

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, CHENNAI.

Arguments heard on 17.03.2017

Order passed on 24.03.2017

CA No.19 of 2016

in

T.C.P.No. 146 of 2016

(C.P.No.57 of 2014)

Under sections 397 and 398 of the Companies Act, 1956

Applicants : Mr.Nirej V Paul and Anr.
Represented by Counsel Mr. K. Gowtham Kumar
Vs

Respondents : M/s. The Canning Industries Cochin Limited and 15 Ors.,
Represented by Counsel Mr.Srikant Mohan for 1stRespondent

CORUM

**ANANTHA PADMANABHA SWAMY & CH MOHD SHARIEF TARIQ,
MEMBERS (JUDICIAL)**

ORDER

CH MOHD SHARIEF TARIQ, MEMBER (JUDICIAL) :- (ORAL)

1. This is an Application which is numbered as CA 19/2016 filed in TCP No: 146/2016. The Application has been filed by the Applicants/Petitioners against the Respondents/Respondents, wherein it has been prayed to restrain the Respondents from in any manner alienating/disposing of the fixed assets of the company including the property at Mangalore and to appoint an independent Auditor to carry out an investigative audit into the books of the 1st Respondent Company.

2. Counsel for the Applicants/Petitioners also filed a Memo on 13.01.2017 stating that the Resolution passed at AGM of the 1st Respondent Company for the sale of the property of the company is in violation of Section 110 of the Companies Act, 2013 and Rules made thereunder. Therefore, the Resolution is void and is liable to be set aside. However, the Counsel for the Applicants/Petitioners has suggested some procedure for maintaining transparency for the purpose of sale of the property in question.

3. The Counsel for the 1st Respondent/1st Respondent filed the counter to CA 19/2016 stating therein that in the explanatory statement attached to the notice of AGM of this year, the Mangalore Unit stopped production way back in 1990 and the Board of Directors do not visualise any plans to restart production there and formed opinion that by selling the property in question, the proceeds can be deployed more profitable and in the best interests of the 1st Respondent Company and its shareholders, because at present the Bank borrowing may be repaid to make the 1st Respondent Company a debt free company. It has also been ensured that the 1st Respondent/1st Respondent will make efforts to fetch the best possible price for which the company proposes to make the sale by inviting a closed Tender through newspaper advertisements. In the light of the above, it has been prayed that CA 19/2016 be dismissed.

4. We have heard both the Counsel. Counsel for the Petitioners/Applicants has drawn our attention towards the provisions of Section 110 (1) (a) of the Companies Act 2013 which provides that notwithstanding anything contained in the Act, a

company shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot. This Section needs to be read with Section 180 of the Companies Act 2013, which places restrictions on powers of Board and provides that such powers shall be exercised only with the consent of the company by a Special Resolution to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

The term '*undertaking*' has been defined under the explanation which provides that an undertaking in which investment of the company exceeds 20% of its net worth, and for the expression for the term '*substantially the whole of the undertaking*', in any financial year shall mean 20% of the undertaking as per the audited balance sheet of the preceding financial year. Section 180 of the Companies Act, 2013 corresponds to Section 293 (1) (a) of the Companies Act 1956.

5. Counsel for the 1st Respondent Company relied on a decision of Hon'ble High Court of Karnataka in **International Cotton Vs. Bank of Maharashtra and Anr.**, reported in **1971 41 Comp Cas 226 Kar**, wherein it was observed that the term '*undertaking*' used in Section 239 (1) (a) of the Companies Act, 1956 would apply when the whole or substantially the whole of the undertaking of the company is sold, leased or otherwise disposed of. It was held that the business or undertaking of the company must be distinguished from the properties belonging to the company. In the said case, the

decision of Hon'ble Supreme Court in the landmark case **Secretary, Madras Gymkhana Club Employee's Union Vs. Management of the Gymkhana Club**, reported in **1968 AIR 558** was also referred wherein the dispute was as to whether the Petitioner Company is an 'industry or not'. Their Lordships were of the opinion that the word 'undertaking', though elastic, must take its colour from other expressions used in the definition of industry and must be defined as 'any business or any work or project which one engaged in or attempts as an enterprise analogous to business or a trade'.

6. In the light of the above case law relied upon by the Counsel for the 1st Respondent Company, the property which the Respondent Company proposes to sell is not any 'undertaking' but a part of its assets. It is otherwise also, in terms of the value of the assets of the 1st Respondent Company, it roughly comes below 20% of its net worth as per the audited balance sheet of the preceding financial year as has been submitted by the Counsel for the 1st Respondent Company. Therefore, the objection of the Applicants/Petitioners that the property falls within the purview of the term 'undertaking' is not legally sound, and stands rejected. There was no requirement to strictly comply with the procedure provided under Section 110 of the Companies Act, 2013, which requires that the item of business relating to the 'undertaking' shall be transacted only by means of postal ballot. However, for the purpose of maintaining transparency and fetching the market value of the property proposed to be sold, we appoint three Members Committee, the 1st Petitioner/Applicant and any two Directors of the 1st Respondent Company, who could be nominated by the company, ^{under} in whose supervision the property will be sold by following transparent procedure by way of inviting a

closed Tender through the newspapers, one in English and the other in vernacular language of the state where the property in question is situated. However, for the purpose of determining the true and fair value which could be offered at the time of advertisements in the newspapers, a qualified Chartered Accountant shall be appointed by the 1st Respondent Company, who shall make an assessment about the true and fair value of the property that could be taken as the base for inviting the Tender from the general public, so that the prospective buyers must know the true and fair value of the property. Accordingly, CA 19/2016 stands disposed of.



(K. ANANTHA PADMANABHA SWAMY)
(MEMBER (JUDICIAL))



(CH. MOHD. SHARIEF TARIQ)
(MEMBER (JUDICIAL))



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