OD-1

IA NO. GA/12/2022

In CS/12/2009

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

NARENDRA KUMAR BERLIA AND ORS.

Vs.

OM PRAKASH BERLIA AND ORS.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Date: 17th May, 2022.

Appearance:

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Jishnu Chowdhury, Adv.
Mr. Sarvapriya Mukherjee, Adv.
Mr. Arif Ali, Adv.
Mr. Ratul Das, Adv.
Mr. Arnab Sardar, Adv.
...For the plaintiff/petitioner

Mr. K. Thaker, Adv.
Mr. S. E. Huda, Adv.
Mr. Varun Kedia, Adv.
...For the respondent no. 15.

Ms. Iti Dutta, Adv.
...For the respondent no. 8

Mr. Shiv Ratan Kakrani, Adv.

Mr. T. Kakrani, Adv.
Mr. Karanjeet Sharma, Adv.
Mr. Tanujit Chakraborty, Adv.
...For the defendants no. 1 & 2

Mr. Deepan Kr. Sarkar, Adv.
Ms. D. Adhikari, Adv.
...For the defendant/respondent no. 3

ORDER

The plaintiffs have filed the instant application for grant of injunction with respect of piece and parcel of land measuring 20.90 equivalent to 84,858 sq. mts. bearing Gat Nos. 1/1/A, 1/4/B,1/5,1/6/C.2/2,2/5,7/1 and 7/2 and/or structures standing thereon, situate at Village Chitalsar Manpada, Taluka Thane, District Thane, Maharashtra, and prayed for following orders:

"(a) Direction upon the respondents to immediately circulate the valuation report of the CBRE South Asia Pvt. Ltd. in terms the order dated 27th January, 2022 passed in G.A. No. 10 of 2022 and G.A. No. 11 of 2022 in C.S. No 12 of 2009 [Narendra Kumar Berlia & Ors. Vs. Om Prakash Berlia & Ors.];

(b) A fit and proper person be appointed as Special Officer/ Receiver who may be directed to do the following:

(i) Obtain a copy of the valuation report from the appointed valuer, namely, CBRE South Asia Pvt. Ltd. and thereafter circulate the same to all the parties;

(ii) Conduct sale of the said property by public auction or in such other transparent manner as this Hon'ble Court nay so direct in order to ensure maximization of the sale value;

(iii) Retain and hold the sale proceeds in a separate bank account subject to such further order or orders that may be passed by this Hon'ble Court.

(c) Injunction restraining the respondent Nos. 1, 2 and 15, their agents, servants and assigns from dealing with, disposing of or transferring the said property more fully described in the schedule hereunder pending disposal of the present application;

(d) Ad interim orders in terms of prayers above;

(e) Such further and/or other order or orders be passed, direction or directions be given as Your Lordships may deem, fit and proper."

Mr. Abhrajit Mitra, Senior Counsel appearing on behalf of the plaintiffs submits that earlier the plaintiffs have filed an application being G.A.No. 9 of 2021 in CS No.12 of 2009 praying for an injunction on the sale of the aforesaid property and the said injunction application was disposed of on 4th October,2021 by passing the following order :

"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."

Ld. Senior Counsel further submits that in terms of the order dt. 4th October 2021, an application for appointment of valuer was filed being G.A.No. 10 of 2022 and this Court had disposed of the said application on 27th January 2022 by passing the following order:

> *"After hearing the parties, who have indicated that the choice of Valuer may be decided by this Court, I am appointing CBRE South Asia Pvt. Ltd., 11th Floor Raheja Towers, G Block, Bandra Kurla Complex, Mumbai, as the Valuer for carrying out the above exercise.*
>
> *The fees of the Valuer shall be borne by the company and the exercise of valuation should be completed within six weeks from date.*
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> *IA No.GA/10/2022 is, accordingly, disposed of."*

At the time of hearing of the instant application the counsel for the plaintiffs has handed over the Valuation and Advisory Report dt. 10th March 2022 and submits that the said report was received by the plaintiff on 29th March 2022 i.e. after the filing of the instant application.

Mr. Mitra, Ld. Senior Counsel by referring the said report submits that as per the opinion of the Valuer the market value of the property is Rs. 2,977 Mn. Ld. Counsel further submits that the said value is only with respect of piece of land and not with respect of any structure standing in the said property.

The plaintiffs have also filed a supplementary affidavit by enclosing copies of the particulars of the Deeds registered with respect of the property in question and submits that on 31st March 2022 the defendant no.15 has executed conveyance deeds in favour of third party namely Dhruva Woolen

Mills Pvt. Ltd for a total sum of Rs. 471,00,00,000/- and as per the said valuation, the value of the said property is Rs. 54,000/- per sq.mts. though as per order passed in G.A. No. 9 of 2021 dt. 04.10.2021 the value of the said property would be Rs. 1,31,300/- per sq. mtrs.

