IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

Ex.FA.No. 10 of 2015 ()

AGAINST THE ORDER DATED 28.2.2015 IN E.A.NO.24/2014 IN EP NO.2/2008 IN OS. NO.159/2004 IN THE COURT OF SUB JUDGE, KATTAPPANA

APPELLANT/PETITIONER:-:

* M/S. GOLD VIEW VYPAR PVT. LTD.,
REGISTERED OFFICE AT HONG KONG HOUSE, KOLKATTA
WEST BENGAL, REPRESENTED BY ITS MANAGING DIRECTOR
THOMAS MATHEW, BETHEL HOUSE, PATHANAMTHITTA VILLAGE.

* (THE NAME OF THE APPELLANT/PETITIONER IS CORRECTED AS "M/S. GOLD VIEW VYAPAAR PRIVATE LIMITED" AS PER ORDER DATED 22.12.2015 IN IA NO.4488/2015 IN EXFA NO.10/2015)

BY ADV. SRI.M.NARENDRA KUMAR

RESPONDENTS/RESPONDENTS:-:

1. A.K.RAJAN,
KRISHNAVILASAM HOUSE, 31ST MILE, MUNDAKAYAM
KANJIRAPPALLY TALUK, (DECREE HOLDER), PIN - 686 513.

2. PODDAR UDYOG LTD.,
HONG KONG HOUSE, B.B BAG (SOUTH)
KOLKATTA (1ST JUDGMENT DEBTOR), PIN - 700 001

R1 BY ADV. SRI.S.SREEKUMAR (SR.)
R1 BY ADV. SRI.P.MARTIN JOSE
R1 BY ADV. SRI.P.PRIJITH
R1 BY ADV. SRI.THOMAS P.KURUVILLA
R2 BY ADV. SMT.RUBY P.PAULOSE

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON 28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

ANTONY DOMINIC & P.V ASHA, JJ.

Ex.F.A No.10 of 2015

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Dated this the 28th day of October, 2015

JUDGMENT

Antony Dominic, J.

The petitioner in E.A No.24 of 2014 in E.P No.2 of 2008 in O.S.159 of 2004, on the file of the Sub Court, Kattappana, is the appellant. In this appeal, the appellant challenges the order dated 28.02.2015, passed by the Sub Court, dismissing the E.A filed by the appellant under Order XXI Rule 58 of the Code of Civil Procedure treating it as one filed under Rule 97 thereof.

2. We heard the learned counsel for the appellant and the learned counsel appearing for the 1st respondent/decree holder.

3. Briefly stated the facts of the case are that, an agreement for sale was entered into between the 1st and the 2nd respondents on 20.03.2004. On failure of its performance, the 1st respondent filed O.S No.159 of 2004 on 20.12.2004, for

return of the advance amount paid to the 2nd respondent. The suit was decreed on 16.02.2006. Subsequently, E.P No.2 of 2008 was filed and 6.5 Hectares of land was attached in 2008. The attached land was sold on 24.11.2011 and was purchased by the decree holder himself. The sale was confirmed on 10.02.2012 and sale certificate was issued on 13.4.2012. Thereafter, E.A No.84 of 2012 was filed by the decree holder for delivery of the property.

4. At that stage, the appellant filed E.A No.24 of 2014, under Order XXI Rule 58 of C.P.C. In the E.A, the appellant contended that, as a result of the scheme of amalgamation sanctioned by the Calcutta High Court in its order in Company Petition No.215 of 2008, the Tea undertaking of the 2nd respondent, including the property sold, was amalgamated in the appellant w.e.f 1.4.2007, the effective date specified in the approved scheme, and therefore, as on the date of attachment in 2008, sale in 2011 and its confirmation in 2012, the 2nd respondent/judgment debtor, the transferor in the scheme, did not have any saleable interest in the property. The court below, by its impugned order, dismissed E.A No.24 of 2014.

5. The reasons stated in the impugned order are that, Ext.A1 - a copy of the order of the High Court of Calcutta, the certified copy of which has been produced by the appellant before this Court, was only an attested copy and was inadmissible. It was also stated that there was no evidence that the property sold in execution forms part of the property acquired by the scheme for amalgamation. It was also held that, being a transferee company under the scheme of amalgamation, the petitioner had no escape from the liability of the transferor company. It is this order which is under challenge before us.

6. In so far as the finding of the lower court that Ext.A1 was only an attested copy of the order of the Calcutta High Court is concerned, along with I.A No.1894 of 2015, the appellant has produced certified copy of the order of the Calcutta High Court and that application has been allowed.

