It was thereafter, the 1st respondent approached the learned Company Judge by filing Company Application No.245 of 2015 in Report No.7 in C.P.Nos.9, 14 and 15 of 2011, seeking an order to release the

land having an extent of 22.38 cents, comprised in Re. Survey No.106, Block No.175 of Kollam East Village, and the building situated therein, in his favour.

14. It is trite law that the property purchased by a third-party auction purchaser, in compliance of a Court order, cannot be interfered with on the success or failure of parties to the proceedings if the auction purchaser had bona fide purchased the property. Therefore, ordinarily, a bona fide purchaser for value in an auction sale is treated differently than a decree-holder or any other person interested in the lis purchasing such property.

15. In **Janatha Textiles v. Tax Recovery Officer (2008 (12) SCC 582)** the Apex Court held that, law makes a clear distinction between a stranger who is a bona fide purchaser of the property at an auction-sale and a decree-holder purchaser at a Court auction. The strangers to the decree are afforded protection by the Court because they are not connected with the decree. Unless the protection is extended to them the Court sales would not fetch market value or fair price of the property. However, in **Valji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) (2008 (9) SCC 299)** the Apex Court carved

out one exception to the above principle, holding that once sale is confirmed by the authority certain rights accrue in favour of the auction-purchaser and these rights cannot be extinguished except in exceptional cases such as fraud. Relying on the principles laid down in the judgments supra, the Apex Court reiterated in **Sadashiv Prasad Singh v. Harender Singh (2015 (5) SCC 574)** that the rights of an auction-purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion.

16. A reading of the affidavit sworn in support of the Judges' Summons in Company Application No.245 of 2015 would indicate that, the 1st respondent has approached the learned Company Judge as if he is a bona fide purchaser of the aforesaid property in the public auction conducted under the provisions of the SARFAESI Act, by the Authorised Officer of the 4th respondent Bank. The specific allegation made against the 9th respondent herein, who was the Managing Director of Transworld HPIL, is that he colluded with the officials of the Indian Bank and brought the property for a far lower price in favour of a person with whom the marriage engagement of his second daughter had taken place. If the said

allegation is found to be true, then the 1st respondent is neither a stranger to the 9th respondent and others connected with the lis nor a third-party auction purchaser, who bona fide purchased the property in the auction conducted by the Authorised Officer of the 4th respondent Bank. We also notice from the proceedings of the auction that, in the auction conducted on 22.8.2011 the 1st respondent herein was represented by the 9th respondent herein, who participated in the bidding process as the authorised representative of the 1st respondent. Similarly, the 7th respondent herein, another bidder named Khadeeja, was also represented by the 9th respondent herein, in respect of another item of property, as her authorised representative. A copy of the proceedings of the auction conducted on 22.8.2011 form part of Annexure A2 letter produced along with Company Application No.245 of 2015 (Annex.2/4, 2/5 and 2/6 @ Page Nos.25 to 27 of the paper book). Since the application filed by the 3rd respondent herein for setting aside the sale conducted on 22.8.2011 is now pending consideration before the Debt Recovery Tribunal, we refrain from expressing any opinion as to the legality or otherwise of the sale conducted on 22.8.2011 by the Authorised Officer of the 4th

respondent Bank. It is for the Debt Recovery Tribunal to consider the legality of the sale conducted by the Authorised Officer of the 4th respondent Bank and also whether the sale is vitiated by collusion or fraud.

17. In the matter of control of the assets of a company in liquidation, the Court exercises *parens patriae* jurisdiction. It safeguards not only the interest of the mortgagees, but also the interest of the mortgagor. The Court is bound to safeguard the interest of the workmen and also the unsecured creditors. In the case on hand, the pleadings and the materials on record contain specific allegations regarding diversion of funds to the tune of several crores from the company in liquidation to Transworld HPIL for developing its business and for purchasing immovable properties. It is also alleged that the properties so purchased, which were mortgaged to the Indian Bank were sold at reduced price, thereby cheating the creditors of the company in liquidation and also the creditors of Transworld HPIL.

18. The Official Liquidator has filed Report No.7 in C.P.Nos.9 of 2011, 14 of 2011 and 15 of 2011 stating that, company in liquidation was having only movable assets and he has realised

only a sum of ₹60,710/- towards sale proceeds of the movables. However, as per the Statement of Affairs filed by the 8th respondent, the gross liability of the company in liquidation is ₹8,95,18,290/-. Therefore, according to the Official Liquidator, the circumstances raise a suspicion that majority of the funds of the company in liquidation have been transferred illegally to the other company to acquire land and immovable properties in its name, as alleged by the Ex-Directors. The learned Company Judge, by the order dated 28.1.2015 in Report No.1 in Report No.7, appointed a Chartered Accountant to investigate into the matter and the investigation is progressing. Once the report is filed, it is for the learned Company Judge to consider the same and take appropriate measures in that matter, in accordance with the provisions under the Act and the rules made thereunder.

19. A reading of the impugned order would show that, before the learned Company Judge, the Official Liquidator maintained a stand that the property in question does not form part of the assets of the company in liquidation and that, it was wrongly taken possession of from the 1st respondent herein. On the other hand the appellant and other creditors raised an

apprehension that, if the property goes into the hands of the 1st respondent herein, he will dispose it of to third parties, in which case the creditors of the company in liquidation will be left with no remedy for realisation of the amounts due to them. Therefore, in order to safeguard the interest of all the creditors of the company in liquidation, the learned Company Judge ordered attachment of the property, subject to the decision to be taken by the Debts Recovery Tribunal on the application filed by the 3rd respondent herein to set aside the sale in favour of the 1st respondent herein. The Registry was also directed to intimate the fact of attachment of the property to the Sub Registrar concerned. Subject to such attachment, the Official Liquidator has been directed to hand over possession of the property to the 1st respondent herein within one month. It was also made clear that, the 1st respondent herein will possess the said property subject to the attachment made by this Court and subject to the final orders to be passed by the Debts Recovery Tribunal on the application to set aside the sale and that, the 1st respondent herein shall not hand over possession of the property to anybody or conduct any act of waste in that property. Since sufficient safeguards have been provided in the impugned

order in order to protect the interest of the creditors of the company in liquidation, we find absolutely no grounds to interfere with the said order dated 18.11.2015 passed by the learned Company Judge. However, we make it clear that, the order of attachment made by the learned Company Judge by the impugned order will also be subject to the out come of the investigation conducted by the Chartered Accountant pursuant to order dated 28.1.2015 in Report No.1 in Report No.7 in C.P.Nos.9, 14 and 15 of 2011 and the decision to be taken by the learned Company Judge in that matter.

20. Though several other grounds are raised in the memorandum of appeal, there is nothing on record to suggest that such grounds were ever raised before the learned Company Judge. If indeed any grounds which were argued was not considered, the remedy open to the party aggrieved is to file a proper application before the learned Company Judge seeking review of that order and not an appeal under Section 483 of the Act. The learned counsel for the appellant would also contend that, if possession of the property in question is handed over to the 1st respondent herein, it would prejudice the rights of the creditors of Transworld HPIL,

which has also been ordered to be wound-up by order dated 21.5.2014 of the learned Company Judge in C.P.Nos.40 of 2011, 55 of 2011 and 2 of 2012. If the creditors of Transworld HPIL have any such grievance, it is for them to approach the learned Company Judge for appropriate relief.

In the result, the appeal stands dismissed, subject to the observations made hereinbefore.

Sd/-
P. R. RAMACHANDRA MENON,
JUDGE

Sd/-
ANIL K. NARENDRA,
JUDGE

kmd

True copy

P.A.to Judge