Mr. Mitra, Ld. Senior Counsel further submits that the company which is a family company is protected by ensuring that the sale of the property is to be done in a fair and transparent manner and the valuation report of the valuer ought to have been circulated amongst the parties for taking appropriate steps but the defendant no. 15 of his own had executed conveyance deed in a lower consideration by depriving the right of the plaintiffs. It is further submits that defendant no. 15 ought to have fetch the best price for the benefits of the company and its shareholders.

Ld. Counsel for the plaintiff submits that as the defendant no. 15 has already executed conveyance deed on 31. 03.2022 behind the plaintiffs herein and prayed for injunction in terms of prayer (b)(iii) of the instant application.

Mr. Krishnaraj Thaker, Ld. Counsel representing defendant no. 15 submits that the plaintiff only holds 0.05% of shareholding of the defendant no.15 company and resolutions for sale of the property in question were passed by requisite majority. In an earlier application filed by the plaintiff being G.A. No. 9 of 2021 in the said order this Court categorically held that the resolution cannot be defeated and the defendants cannot be restrained from giving any effect to said resolution or restrained from disposing of or dealing with the said property.

Mr. Thaker further submits that the property in question is sold to cover the huge loss faced by the Company during the Covid-19 pandemic and the demands made by financial creditors. It is further submits that as the company was in urgent need of money and as such the defendant no. 15 had filed an application before this Court for appointment of valuer in terms of order dt.04.10.2021 and on the prayer of the defendant no. 15 valuer was appointed.

Mr. Thaker further submits that valuer was appointed by this Court with the consent of the parties and is an approved valuer. The valuer had assessed the value by adopting the Discounted Cash Flow Methodology. It is further submitted that in an earlier proceeding being G.A.No.09 of 2021 the plaintiffs have prayed for similar relief but the plaintiff could not succeed in the said proceeding and thus the instant application is barred by Res judicata.

Ld. Counsel for the defendant no.15 further submits that the plaintiffs are having only 0.05 % of share in the company and the shareholders acquires a right to participate in the profits of the company and are not entitled to acquire any interest in the assets of the company.

Ld. Counsel for the defendant no. 15 relied upon the judgment reported in AIR 1964 SC 993 in the case of (Arjun Singh -versus- Mohindra Kumar

&Ors) and AIR 1955 SC 74 in the case of (Bacha F. Guzdar, Bombay -versus- Commissioner of Income Tax, Bombay).

Heard the Ld. Counsel appearing for the parties, documents available on record and the judgment referred by the counsel for the defendant no. 15.

Admittedly the plaintiffs have filed an application before this Court being G.A. No. 9 of 2021 earlier and in the said application also the plaintiffs have prayed for an injunction against the defendant no. 15 by restraining the defendant no. 15 for dealing with, disposing of and encumbering the property in question. In the said application this court vide order dt. 04.10.2021 had categorically held that defendants cannot be restrained from giving any effect to the resolutions or restrained from disposing of or dealing with the said property. The plaintiffs have accepted the said order and have not carried the said order in appeal and thus the order dt. 04.10.2021 reached its finality.

It further transpires from record that during the pendency of the instant application the defendant no. 15 had executed deed of conveyance with respect of the suit property on 31. 03 2022 and thus third party interest has been accrued and the plaintiffs have not made the purchaser as party to the instant application. The plaintiffs are also not challenged the report of valuer and the deed of conveyance though the plaintiff had the knowledge of both documents.

As regard the prayed (b)(iii) of the instant application as prayed for by the plaintiff it is settled law that the shareholder of the company acquires right to participate in the profits of the company but not in the assets of the company as reported in AIR 1955 SC 74 (supra) wherein the Hon'ble Supreme Court held inter alia :

> ***"7.*** *It was argued by Mr. Kolah on the strength of an observation made by Lord Anderson in Commissioners of Inland Revenue v. Forrest, that an investor buys in the first place a share of the assets of the industrial concern proportionate to the number of shares he has purchased and also buys the right to participate in any profits which the company may make in the future. That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word 'assets' in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the Sholapur Mills Case. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the, sole determining voice in administering the affairs of the company and are entitled, as provided by the Articles of Association to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. Reliance is placed on behalf of the appellant on a passage in Buckley's Companies Act (12th Ed.), page 894, where the etymological meaning of dividend is given as dividendum, the total divisible sum but in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. This statement does not justify the contention that shareholders are owners of a divisible sum or that they are owners of the property of the company. The proper approach to the solution of the Question 1st to concentrate on the plain words of the definition of agricultural income which connects in no uncertain language revenue with the land from which it directly springs and a stray observation in a case which has no bearing upon the present question does not advance the solution of the question. There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the*

company which is a juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up, but not in the assets as a whole as Lord Anderson puts it."

In view of the circumstances mentioned above this court is of the view that the application filed by the plaintiffs is misconceived and the plaintiffs are not entitled to get any injunction as prayed for. However, this court has not gone into the point raised by Mr. Thaker with regard to Res judicata .

G.A. No. 12 of 2022 is thus dismissed.

(KRISHNA RAO, J.)

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