

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

IA No. G.A.9 of 2021

C.S.12 of 2009

Narendra Kumar Berlia & Ors.

Vs.

Om Prakash Berlia & Ors.

For the Petitioners	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Jishnu Chowdhury, Adv. Mr. Sarvapriya Mukherjee, Adv. Mr. Arif Ali, Adv. Mr. Arnab Sardar, Adv. Mr. Ratul Das, Adv.
For the Defendant	:	Ms. Iti Dutta, Adv.
No.8.		
For the Defendant Nos.	:	Mr. Sakya Sen, Adv.
1 & 2.		
For the defendant Nos.3, 5,	:	Mr. H.L. Tiku, Sr. Adv.
16.		Ms. Yasmeet Kour, Adv. Mr. Rohit Banerjee, Adv. Ms. D. Adhikari, Adv.

For the Defendant No.15 : Mr. S.N. Mookherjee, Sr. Adv.
Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Varun Kedia, Adv.

Reserved on : 09.09.2021.

Delivered on : 04.10.2021.

MOUSHUMI BHATTACHARYA, J.

1. The plaintiffs seek an injunction on the sale of a property of the defendant no. 15 Company consisting of 20 acres of land situated at Thane, Maharashtra. The plaintiffs claim the present application to be a derivative action for the benefit of the defendant no.15 which has been described as a family Company acquired by the first plaintiff's late father in 1981. The defendant nos. 13, 15, 16, 18 and 22 to 26 are the alleged offenders with regard to issue of shares and appointments of directors of the defendant no.15 Company which are the other complaints of the plaintiffs in the suit.

2. The primary contention of the plaintiffs, as would appear from the submissions of Mr Abhrajit Mitra, Senior Counsel, is that the sale of the land at Thane should be restrained on the ground of the sale being undervalued and not in the best interest of the Company. The plaintiffs also challenge the manner in which the Extraordinary General Meeting of the Company has been called in violation of section 101 of the Companies Act, 2013.

3. The plaintiffs are supported by the defendant no.3 who questions the need to sell the undertaking of the Company. According to Mr. H.L. Tikku, Senior Counsel, the defendant no.1 has illegally issued further shares after 2004 and has allotted 5 lakh equity shares on preferential basis resulting in reduction of the shareholding of the other parties.

4. Mr. S.N. Mookherjee, Senior Counsel appearing for the defendant no.15 Company, opposes the application on the ground that the Thane property is required to be sold to cover the huge losses faced by the Company during the Covid-19 pandemic and the demands made by financial creditors. Counsel defends the valuation done for such sale and urges that satisfactory notice of the EGM was given to the plaintiffs. It is submitted that non-compliance of section 101 of the 2013 Act would not render the meeting a nullity and further that the resolutions pertaining to sale of the property were passed by requisite majority.

5. The defendant nos. 1 and 2 are represented by Mr. Sakya Sen, counsel, who urges that the final reliefs claimed are not supported by the pleadings in the plaint. It is submitted that the cause of action in the plaint is identical to that pleaded in a Partition Suit C.S. No. 79 of 2011 which is pending as on date. Counsel submits that the cause of action is based on the plaintiffs being co-sharers of the joint family properties which cannot form the basis of a derivative action of a minority shareholder of a public limited company.

6. The first point which is required to be answered in view of the objection taken on behalf of the defendant nos. 1, 2 and 15 is whether the prayers in the application can be allowed with reference to the form of the suit, i.e., C.S. No.12 of 2009. The contention of the said defendants is that the plaintiff cannot claim any relief in the nature of a derivative action in the present suit as the plaintiffs themselves have described the Thane property as a joint family property. This aspect requires a brief statement of the background of the matter. An order dated 6th April, 2011 in the application for interim relief filed in the present suit indicates that the learned Single Judge was of the view that the merits of the claim cannot be entertained since claiming partition of several assets of the Company in a derivative action is contradictory to the recognised form and purpose of such action. The aforesaid view was founded on the nature of a derivative action where the complainant seeks to enforce a cause of action on behalf of the company and does not have a personal interest in the reliefs claimed since a derivative action is for rectifying a wrong done to the company where a judgment is given in favour of the company without any personal benefit accruing to the complainant.

