

NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, KOLKATA

CA No. 163/2014
In
CP No.187 of 2013

Sections 111, 397, 398, 399, 402, 403 and 406
and other relevant provisions of the
Companies Act, 1956

Nand Kishore Bhutra
..... Petitioner/ Applicant

Vs.

Mangalahat Construction & Builders Pvt. Ltd.
& Ors
..... Respondents/ Non-Applicant

Judgment / Order delivered on : 11-7-2017

CORAM :

Hon'ble Ms. Manorama Kumari, Member(J)

- For the Petitioners : Ms. Nitu Poddar, PCS
- For the Respondents No. 1 to 5 : Mr. Ratnanko Banerji, Senior, Advocate
Mr. DN Sharma, Advocate
Mr. Raj Ratna Sen, Advocate
Ms. Pritha Bose, PCS
- For Gajanand Agency Service Ltd.: Mr. Promit Ray, Senior Advocate
Mr. Aditya Kanodia, Advocate
Mr. S Sarkar, Advocate
Mr. A Das, Advocate
- For Unipon Merchants (P) Ltd. : Mr. S Mitra, Advocate
Mrs. P Chowdhury, Advocate
Mrs. P Chowdhury, Advocate
- For Gajanand Agency Service Limited : Mr. Reetabrata Mitra, Advocate
Mr. Prasanta Naskar, Advocate

Per : Ms.Manorama Kumari, Member(J)

O R D E R

The instant Company Application bearing No. 163 of 2014 is filed by the Petitioner/Applicant on 21-03-2014 with a prayer, apart from other prayers, to implead :

- i) Unipon Merchants Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at U-119, Karbala Road, Kolkata – 700018 ;
- ii) M/s. Gajanand Agency Services Ltd., a company incorporated under the Companies Act, 1956 having its registered Office at Milanpur, rehabari, Guwahati, Assam- 781 005 ;
- iii) M/s, Vandana Real Estate Pvt. Ltd., a company incorporated under the Companies Act, 1956 having its registered office at 11-B, Armenian Street, Kolkata – 700001;

in relation to the illegal mortgage of Mangalahat Property as detailed in the Application, which could not have been made available with the petitioner/applicant at the time of the filing of the Company Petition No. 187/2013, and as such they are not arrayed as party respondents to the Company Petition which has been filed on 30th August, 2013.

The facts have only come to the knowledge of the petitioner on perusal of the reply affidavit dated 23-12-2013, filed by the Respondents to the Company Application being C.A. No.614 of 2013, since disposed of, which has material bearing on the stake and interest of the Applicant in the Respondent No.1, Company, and have material bearing on the present case itself.

In terms of order dated 06-12-2016, the Ld. Lawyer, appearing on behalf of the Petitioner/Applicant in the instant CA, submitted that he was not pressing his prayer for impleading Gajanand Agency Services Ltd. and Vandana Real Estate Pvt. Ltd. as parties to the main Company Petition, as made in CA No. 163/2014.

However, the prayer of the petitioner/applicant for impleading Unipon as made in CA No. 163/2014, remained, as was allowed by the Bench vide the said order dated 06-12-2016.

In view of the withdrawal of prayer by the applicant/petitioner for impleading Gajanand Agency Services Ltd. and Vandana Real Estate Pvt. Ltd. as parties, **the Ld. Lawyer, namely, Mr. Promit Kumar Ray, Senior Advocate appearing on behalf of Gajanand Agency Services Ltd. submitted that he also would not wish to proceed with the CA No. 1240/2015, filed by him, as reflected in the said Order dated 06-12-2016.**

The Respondent company was incorporated on 25-02-2004 under the provisions of the Companies Act, 1956 and is a closely held private company limited by shares.

M/s. Unipon Merchants(P) Ltd. is a non-banking financial Company(NBFC) registered with Reserve Bank of India as a Micro Financial Institution.

The petitioner submitted that the respondents have illegally and surreptitiously created a mortgage on the property for a sum of Rs. 3,60,00,000/- (Rupees three crores and sixty lakhs only) with one Unipon Merchants(P) Ltd., completely in an illegal and mala fide manner and in substance, the Respondents have tried to transfer the valuable property of the Respondent No.1, Company, in shadow of mortgage, thereby completely proposing to deprive the Company of its very substratum. The sole significant asset of the company has been jeopardised in the hands of the Respondents.

In the Reply affidavit of the Respondents Nos. 1 and 2, the purported mortgage deed dated 01-07-2013 was annexed as "R-13" and only upon receipt of the Reply Affidavit of the Respondents on 23-12-2013, the fact was made known to the petitioner/applicant.

It is alleged that the market value of the property was nearly 80 crores in July, 2013 but the mortgage with the right of purchase was, however, made for a consideration of a sum of Rs. 3.60 crores only.

It is alleged that the impugned mortgage is a virtual transfer of the property to Unipon Merchants Pvt. Ltd., the proposed added respondent.