7. The contention raised by the learned counsel for the appellant is that, as is evident from the order passed by the Calcutta High Court, the Tea undertaking of the 2nd respondent has been transferred and vested in the petitioner w.e.f 1.4.2007, the effective date of the scheme of amalgamation. It is

contended that, therefore in 2008, when the property was attached or in 2011 when the property was sold in court auction, the judgment debtor company/the transferor under the scheme of amalgamation, did not have any saleable interest and that therefore the sale is invalid. In support of this contention, the learned counsel placed reliance on the judgments of the Privy Council in **Raghubar v. Bank of Upper India** [A.I.R 1919 Privy Council 9] and the Supreme Court Judgment in **Marshall Sons & Co. (India) Ltd. v. I.T.O** [(1997) 2 SCC 302], where the Privy Council's judgment was followed. The learned counsel also referred us to the judgment of the Calcutta High Court in **Mahiganj Loan Office v. Behari Lal** [AIR 1937 Calcutta 507] and the Apex Court in **General Radio & Appliances Co. Ltd. v. M.A.Khader** [1986 (60) Co.Cases 1013]. These contentions were refuted by the learned Senior Counsel appearing for the 1st respondent, who made detailed reference to the provisions of the scheme, and according to him, being a transferee under the scheme of amalgamation, the appellant was bound by the decree obtained against the 2nd respondent.

8. We have considered the submissions made. It is true

that by a scheme of amalgamation approved by the Calcutta High Court as per its order in Company Petition No.215 of 2008, the Tea undertakings of the 2nd respondent stood transferred and vested in the appellant. The scheme also shows that the effective date of transfer is 1.4.2007. This means that, irrespective of the fact that the actual approval of the scheme was much later to the effective date, the scheme came into force with effect from 1.4.2007, ie., the effective date provided in the scheme. It is this legal position, as contained in the provisions of the Companies Act which are referred to in the judgments, that are relied on by the learned counsel for the appellant.

9. The decree obtained is against the transferor company. It is on that basis, the learned counsel for the appellant contended that as on the date of attachment or sale, the transferor company did not have any saleable interest in the property and therefore the auction sale is invalid. However, in so far as this case is concerned, irrespective of the above legal position, we feel that the matter is governed by some of the provisions of the scheme itself and the order passed by the Calcutta High Court. In this context, reference has to be made

to clauses 5, 8 and 9(d) of the scheme and also clause 3 of the order passed by the Calcutta High Court in Form No.42 prescribed in the Companies (Court) Rules. These provisions are respectively extracted below for reference:

> "5. All legal or other proceedings by or against the TRANSFEROR COMPANY pending on the Appointed Date and relating to the TEA UNDERTAKING shall be continued and enforced by or against the TRANSFEREE COMPANY.
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> 8. Subject to other provisions of this Scheme all contracts, deeds, bonds, agreements, Insurance policies and other Instruments of whatsoever nature relating to the TEA UNDERTAKING of the TRANSFEROR COMPANY to which the TRANSFEROR COMPANY is a party subsisting or having effect even before this Scheme becomes operative shall be in full force and effect against or in favour of the TRANSFEREE COMPANY, and may be enforced as fully and effectually as if, instead of the TRANSFEROR COMPANY, the TRANSFEREE COMPANY had, at all material times, been a party thereto.
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> 9(d) 3. That all the proceedings and/OR suits and/or appeals now pending by or against the Tea undertaking of the said transferor company shall be continued by or against the said transferee company,"

A reading of the above provisions of the scheme and the order passed by the Calcutta High Court would show that all legal or other proceedings by or against the transferor company pending on 1.4.2007 and those relating to the Tea undertaking shall be continued and enforced by or against the transferee company. Similarly, under clause 8, all contracts, deeds, agreements of whatever nature relating to Tea undertaking of the transferor company to which it is a party subsisting and have effect even before the scheme became effective, shall be in full force and effect against or in favour of the transferee company. A combined reading of these provisions would show that as a result of the scheme, every Instrument and liability that were binding on the transferor company have been taken over by the transferee company, and legal proceedings pending against the transferor company were to be continued by the transferee company.

10. This therefore means that the effect of the scheme is that as on 1.4.2007, the transferee company stepped into the shoes of the transferor company. From the facts that we have stated, it is obvious that as on 16.02.2006, when the suit was filed, the scheme was not in force and by the time execution petition E.P No.2 of 2008 was filed, the Scheme had come into force, it being subsequent to 1.4.2007, the effective date of the scheme. In the E.P, despite the scheme, the transferor company appeared and contested the matter. Therefore, if at all the transferee company wanted to contest the matter, it was upto the transferee company to have got itself impleaded in the Execution Petition, and contested the execution petition. Having

not done so, it is now not open to the transferee company to contend that, in view of the provisions of the scheme, the transferor company did not have saleable interest as on 2008 when the E.P was filed or attachment was effected or sale was held in 2011.

We therefore, do not find any merit in the E.A No.24 of 2014 filed by the transferee company and therefore the impugned order does not warrant any interference by this Court.

Accordingly, the appeal is dismissed.

Sd/-
ANTONY DOMINIC
Judge

Sd/-
P.V.ASHA
Judge

rtr/