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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 13th October, 2017
Pronounced on: 25th October, 2017**

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CO.A(SB) 66/2014

SH. RAKESH JAGMOHAN PANDEY Appellant

Through : Mr.Anup J. Bhambhani, Sr
Advocate with Mr.Vijay M
Chauhan, Advocate.

versus

M/S JVG FINANCE LTD. Respondent

Through : Mr.Kunal Sharma, Advocate for
Official Liquidator.
Ms.Swati Setia, Advocate for
Reserve Bank of India.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is against the notice dated 13.11.2014 of the Official Liquidator and against the report dated 22.08.2014 of the One Man Committee constituted by this Court.

2. It is only on the basis of the report dated 22.08.2014 of the One Man Committee, the Official Liquidator had demanded the vacant possession of flat bearing No.402, Panchmukhi Apartment and another flat bearing No.502, Panchamarat Apartment, Off Yari Road, Versova (West), Andheri, Mumbai (hereinafter referred to as flat Nos.402 and 502 respectively). The appellant alleged to be a

bona fide purchaser in good faith for valuable consideration and claims to be a registered owner of the flats. The appellant claims to be in possession of the flats since 20.04.1998 pursuant to two separate agreements to sell dated 13.04.1998, registered in his favour on 20.04.1998. The said agreements were executed in his favour by the respondent company through its authorized agent Mr.Dharmendra Pal Singh Chauhan – an authorized person – authorized vide resolution dated 10.03.1998 of the board of directors of the respondent company.

3. As alleged, in the year 1998 the appellant was seeking to buy residential properties in Mumbai in the area of Andheri and came to know the respondent company was trying to sell its properties in Panchamrat and Panchmukhi Apartments in Versova area of Andheri (West). In March, 1998 the appellant approached the respondent company and negotiated with Shri D. Pal Singh Chauhan, an authorized agent of the respondent company for purchase of the flats for an amount of ₹31 lacs for Flat No.402 and for an amount of ₹38 lacs for Flat No.502. Though the appellant was ready and willing to pay the purchase price by a cheque but Sh. V. K. Sharma, the then managing director of the respondent Company insisted for cash as the company had to pay off its retail depositors. The sale consideration was thus paid in cash.

4. The Board Resolution dated 10.03.1998-Annexure A-2 reveals Mr.Dharmendra Pal Singh Chauhan was authorized to negotiate, sign and do all acts ancillary for sale of the flats, on

behalf of the respondent company. The said resolution is on the letter head of the respondent company and at its bottom it notes the respondent company deals in real estate, colonizing, financing, leasing, hire-purchasing etc and hence the usual course of business of the respondent company was to deal in real-estate.

5. Now, qua flat No. 402 (supra), the appellant had filed on record a receipt of ₹25.50 lac issued by the respondent company in his favour with breakup of the cash amount given to the respondent. The agreement to sell dated 13.04.1998 executed for this flat is also filed and it was executed on a stamp paper purchased from one Yogesh G Dave a stamp vendor in the name of respondent company and it bear the stamp of franking machine showing stamp duty of ₹2,62,750/- paid by the appellant on 15.04.1998 to purchase flat No.402. If one peruse the Clause Nos.2(b), 4, 8, and 9 of the agreement to sell, it says the possession is handed over at the time of execution of the agreement to sell but whereas the balance amount of ₹5.50 Lac shall be payable at the time of registration of the said agreement – i.e. within ten days from its date of execution. The copy of the registration certificate dated 20.04.1998 issued by the Sub Registrar Mumbai mentions the consideration paid as ₹31.00 Lac for purchase of flat No.402. *It notes valuation checked as per PR1998 correctly calculated and paid.* It also notes the stamp duty of ₹2,06,750/- and registration fee of ₹20,000/- having been paid by the appellant. Thus where the registration certificate dated 20.04.98 and Index no. II notes the

total consideration paid, there could be no confusion if balance sale price was paid or not.

6. Similarly, agreement dated 13.4.1998 for flat No.502 annexure A3 bear the stamp of Mr.Yogesh G Dave –stamp vendor, purchased in the name of respondent company. It has an impression of franking machine showing the stamp duty of ₹2,62,750/- purchased for the transaction. This agreement also had similar clauses qua handing over of its possession; the payment of balance amount of ₹8.00 Lac within ten days from the date of its execution. There is on record, registration certificate for this flat No.502 too which shows the entire consideration for this flat, the stamp duty of ₹2,62,750/- and registration fee of ₹20,000/-, paid at the time of registration with the Sub Registrar, Mumbai.