The terms of the mortgage are absolutely one sided and grossly onerous on the company. The purported mortgage deed not only gives a right to sale the property to Unipon but it also permits it to purchase the property in adjustment of the loan.

As submitted by the Petitioner/applicant, the mortgage deed is also self-contradictory. At some places, it has been stated that advance will be made by Unipon to the Company while elsewhere it is said that the advance has already been received by the company.

The petitioner/applicant submitted that the company was not in need of any funds and the company has also no business and ought not to be having any expenses. It is an admitted fact that the Company could not undertake the development of the subject property for various reasons.

It is alleged that from the perusal of the Reply affidavit it could not be ascertained whether, at all the Company received the sum of Rs. 3.60 crores from Unipon and if so, the present whereabouts of the funds.

The respondents/non-applicants in their reply have not divulged as to when, if at all the money was received, and how the money has been utilised. Neither they provided any details with regard to the Bank accounts where such alleged money was received nor details as to how the funds have been utilised or to whom the funds have been further diverted to.

Therefore, the Applicant/Petitioner has reasons to believe that the company has, not received the money or if at all the money was received, it was immediately diverted to chosen nominees of the respondents of the Respondent Nos.2 and 3.

It is the allegation of the Petitioner/applicant that the impugned mortgage tantamounts to disposal of the whole and/or substantially the whole of the undertaking of the company. The said mortgage could not have been done without calling a general meeting which would have required notice to be served on the Applicant, which has not been done, which is yet to be decided in the Main Company Petition.

The Petitioner/applicant stated that the said mortgage is illegal, unlawful, mala fide, fraudulent preference and is opposed to the Terms of Settlement Agreement dated 17-01-2012, as annexed as "R-11" in the Reply affidavit of the Respondent No.1 and 2.

It is stated by the Petitioner/applicant that the Respondent No.1, at all material times, was intended to be and in fact, was in the nature of a Joint venture of two groups of shareholders viz. Nav Ratan Binani who had 5000 shares and the petitioner who had 5000 shares;

The petitioners/applicants stated that as the sole purpose and intention of the Company was at all times to cause development of the property, which in any case could not have or has not proceeded ahead, due to several pending litigations on the property filed by various parties before various adjudicatory forums. The company could not have and has not engaged in any other business activity of any kind. There could not have been any understanding oral or otherwise, other than the very purpose for which the Company existed.

Therefore, the allegation of the petitioner/applicant is that such a loan or share application money is just a conduit/means to siphon off the very substratum of the Company i.e. the Mangalahat Property and to take control over the company.

Further, as per Section 402(f), of the Companies Act, 1956 states that "the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under Section 397 or 398 would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference."

The Applicant/petitioner submitted that the said mortgage has been created on 01-07-2013 and the Company Petition was filed by the Applicant on August 30, 2013 under Section 397-398 of the Companies Act, 1956.

In the light of Section 402(f), the said mortgage is created well within the time period of three months and is nothing but a fraudulent preference under the Companies Act, 1956.

Further it is stated by the petitioner that a registered NBFC-MFI cannot advance Corporate Loans

In reply, M/s. Unipon Merchants(P) Limited stated that the CP No. 187 of 2013 has been filed by the applicant/petitioner against the Respondent No.1 and its management being majority shareholders thereof, complaining of alleged acts of oppression and mismanagement. There are no allegations at all and/or there is no mention of M/s. Unipon in any manner whatsoever.

The present proceeding as it appears is dispute between the shareholders of the Respondent No 1, Company and Unipon Merchants Private Ltd. is not a shareholder nor connected in any of the internal management of the respondent No.1. It is only by way of filing the instant application that the applicant/petitioner has sought to make certain allegations against Unipon and has sought to add them as a party to the main CP No.187 of 2013,

although Unipon Merchants Private Limited has nothing to do whatsoever with the cause of action as pleaded in CP. No.187 of 2013.

Unipon Merchants Pvt. Ltd. is in no way involved with the internecline disputes between the shareholders of the Respondent No.1, Company, therefore, to unnecessarily drag Unipon to a litigation where it has no role to play, would be highly detrimental to the interest of Unipon Merchants Pvt. Ltd. and as such they pray for the dismissal of the instant application CA No.163/2014.

It is stated by Unipon that Manglahat Construction and Builders Pvt. Ltd. has had certain business relations and/or transactions with them from time to time.

The Directors of the Respondent No.1, company approached them sometime in June, 2013 as they were in urgent requirement of funds representing that they had to repay the existing loan given to the Respondent No.1, Company by the Respondent No.4.

In that view of the matter, there were certain meeting between the Respondent No.1, Company and Unipon of which Mr. Bhutra, the applicant being a Director of the Respondent No.1, Company was well aware of, wherein it was decided that a loan would be granted by Unipon Merchants Private Limited, to the Respondent No.1 to the extent of Rs. 3,60,00,000/- (Rupees three crores sixty lacs only) and as a security for such loan , a mortgage deed was to be executed.

