

(1998) 04 PAT CK 0038

In the Patna High Court

Case No : Company Petition No. 10 of 1996

Bajnath Prasad and Others

APPELLANT

Vs

Jaimangal Limited and Others

RESPONDENT

Date of Decision : 03-04-1998

Acts Referred:

Companies Act, 1956 — Section 441(2), 443(1), 529, 529A
State Financial Corporations Act, 1951 — Section 29, 46B

Citation : (1998) 93 CompCas 340

Hon'ble Judges : S.N. Jha, J

Bench : Single Bench

Advocate : Ram Akwal Singh, Gopesh Kumar and Sunil Srivastava, for the Appellant; Anil Kumar Tiwary and Umesh Prasad Singh for respondent Nos. 1 and 2, Pawan Kumar, Kali Kant Jha, Arun Kumar and Tej Bahadur Roy for respondent No. 3 and Ajay Kumar Sinha, for the Respondent

Judgement

S.N. Jha, J.—Jaimangal Limited, the company in question, was wound up by order dated December 5, 1997. The official liquidator was appointed as the liquidator of the company and directed to take charge of its assets, and further to take necessary steps in accordance with the provisions of the Companies Act. An application (flag "11") was, thereafter, filed on behalf of opposite party No. 5, Bihar State Credit and Investment Corporation Ltd. (BISCICO) on January 28, 1998, seeking modification of the aforementioned part of the order by which the official liquidator had been directed to take charge of the assets of the company. Both the company--the petitioner and opposite party Nos. 1 and 2--have filed counter-affidavits objecting to the prayer. The official liquidator in his reports has also taken a similar stand. The matter was heard at length.

2. Mr. Pawan Kumar, learned counsel for the BISCICO appearing in support of the application, submitted that the BISCICO had taken charge of the assets of the company in exercise of its statutory powers u/s 29 of the State Financial Corporations Act, 1951 ("SFC Act", for short), after long contest on October 15, 1996, that is, much prior to the winding up order. Although in terms of Section

456 of the Companies Act, where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator is empowered to take into his custody or under his control, all the property, effects and actionable claims of the company, the said provisions as well as other relevant provisions of the said Act have to be read in derogation to the provisions of the State Financial Corporations Act, in view of the non obstante clause contained in Section 46B of that Act. In other words, notwithstanding the winding up order, the BISCICO, as a financial institution established u/s 3 of the State Financial Corporations Act, 1951, is entitled to take over the management of an industrial concern u/s 29 of the Act and also entitled to take steps for the sale of its assets for realisation of its dues. However, in the present case, BISCICO has no objection to working in tandem with the official liquidator, as directed by this court in its order dated December 5, 1997, which order is in consonance with the order of the Supreme Court in SLP (Civil) No. 7338 of 1984. Apart from the provisions of the SFC Act, if BISCICO is compelled to hand over the custody of the assets to the official liquidator, it may adversely affect the prospective sale of the assets, for, that may act as a deterrent to the prospective buyers.

3. Mr. Umesh Prasad Singh, learned counsel for opposite parties Nos. 1 and 2, submitted that BISCICO is only one of the secured creditors and if it is allowed to retain the possession and custody of the assets and go ahead with sale, it is not expected that it will also look after the interest of other secured creditors, contributories, debenture-holders--whose interests have also to be looked after, and that is possible only when the official liquidator is allowed to take charge of the assets. Pointed reference in this connection was made to the provisions of Section 529A of the Companies Act. He further submitted that in terms of Section 441(2) of the Companies Act, the winding up proceeding is deemed to commence from the date of filing of the winding up petition and, therefore, in the present case the winding up petition having been filed on August 22, 1996, BISCICO could not have taken possession of the assets on October 15, 1996. In view of the provisions of Section 477 (1) and (6) of the Companies Act, this court is competent to direct any person in possession of any property of the company to deliver the same to the liquidator "in such manner and on such terms as to the court may seem just". Mr. Singh also attempted to go into the circumstances in which BISCICO had taken possession, "forcibly"--as he put it--of the assets. He further contended that BISCICO has misappropriated the assets of the company. In this connection he pointed out that it has been appropriating a sum of Rs. 50 thousand per month from the rental alone, without giving any account thereof to this court. He submitted that every creditor, contributory, shareholder, etc., has a charge over the assets and its income, Counsel further submitted that unless the full charge of the assets and records are handed over to the official liquidator, he cannot file any statement of affairs u/s 454 of the Companies Act, nor can he get the accounts audited nor discharge his obligations under various statutes, such as, the Income Tax Act. He pointed out in this connection that neither Income Tax returns have been filed for the intervening periods nor the

municipal taxes have been paid to the Patna Municipal Corporation endangering the interests of all creditors, shareholders, etc. He suggested that this court may consider appointing a committee to look after the management of the company associating the official liquidator, secured creditors, etc., for properly looking after the interests of all concerned.