7. The documents above show both the flats having been duly registered in the name of the appellant on 20.04.1998 *prior* to the filing of winding up petition by the Reserve Bank of India against the respondent company.

8. The appellant along with his application C.A.No. 1729/2016 has also filed the copy of minutes prepared by the Official Liquidator at the time of inspection/enquiry qua flats No. 402 and 502 conducted at the General Stamp Office, Registrar Office, Mumbai and at Panchmukhi and Panchamrat Apartments, Versova, Andheri, West Mumbai on 11.09.2008 and 13.09.2008. The officials were sent by the Official Liquidator. The team obtained certified copies of registration certificates, verified

payments made by the appellant to the respondent company and also that the appellant have been paying the maintenance bills to the residential societies regularly. The enquiry team obtained letter dated 11.09.2008 from the Treasury Officer, General Stamp Office, Mumbai which confirmed the two stamp papers purchased and franking done on dated 13.04.2008. The details were also verified from the Sale Register of the office. The applicant has filed the copy of register belonging to Yogesh G Dave giving details of sale of non-judicial stamp papers and it show the respondent company had purchased 12 stamp papers of ₹10 denomination and two stamp papers of ₹100 denomination at the relevant date. The copy of the Treasury Register show the purchase of the stamp duty by the appellant to the extents of ₹2,06,750 and ₹2,62,750/- respectively on the relevant dates.

9. The document Annexure A-9 to the appeal reveal these flats were mortgaged with PNB by the appellant as guarantee to loan given to M/s Raghuraji Agro Industries Private Limited in which the appellant is a managing director. The said company later repaid the entire loan amount and the flats were released. The Punjab National Bank must have done its *due diligence* before accepting these flats on mortgage.

10. The above facts do show the appellant to be a bonafide purchaser having paid the entire consideration for the flats; took its possession and acted as an owner thereof; had even mortgaged such flats with PNB as a guaranter for obtaining loan for his

company and hence exercised his rights as an absolute owner over such flats.

11. Now, reverting to the decision of One Man Committee - it rejected the plea of the appellant on following grounds:-

- a) The order dated 10.10.1997 of RBI placed a clear embargo on the respondent company- not to alienate any of its assets without prior permission of the Reserve Bank of India, except for the purposes of repayment to its depositors or creditors;
- b) admittedly - no prior permission was obtained from the Reserve Bank of India for alienating these two flats, hence the agreements are nullity in the eyes of law;
- c) the transfer is hit by Section 531A of the Companies Act, 1956;
- d) no valuation reports annexed to show that the flats were sold at the market price;
- e) the transaction is hit being not done in 'good faith' and for 'valuable consideration' since the claimant could not prove payment of balance consideration of ₹5.50 Lac for flat No.402 and ₹8.00 Lac for flat No.502;

12. The One Man Committee in para No.38 of its report dated 22.08.2014 had observed as under:-

“38. Thus, the argument of 'good faith' and 'valuable consideration' is rejected for the following reasons:

(i) The good faith of the purchaser does not vitiate the existence of the Prohibitory Order and would not legitimize a transaction which heavily tilts towards

indicating a collusive act between the Claimant and the company to subvert the process of law for their collective benefit at the cost of the depositors;

(ii) The transaction itself is incomplete with the payment or sale consideration as agreed to between the parties, not having been completed;

(iii) The detailed discussion of Section 531A, as noted above, disentitles the Claimant to the relief sought by him;

(iv) The case law cited by the learned counsel for the claimant is clearly distinguishable on facts. Whereas in the cases cited by the learned counsel for the Claimant the transaction which have been read as outside the ambit of Section 531A are duly authorized transactions of the company and the transactional value has been appropriately recorded in the accounts of the company, whereas in the present case there is nothing brought on record to evidence a proper authorization of the transaction or a proper accounting of the transactional value in the accounts of the company.”

13. Grounds (a) and (b) above, show the One Man Committee rejected the claim, primarily, on the ground that there exists a prohibitory order dated 10.10.1997 prohibiting the respondent company to dispose of its assets except to pay off its creditors.