7. By reason of the view taken by the Single Bench, the plaintiffs filed a second suit; C.S. No.79 of 2011 which incorporated the personal cause of action of the plaintiffs and formed the subject-matter thereof. In the said suit, an interim order of injunction was passed by a learned Single Judge on 18th April, 2011 restraining the defendant no.15 herein and some of the other defendants from transferring or alienating their fixed assets without prior leave of the Court. In the said order, the learned Single Judge noted

that the suit, i.e., C.S. No.79 of 2011 is a suit for partition filed on the basis of the plaintiff claiming to be a member of the Berlia family. In a challenge by some of the defendants from the order of the learned Single Judge, the Division Bench in its order dated 16th June, 2011 recorded that the earlier suit filed by the plaintiffs was a derivative and a representative action and hence, there was no scope of claiming partition of the Company's assets. The Division Bench held that if a plaintiff removes the defect in an earlier suit and files a properly constituted suit, the earlier defect cannot be a ground for refusing relief in the later suit. The Division Bench also noted that the plaintiff had abandoned some of the prayers in the earlier suit and the Single Bench had recorded this fact. It was on this basis that the Division Bench allowed the claim for partition and held that the provisions of Order II Rule 2 of The Code of Civil Procedure would not stand in the way of the plaintiff filing an appropriate suit claiming the relief which was not available to it in the earlier suit.

8. In an application filed by the plaintiffs in the first suit, i.e., C.S. No.12 of 2009, by an order dated 17th June, 2011, prayers (a) to (e) and (o) claimed in the plaint in C.S. No.12 of 2009 were allowed to be abandoned. The aforesaid reliefs were for partition of the assets of some of the companies and for a declaration that the defendant companies are all family companies and constitute a part of the joint assets of the Berlia family. The order notes that the plaintiffs filed a subsequent suit (C.S. No.79 of 2011) seeking partition of the alleged joint family assets and that the personal cause of action has been made the subject-matter of the later suit.

9. The sequence of orders shows that the fact of the plaintiffs segregating the derivative and personal causes of action in two different suits has been noted by several orders of the Court and accepted by the parties. The personal cause of action is now a part of the second suit being C.S. No.79 of 2011 while the present suit is in the nature of a derivative action where the defendant no.15 Company is the *eo-nomine* plaintiff. Hence, the objection that the plaintiffs are claiming the same reliefs as in C.S. No.79 of 2011 incorporating the personal cause of action is liable to be rejected. The plaintiffs are therefore entitled to seek reliefs which are essentially related to the defendant no.15 Company and are for benefit of the Company.

10. The merits of the present action can now be gone into. The immediate reason for filing the present application is the admitted sale of the entire undertaking of the defendant no.15 Company at Thane which came to the knowledge of the plaintiffs from a public notice of 25th May, 2021. The primary prayer in the present application is for restraining the defendants from giving any effect to the purported letters dated 11th May, 2021 and 25th June, 2021 which were written by the defendant no. 15 to the Bombay Stock Exchange on the outcome of the Board Meeting approving the sale of the land situated at Thane. The thrust of the argument put forth on behalf of the plaintiffs is that the proposed sale is a fraudulent and undervalued sale and is hence not in the interest of the defendant no.15 Company. The material-on-record, specifically the Valuation Report shows that the applicable Circle Rate as per the said Valuation Report is Rs.1,31,300/- sq. metre. The Circle Rate of

Rs.44,900/- as per the rates of Maharashtra Ready Reckoner for the year 2021-2022 which is applicable for "*Khuli Zameen*" is at variation with several other documents on record. The Property Value Search Report dated 1st July, 2021 relied on behalf of the plaintiffs mentions that the property falls within the "urban area" category in the territorial limit of Thane and that the land is "industrial" in nature which would translate to a rate of Rs.1,28,100/- sq. metre. This rate is as per the rates of the updated Stamp Duty Reckoner Portal of the government. The Schedule contained in the public notice dated 25th May, 2021, the letters dated 11th May, 2021 and 25th June, 2021 and the description of the property contained in the Valuation Report shows that the property is non-agricultural land along with factory buildings and other ancillary structures on it. Hence, choosing the lowest applicable Circle Rate at Rs.44,900/- which is applicable for "*Khuli Zameen*" appears to be without any explanation. Further, the aforesaid two letters written by the defendant no.15 to the Bombay Stock Exchange are different to the extent of mentioning that the sale of the land at Thane has been approved by the Company's Board on the basis of a Valuation Report by a Registered Valuer and upon negotiations with a probable buyer. There is also no satisfactory explanation on behalf of the defendant no.15 as to why the Property Value Search Report relied on behalf of the plaintiffs should not be accepted as correct.

