
(1972) 02 RAJ CK 0011

In the Rajasthan High Court

Case No : Reference in Company Miscellaneous Application No. 28 of 1971

B. Gopal Das and Others

APPELLANT

Vs

Kota Straw Board (P) Limited

RESPONDENT

Date of Decision : 01-02-1972

Acts Referred:

COMPANIES ACT, 1956 — Section 441, 536

Citation : (1972) RLW 649 : (1972) WLN 35

Hon'ble Judges : Jagat Narain, C.J;P.N. Shinghal, J;B.P. Beri, J

Bench : Full Bench

Judgement

1. The question which has been referred to us for consideration is whether the Court has jurisdiction u/s 536(2) of the Companies Act, 1956, to authorise a disposition of a company's property during the pendency of a winding-up petition notwithstanding that a winding up order has not been made? The reference has become necessary as it has been suggested that the decision of a Division Bench of this Court in Bhanwarlal and Another Vs. Insaf Ali and Another, requires reconsideration. In that case also a similar question had arisen, but was answered in the negative.

2. Section 536 of the Companies Act, 1956, hereinafter referred to as "the Act", occurs in that portion of Chapter V of Part VII which deals with the effect of winding up on antecedent and other transactions. Sub Section (2) of that section provides as follows:

536 (2). In the case of a winding up by or subject to the supervision of the Court any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void.

And Section 441(2) provides that the winding up of a company by the Court shall be "deemed" to commence at the time of the presentation of the petition for the

winding up. The effect of Sub-section (2) of Section 536, in a case like the present where a petition has been made for the winding up of the company by the Court is, *inter alia*, to nullify the effect of any disposition of a property of the company during the period intervening between the date of the presentation of the winding-up petition and the date of the winding up order. As there is always some interval between these two dates, the provision is beneficial to the creditors of the company for it protects and preserves the property of the company from dissipation or unscrupulous appropriation or transfer by providing that any disposition of the property shall be void. But while the sub-section casts such a cloak of protection round the property of the company in the interest of its creditors, it takes note of a situation where disposition of the property may become necessary or unavoidable, for it empowers the Court to uphold transactions which are honest and arise in the ordinary course of its business. While the sub-section safeguards the interests of the share-holders as well as the creditors, it is so framed that before a transaction is allowed to stand it is necessary that the Court should scrutinise it.

3. In this state of the law, it is only natural that the company should find it difficult to attract persons who would accept a disposition of its property, during the pendency of the winding up petition, even when it acts honestly. Thus, in a given case, the company may not find it possible to save a valuable property from distress sale, on account of the reluctance of any other party to agree to a transaction which may not be upheld by the Court in case of a winding up. In such a case, that party would like to fortify itself by an assurance that the disposition would be upheld by the Court and shall not be void *ab initio* on the making of the winding up order. It appears to us that in such a case there is no reason why it should not be permissible for the Court to authorise the disposition before the making of the winding up order.

4. As has been stated, Section 536 finds a place in that portion of the Act which deals with the effect of winding up on antecedent and other transactions, and there is nothing in subSection (2) or the schemes of the Act to show that the Court cannot authorise a disposition in a case where winding up petition is pending but a winding up order has not been made. On the other hand, it may well be argued that, in the absence of any prohibition in the law, there is no reason why the Court should be precluded from examining the propriety of a proposed disposition during the pendency of a winding up petition if the company has a genuine case requiring early consideration. It has to be appreciated that while this view is advantageous to the company in as much as it saves it from that difficulty or predicament which leads it to the proposed disposition, it does not harm the interest of the creditors from any unfortunate result which may ensue from an eventual winding up order in as much as the same Court, which has the authority to validate the disposition after the winding up order, examines the merits of the disposition at the very outset. The extent of the eventual protection to the creditors is not therefore mitigated and is available in either case. We are accordingly of the opinion that the Court has jurisdiction to

authorise a disposition of the company's property during the pendency of the winding up petition.