Admissibly, in terms of the agreement between the parties, Unipon Merchants Pvt. Ltd., duly issued cheques in favour of the Respondent No.1, company, the first one being dated 19-06-2013 for a sum of Rs. 10,00,000/- and two other cheques both dated 28-06-2013 for Rs.1,70,00,000/- and Rs. 1,80,00,000/- and in consideration of receipt of the said sums, the Respondent No.1, Company duly executed a Deed of Mortgage dated 01-07-2013.

The mortgage was lawfully created in view of loan taken by the Respondent No.1, Company, by observing the normal and widely used business practice prevailing in this country and it is denied that the impugned mortgage tantamount to disposal of the whole and/or substantially the whole of the undertaking of the company as alleged.

Creation of mortgage does not amount to disposal, sale or transfer of the property. In any event, admittedly, the respondent No.1, company is only owner of undivided half share of the Manglahat property at Howrah which is occupied by over 3000 stall holders/unauthorised persons and for which several litigations are pending.

M/s. Unipon submitted in their reply that the transaction of loan entered into between the Respondent No. 1, company and Unipon which resulted in creation of the said Mortgage Deed, is purely a business transaction and there is no other connection whatsoever, as sought to be alleged, between the Respondent No.1 and Unipon and they denied that the said covenant has the effect of granting a proprietary interest in the property to the mortgagee or thereby, the so called mortgage takes the substantive nature of contingent conveyance or is not a true mortgage in essence.

The Respondents No.1, Company and the Respondent No.2, in their reply affidavit submitted that the filing of the instant Application, has sought to completely change the nature and character of the CP No.187 of 2013 which would amount to a fresh cause of action which should not be allowed to be taken on record by this Tribunal as the same would be in violation of the principles laid down in Order 6 Rule 17 of the Code of Civil Procedure, 1908.

It is the submission of the Respondent Nos. 1 and 2 in their reply affidavit that the nature of the alleged complaints made in the said Application were well within the knowledge of the Applicant before the CP.No.187 of 2013 was filed.

The Respondent No.1 and 2 further submitted that the Applicant was well aware of the creation of the mortgage for repayment of the loan to the Respondent No.4, in view of the fact that the decision, inter alia, to mortgage the property, which had been authorised in their favour at a Board meeting of the Company held on November 10, 2011 and the extracts of the minutes of the said Board meeting was signed by the Applicant himself, as per Annexure "R-1" annexed with the reply affidavit of Respondent Nos. 1 and 2.

The Board of Directors of the Company, at this meeting dated 10-11-2011, also bestowed upon the respondent No.2, the absolute powers to deal in any manner with the property of the Company.

It is further submitted that the Respondent No. 2 to 6 had substantial financial involvement in the Company much more than the Applicants.

The applicant had invested only a sum of Rs.1,70,000/- by way of share Application money in respect of the shares held by him.

At all material times, the Respondents together had invested a sum of Rs.3,61,51,000/- of and in the Company in addition to the amount invested in the share capital of and in the Company.

It is further submitted by the Respondent Nos. 1 and 2 that prior to May, 2007 substantial loans and share application money to the extent of Rs. 3,61,51,000/-

had also been advanced by concerns which are known to or in control of then Directors of the Company and in 2007, majority shareholding of and in the Company was transferred to Respondent No.2 or to the entities under his control.

The Respondent No.2 further submitted that it was also the understanding between the parties that he would bring funds and retire all the existing loans of the Company; take over the existing share application moneys brought into the Company; would purchase the entire shareholding of the outgoing shareholders; and shall be entitled to majority representation on the Board and shall also bring in all the moneys as and when required for the development of the property of the Company, which owned at all material times, 50% shares of and in the property known as Manglahat.

Under the facts and circumstances as discussed above, admittedly, the Respondent No.1 has entered into agreement with M/s. Unipon Merchants Pvt. Ltd., who issued a cheque in favour of Respondent No.1, company and thereby, mortgaged the property of the company.

Admittedly, the Respondent No.1, company is the owner of undivided half share of the Manglahat property at Howrah.

Under such circumstances, the Unipon Merchants Pvt. Ltd. became the interested party in the subject matter of litigation, which will affect him legally, that is, by curtailing his legal right.

While considering the question of impleadment of party in a proceeding, the well settled essential requirements are :-

- (i) A necessary party is one without whom no order can be made;
- (ii) A proper party is one in whose absence, an effective order can be made, but whose presence is necessary for a complete and final decision on the questions involved in the proceeding;
- (iii) A party must be directly or legally interested in the subject matter of litigation i.e. he/she can say that the litigation may lead in a result, which will affect him/her legally that is, by curtailing his legal rights.

In view of the above discussion, I found that the proposed impleadment of Unipon Merchants Private Limited as Respondent No.9, is necessary to come to the just decision of the main Company Petition.

The prayers made in CA No. 163/2014 is allowed only to the extent of impleading the Unipon Merchants Private Limited as necessary party to the main CP.

Accordingly, the petitioner/applicant may file his amended petition with copy to all the respondents.

MANORAMA KUMARI
MEMBER(J)