The prohibitory order dated 10.10.1997 runs as under:-

“xxx

4. In the circumstances, the Reserve Bank of India is satisfied that it would not be desirable in the public interest to allow your company to accept further deposits from public/companies. The bank, therefore, in exercise of the powers conferred under Section 45k read with Section 45MB of the Reserve Bank of India Act, 1934 prohibits your company from accepting deposits with

immediate effect and the company is hereby prohibited from accepting deposits from any person in any form whether by way of fresh deposits or renewals of deposits or otherwise.

5. In this connection, your attention is invited to the provisions of Section 588(5) read with Section 58C of the Reserve Bank of India Act, 1934 in terms of which receiving any deposit in contravention of this order or alienation of any asset without our prior written permission except for the purpose of repayment of deposits would render the company and every director liable to the penalties provided in the said provisions of the Act.”

14. The order dated 10.10.1997 is based upon Section 45 MB of Reserve Bank of India Act, 1934 which read as under:-

“45MB. Power of Bank to prohibit acceptance of deposit and alienation of assets.

(1) If any non-banking financial company violates the provisions of any section or fails to comply with any direction or order given by the Bank under any of the provisions of this Chapter, the Bank may prohibit the non-banking financial company from accepting any deposit.

(2) Notwithstanding anything to the contrary contained in any agreement or instrument or any law for the time being in force, the Bank, on being satisfied that it is necessary so to do in the public interest or in the interest of the depositors, may direct, the non-banking financial company against which an order prohibiting from accepting deposit has been issued, not to sell, transfer,

create charge or mortgage or deal in any manner with its property and assets without prior written permission of the Bank for such period not exceeding six months from the date of the order.”

15. The One Man Committee had rejected the claim of the applicants observing inter-alia, the respondent company was prohibited per prohibitory order dated 10.10.1997 from selling, transferring, creating charge or mortgaging or dealing in any manner with its property and assets without prior written permission of the bank. However the One Man Committee completely ignored such a prohibitory order was valid only for a period of six months from the date it was issued [see Section 45MB (supra)]. These flats were purchased by the appellant after six months have elapsed. Admittedly, the order dated 10.10.1997 was never extended, hence would not have any effect upon the legality of sale of these flats. Thus the finding of One Man Committee viz., the sale being hit by Section 45MB is wholly incorrect. Alternatively, even if the sale was in contravention of prohibitory orders, then it simply could have entailed a penalty or imprisonment to the company's officials which could have been extended to three years or fine, (see section 58B of the Reserve Bank of India Act). Strictly speaking the sale was not in contravention of Section 45MB of the Act. Moreso the prohibitory order was not an order in rem, hence no knowledge of it could be attributed to the appellant herein. The one man committee rather took a narrow view of the facts.

16. The One Man Committee then preceded to hold the transfer being hit by Section 531A of the Companies Act, 1956. Section 531 A read as under:-

“531A. Avoidance of voluntary transfer. Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by or subject to the supervision of the Court or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator.”

17. This Section makes the sale transaction of property by the company void if made within one year before the filing of the winding up petition unless done in its ordinary course of business or in good faith and for a valuable consideration. The One Man Committee held the subject transaction being neither in its ordinary course of business nor appear to be in good faith or for valuable consideration, hence hit by Section 531A of the Act.

18. The learned counsel for the official liquidator referred to the Main Objects of the respondent company as are enumerated in its Memorandum of Association and argued since the sale/purchase of flats being not covered in its main objects, such sale cannot be said to be made by the respondent company in ordinary course of its

business. The learned counsel for Official Liquidator referred to *Shiv Shakti Builders and Financed Company In Re* (2010) 158 Comp. Cases 237 to prove his contention that if sale of property is not included in the main objects, the sale is not said to be in the ordinary course of business of the Company and thus is hit by section 531 A of the Companies Act.

19. Here I differ, as when we are looking at a sale we may also view it from the angle of an innocent purchaser. Section 531A needs to be interpreted in the following manner: **a)** first one may examine if sale is made within a year of presentation of winding up petition; then **b)** then if the sale is in the ordinary course of business of the company and then **c)** if it is in favour of purchaser in good faith and for valuable consideration.

20. Here though, admittedly, the main business of respondent company was not to deal in real estate but interestingly the authorization of the respondent company on its letter head rather indicate the respondent company being dealing in real estate.