5. The question has been examined in England where Section 227 of the Companies Act, 1948. is quite similar to Section 536(2) of our Act. There Section 227 has replaced Section 173 of the Companies Act, 1929, which was similar in material particulars. Those provisions of the English Acts have been examined at length by Buckley J. in *In re A.I. Levy (Holdings) Ltd.* (1964) 1 Ch. 19. He has considered all the reported and unreported cases on the point, including the view of Vaisey J. in *Re Miles Aircraft Ltd.* (1948) 1 A.E.R. 225 that the Court had no jurisdiction to make an order u/s 173 of the Companies Act, 1929, in the absence of a winding up order. Buckley J. has effectively dealt with the argument which prevailed with Vaisey J. and expressed his own view as follows:

It does not appear to me, with the utmost respect to Vaisey J., that the language of the section necessarily requires an order to be made in respect of a company which is in fact being bound up by the Court at the date when the order u/s 227 is made, that is to say, after the date of the winding up order. If that were the true effect of the section, the present case would demonstrate that the section is ill designed to meet a kind of risk to the creditors of a company against which one would have expected it to be intended to protect them.

He has therefore held that the Court has jurisdiction to make an order "not with standing that no winding up order has yet been made".

6. We are in respectful agreement with this view. The law on the point has been stated as follows in Palmer's Company Law, twenty-first edition, page 770:

The Court has jurisdiction u/s 227 to authorise a disposition of the company's property for the benefit of creditors, notwithstanding that a winding up order has not yet been made.

We have gone through the reasoning which prevailed with the Division Bench in taking a contrary view in *Bhanwarlal and Another Vs. Insaf Ali and Another*, That view appears to have been taken for three reasons. Firstly, it has been pointed out that "situation visualised by this section does not arise before winding up order is passed by the Court", secondly, the Bench felt that if the winding up petition was dismissed, the Court's interim interference would be unjustified", and thirdly, it thought that "if the winding up order is passed, then also it would find itself in a difficult situation if its earlier order is found to be erroneous in any way". It therefore took the view that the Court should not pass any order with regard to the property of the company unless it comes to the conclusion that the appointment of a provisional liquidator is necessary.

8. With all respect to the learned Judges, we may point out that, as has been stated already, there is nothing in Section 536(2) to justify the observation that the situation visualised by it does not arise before the passing of the winding up order. On the other hand, as we have stated, such a situation may well arise in

case where the company finds it necessary to make an honest disposition of property in the interest of its creditors. The second reasoning does not also appear to be tenable because even if the winding-up petition is dismissed, the Court's authorisation for the disposition of any property of the company cannot be said to be an unjustified interim interference because the question of allowing it would not arise without a resolution of the company. As regard the third reason, it will be sufficient to say that the making of the winding-up order on a subsequent date would not reopen the disposition authorised by the Court under Sub-section (2) of Section 536, and there will be no question of placing the Court in a "difficult situation". There will really be no occasion for finding the earlier order to be erroneous for the reason that it would always be made after a full and fair consideration of the whole case, including the interest of creditors. We are therefore unable to think that there is any justification for the view that the Court should not pass any order with regard to the property of the company unless it comes to the conclusion that the appointment of a provisional liquidator is necessary. The intervention of a provisional liquidator is a very serious matter, for he has normally the same powers as the liquidator, and his appointment is therefore a serious inroad on the management and standing of the company and its affairs. Such an interference has to be avoided as far as possible, and it will not, in our opinion, be sufficient justification for the appointment of a provisional liquidator to say that it has become necessary because the company has taken out summons for the authorisation of a disposition of its property u/s 536(2).

9. For the reasons stated above, we have no hesitation in holding that the Court has jurisdiction to make an appropriate order u/s 536(2) of the Act in a case where the petition for the winding up of the company is pending but a winding up order has not been made. We accordingly answer the reference in the affirmative. There will be no order as to the costs.