

Tandle

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO. 169 OF 2019
IN
COMPANY PETITION NO. 593 OF 2015

Sanjeev Kapoor ... Applicant

In the matter between :-

Nina Concrete Systems Pvt. Ltd. ... Petitioner.

Versus

Orbit Corporation Ltd. & Anr. ... Respondent.

.....

Mr. Rahul Lakhiani a/w Ms. Anasamah Sayed i/b Bilwala and Co. for Applicant.

Mr. Shanay Shah a/w Ms. Kalyani Wagle i/b T. N. Tripathi and Co. for Official Liquidator.

Mr. Mahendhar Aithe, Company Prosecutor present.

.....

CORAM : K. R. SHRIRAM, J.
DATE : 5TH SEPTEMBER, 2019

P. C. :

1. Application is for leave under Section 446 of the Companies Act, 1956, to prosecute the suit already filed by applicant being Suit No. 181 of 2017. Applicant is a flat purchaser, who has paid a sum of Rs. 2.77 crores and odd as part consideration for the flat, which was to be constructed by company in liquidation. The suit filed is for specific performance and in the alternative for damages and for other reliefs as well.

2. Mr. Shah appearing for liquidator states that applicant only has a letter of allotment and there is no registered agreement, and therefore, the suit filed itself is not maintainable and hence leave should be refused. Mr. Shah relies on a judgment of a Division Bench of Delhi High Court in **National Instt. Of Technology Trust Vs. Official Liquidator**¹ to submit, where an agreement is not registered, leave should be refused. That was a case where the application filed was for permission to file a suit for specific performance of the agreement to sale. Whereas, in this case, the suit has been filed and the relief sought in the suit is not only for specific performance but also for damages and other reliefs against other defendants. Therefore, the judgment of the Division Bench of Delhi High Court is of no assistance to the liquidator.

3. In the circumstances, I am inclined to grant leave under Section 446 of the Companies Act, 1956, subject to certain conditions. This is because, Mr. Shah also submitted that tomorrow, if, applicant does not succeed in the suit, the liquidator would have spent time and money in defending the suit out of the funds, which could have been used for paying other creditors and liquidator may find it difficult to recover those costs from applicant. Therefore,

1 Unreported judgment dated 1-5-2012 in Co.App.No.24 of 2012

applicant is directed to deposit a sum of Rs.1,00,000/- with the liquidator within 15 days from today. Liquidator shall engage advocate / counsel of his choice to defend the suit and use this amount to disburse / pay the fees and expenses. Once this amount is exhausted, applicant shall put the liquidator in further funds as requested by liquidator within one week of receiving communication from the liquidator. If these conditions are not met, leave granted will stand revoked.

4. If applicant succeeds in the suit, it is open to applicant to press for cost including the cost paid to the liquidator and if the trial court grants those costs, applicant may claim the same from the liquidator along with affidavit of proof of debt.

5. This court has not made any observations on the merits of the suit including the submission of the liquidator that the suit itself is not maintainable because there is no registered agreement.

6. Company Application is accordingly disposed.

7. All rights and contentions of liquidator is kept open to be raised in the suit.

(K. R. SHRIRAM, J.)