11. Even if the court were to accept the reasons for selling the property of the defendant no.15 Company and assume that the Company is in urgent need of funds, the Valuation Report and the Circle Rate contained in the

Search Report for the land in question is required to be re-visited. This would also inure to the benefit of the Company and cannot possibly prejudice any of the parties before this court. Reliance in this context may be placed on *Lal Chand vs. Union of India*; (2009) 15 SCC 769 where the Supreme Court emphasized on the importance of a correct assessment of market value and the guidelines for determining the same. The Supreme Court was of the view that Expert Committees constituted by experts in the field of valuation of properties may be required in certain cases who would take into account different methods adopted for valuation of lands, plots, houses and other buildings. It was further opined that the estimation of market value of such statutorily appointed Expert Committees may act as a relevant piece of evidence for determining the correct market value. Even the question whether the Thane property can be classified as vacant land can be determined in a fresh valuation for the satisfaction of all concerned.

12. The second point with regard to the complaint of the plaintiffs pertaining to the violation of section 101 of The Companies Act, 2013 on the lack of notice of the EGM cannot be given much weightage, since the notice was issued at the registered address of the first plaintiff as would be evident from the list of shareholders of the defendant no.15 in the relevant annexure to the application. Notice of the postal ballot dated 22nd May, 2021 was also published in the Business Standard which has a wide circulation. The fact that the notice was not issued at the Kolkata address of the plaintiff no.1 is, therefore of no consequence. The notice also has an explanatory statement as required by statute.

13. *Nirad Amilal Mehta vs. Genelec limited*, a Single Bench decision of the Bombay High Court does not assist the defendant no. 3 (who supports the plaintiffs) since in that case, no notice was given to any member at all and the notice of the meeting was found to be of the same date as that of the meeting. On the other hand, *Surajmull Nagarmull vs Shew Bhagwan Jalan; (1973) ILR 1 Cal 207* considered the effects of shortness of notice, non-service of notice of an AGM on certain parties and want of explanatory statement. In the said decision, this Court took into account the object of Sections 171 to 186 of the Companies Act, 1956 which is to ensure that members of the Company get a proper opportunity of attending and presenting their views at the meetings and held that non-compliance with the statutory requirements envisaged in the provisions will not necessarily invalidate a meeting or render it void. *Maharwal Khewaji Trust vs Baldev Dass (2004) 8 SCC 488* held against changing the nature and character of a suit property including alienation thereof.

14. Since the first plaintiff only holds 500 shares which is approximately 0.05% of the shareholding of the defendant no.15 Company and the resolutions for sale of the Thane property were passed by a requisite majority, the said resolution cannot be defeated and the defendants cannot be restrained from giving any effect to the said resolutions or restrained from disposing of or dealing with the said property. However, since the cause of action in the present suit is in the nature of a derivative action, it is necessary for the court to ensure that the sale of the Thane property is conducted in a transparent manner and fetches the best price for the ultimate benefit of the defendant no.15 Company and its shareholders.

Further, since the Valuation Reports of the land at Thane are inconsistent in terms of the classification of the land, the valuation and other particulars arrived at, this Court is of the view that a fresh valuation of the land should be done by an accredited Valuer based in Maharashtra with the required credentials and expertise to conduct the exercise. The plaintiffs and the defendant nos. 3 on one hand and the defendant nos. 15, 1 and 2 on the other are directed to appoint an independent Valuer of their choice for conducting a fresh valuation of the Thane property described in prayer (b) of the Notice of Motion. The Valuer shall be appointed within four weeks from the date of this order and if the parties are unable to arrive at a consensus on the choice of Valuer, they shall be at liberty of approaching the court for appropriate orders but only to the extent of appointment of an independent Valuer for a fresh valuation of the Thane property.

15. G.A.9 of 2021 is disposed of in terms of the above.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Moushumi Bhattacharya, J.)