21. Section 531A rather saves the transaction if entered into in good faith and for valuable consideration, even if not entered in ordinary course of its business, as is held in *M/S Monark Enterprises v. Kishan Tulpule*, (1992) 2 Bom CR 406 as follows:-

“The official liquidator missed the point when he observed in paragraph 9 of his report that the said transaction could be avoided if it was not entered into in the ordinary course of business. The company was a company engaged in manufacture of suitings and shirtings. To deal in real estate

was not the business of the company. No one can legitimately state that the impugned transaction was entered into in the ordinary course of business. But that is not all. Section 531A of the Act provides for two contingencies. The said section saves transactions entered into in good faith and for valuable consideration though not entered into in ordinary course of business.”

22. Further, though the One Man Committee held the sale being not for valuable consideration as the appellant failed to prove the payment of balance amounts of ₹5.50 Lac for flat No.402 and of ₹8.00 Lac for flat No.502, but the committee ignored the verification being conducted by the office of Official Liquidator by visiting the concerned authorities and even from the Sub Registrar's Office where such agreement to sell(s) were duly registered and the entire valuation checked and paid was noted. The registration certificates (Index II) of flat No.402 do note the sale consideration as ₹31.00 Lac and for flat No.502 as ₹38.00 lac hence there could be no doubt that full consideration was never paid. The Official Liquidator, even otherwise, could not prove such sale certificates though registered were without payment of full consideration. One may also note such registration certificate(s) were executed within ten days of the agreements to sell for both the flats, as stipulated in such agreements. Hence there was no reason for the One Man Committee to say the entire consideration was never paid. Admittedly, the respondent company did not challenge alleged inadequate consideration in any

forum, including before the Official Liquidator. Rather it never denied the receipt of entire consideration from the appellant.

23. Further, the apprehension of One Man Committee viz., such flats being undervalued also appear to be misconceived since the record of Sub Registrar's Office reveal the property was inspected and its *valuation was based on Roads (Amendment) Act, 1998 and the entire stamp duty was paid per its valuation.*

24. Hence **a)** the office of Official Liquidator could not prove the appellant had any knowledge of prohibitory orders dated 10.10.1997 passed by the Reserve Bank of India restraining the respondent to sell the property; **b)** such order being operative only for six months; **c)** there been no evidence on record to show if the respondent company or the appellant ever have acted in collusion or share the common intention to defraud other creditors etc; and **d)** the Official Liquidator rather failed to discharge its onus to prove the appellant did not act in good faith.

25. 'Good faith' has been explained by this Court in *Minnie Pan (India) Ltd vs. Eurobike Limited*, Company Petition No.307/1999 decided on 31.05.2005, wherein it was held as under:-

"11. The principles, while considering such cases under Section 531A of the Act to be kept in mind, are stated in Monark Enterprises v. Kishan Tulpule and Ors., [1992] 74 Comp Case 89. In this case the Court held that even if a transfer is made within a period of one year before presentation of the petition, once it is shown

that it was made in the ordinary course of business or in good faith and for valuable consideration, such a transfer would not be annulled and the burden of proof that transaction was not in good faith or not for valuable consideration, would be on the O.L. or the creditors challenging the transfer.”

26. In *M/s Monark Enterprises vs. Kishan Tulpule* supra, it was held as under:-

“40. ... Relying on several judgments of the Privy Council, the apex court negated this proposition of law propounded in the judgment of the High Court under appeal. The definition of "good faith" in the General Clauses Act (X of 1987) is in these terms:

"A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not."

41. The same definition of "good faith" is not adopted under the Indian Limitation Act, 1963. The definition of "good faith" as set out in the Limitation Act, 1963, states that a thing shall not be deemed to be done in good faith if not done without due care or caution. The definition of good faith as enacted in the Limitation Act was erroneously adopted in the High Court's judgment in support of its finding that the impugned transaction of transfer or usufructuary mortgage was not a transaction in good faith. The High Court held that the mortgagee had not acted with due care and caution and, therefore, the transaction could not be considered to have been effected in good faith. Overruling this

approach of the High Court and its ultimate decision, our Supreme Court held that the definition of "good faith" given in the General Clauses Act (X of 1987) shall have to be read in all Central statutes unless some other definition was provided in the specific statute. It was, therefore, held that the act of the transferee shall have to be held to have been done in good faith if it was done honestly, whether it was done negligently or without due care and caution. No definition of "good faith" is to be found in the Companies Act I of 1956. Applying the ratio of this judgment to the facts of this case and their assessment and overall impact, I hold that Monark Enterprises had acted honestly in obtaining the transfer of the leasehold right in the plot in question and the structures thereon and their conduct is not blameworthy, although the conduct of the transferor is not free from doubt. It is not possible to hold that Monark Enterprises knew that the company was insolvent or that they acted in collusion or fraudulently or shared any common intention to defraud. The petitioning workmen have a valid claim. Merely because Monark Enterprises realised their lawful claim by obtaining a transfer, it cannot be inferred that Monark Enterprises acted fraudulently or not in good faith. Having regard to the totality of facts and circumstances of the case, it is impossible to hold that the transferor and the transferee shared the common intention to defraud other creditors or the workmen as directly or indirectly sought to be imputed to them. Monark Enterprises had supplied goods to the company. The company could have been sued also by the

Bank of Maharashtra as well as by the Dena Bank by reason of the company having accepted the hundis for valuable consideration. In this view of the matter, I hold that the impugned transaction was entered into in good faith and for valuable consideration. The impugned transaction is not fraudulent or collusive. Accordingly I hold that the impugned transaction is not vitiated under section 531A of the Act.”

27. In *Prudential Capital Markets Ltd (In Liquidation) In Re* (2007) 140 Comp Case 754 it was held as under:-

“44. The onus is on the official liquidator to establish that the company as debtor deliberately singled out the creditor for the transfer ahead of other creditors who, upon the company ultimately be wound up, may not have enough for the entire dues to be discharged. But Section 531 does not come into play in this case as the respondent was no creditor of the company as on the date of the second agreement.

45. Section 531A of the Act provides that any transfer of property or goods made by a company within one year before the presentation of a winding up petition against it will be void unless such transaction was in the ordinary course of business. In principle, the same tests as to intent as in Section 531 apply to a transaction challenged under Section 531A of the Act and the onus is on the official liquidator seeking to avoid the transaction to establish that the transfer was not made in the ordinary course of the company’s business or that it was not made in good faith or for valuable consideration. As to whether the transaction is made in

good faith or for valuable consideration will depend on the facts of a given case. If there is no consideration or the consideration is woefully inadequate, there may arise a presumption of want of good faith. Again, even if there is adequate consideration, the official liquidator may attempt to establish that a valuable asset of the company was sought to be shielded against the claims of the company's creditors. The official liquidator's challenge would not pass muster if he cannot establish lack of bonafides on the part of the transferee.

46. In either case, whether under Section 531 or under Section 531A of the Act, for the rigours thereunder to apply and the transfer to be declared void, it must be evident that the company or the controlling mind thereof was aware of the imminent winding up of the company, took out a valuable asset of the company from the general pool to be ultimately available to creditors and dealt with such asset by the impugned transaction. The test that has to be applied in either case has to be one that would hold good for the earliest date of the period covered by either section."

28. Mr.V.K.Sharma, the MD of the respondent company admitted before the Official Liquidator and deposed that he himself had insisted the appellant to make cash payments as the respondent were to make payments to small depositors and the amount so realized on sale of these assets was used to payoff the creditors / depositors of the company. The statement of Mr.V.K.

Sharma recorded by the Official Liquidator rather reveal the sale was for making payments to the creditors/ depositors of respondent company. This statement of Mr. V.K.Sharma was never challenged either by the respondent company or by the Official Liquidator in any forum.

29. Thus, **a)** where the appellant did not have knowledge of the prohibitory orders dated 10.10.1997 or of the company going in liquidation in the ensuing months; **b)** where the appellant acted honestly and did not share common intention to defraud the creditors; **c)** where due diligence / verification was done by the employees of Official Liquidator; **d)** where Official Liquidator failed to prove the appellant did not act in good faith; and **e)** where the sale being for valuation consideration; the intention of the appellant cannot be doubted with and hence in the circumstances, the sale transactions for flat Nos.402 and 502 are neither hit by Section 45MB of the Reserve Bank of India Act nor by Section 531A of the Companies Act, 1956, as alleged. Hence, I allow the appeal and set aside the report dated 22.08.2014 of the One Man Committee to this extent as also the order/notice dated 13.11.2014 of the Official Liquidator.

30. Parties to bear their costs.

YOGESH KHANNA, J

OCTOBER 25, 2017

M/VLD