4. Mr. R.A. Singh, learned counsel for the company-petitioner, adopted the submissions of Mr. U.P. Singh. In the course of submissions, he referred to the order dated September 22, 1995, passed in Company Petition No. 2 of 1991, in the case of Bihar Woollen Fabrics Limited (In Liquidation), In re (since reported in [1998] 93 Comp Cas 334 (Patna)), whereby a similar plea of the BISCICO for leave to effect sale of the assets of the said company u/s 29 of the SFC Act had been rejected.

5. Mr. Pawan Kumar, in reply, submitted that BISCICO had taken possession of the assets of the company in agreement with the Central Bank of India, the only other secured creditor and, therefore, the apprehension that the interest of the secured creditors cannot be properly looked after at the hands of BISCICO are imaginary. In any view, BISCICO is prepared to submit the accounts and act as per the direction of this court in the matter of the sale of the assets to allay any kind of misapprehension in this regard. Counsel submitted that the company being a chronic defaulter which failed to clear its dues despite several opportunities, it does not lie in the mouth of its ex-management to object to retaining the management and custody of the assets by BISCICO.

6. I have considered the submissions of counsel for the parties. It may be that in terms of Section 441(2), by a legal fiction, the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up. However, mere presentation of the winding up petition by itself has no consequence. u/s 443(1)(a) of the Companies Act, the court may summarily dismiss a winding up petition, even with or without costs. There cannot be any doubt that the consequence of winding up takes effect only after the winding up order has been made or a liquidator has been appointed. Again, it may be that u/s 477 of the Companies Act, the company court has power to direct any person in possession of any property of the company to deliver the same to the liquidator. The point for consideration, however, is whether these and the other connected provisions of the Companies Act can have full play in view of the provisions of the SFC Act. Section 46B of the said Act runs as follows :

"The provisions of this Act and of any rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern."

7. The effect of a non obstante clause occurring in a statute is well known. It sets at naught and obliterates such other provisions as may be inconsistent or repugnant to the provisions of that statute. In the book entitled The State Financial Corporations Act, 1951, 3rd Edition, published by the Law Book Company (P) Ltd., the learned authors have referred to a decision of the Rajasthan High Court (at page 321 of the book) in the case of Boolani Engineering Corporation v. Asup Synthetics and Chemicals Ltd. [1990] 1 RLR 10 ; [1994] 81 Comp Cas 872 (Raj) in which the Rajasthan High Court held that the provisions of the SFC Act being special Act, shall prevail over the Companies Act, which is a general Act. In that case, as would appear from the facts stated in the book, the Rajasthan State Industrial Development and Investment Corporation Ltd. (a similar institution like BISCICO in the State of Bihar) had granted a loan to the respondent-company. Later, it took possession of the company to liquidate the loan u/s 29 of the SFC Act. Winding up proceedings was already pending in the High Court. The Rajasthan High Court held that the corporation being a secured creditor and the provisions of the SFC Act, being the special one, would prevail over the provisions of the Companies Act.

8. However, I do not want to make any in depth examination of the matter, in view of the fair stand taken by counsel for the BISCICO that it is prepared to act in tandem with the official liquidator and as per the terms of this court. I would, however, like to observe, before I switch over to the other aspects, that while passing the order dated September 22, 1995, in the case of Bihar Woollen Fabrics Limited (In liquidation), In re [1998] 93 Comp Cas 334 (Patna), the attention of this court was not drawn to the provisions of Section 46B of the SFC Act.

9. At this stage, I would like to refer to the relevant provisions of Sections 529 and 529A of the Companies Act. The proviso to Section 529 lays down that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,--(a) the liquidator shall be entitled to represent the workmen and enforce such charge ; (b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues ; and (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of the proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A. Section 529A provides that notwithstanding anything contained in any other provisions of the Act, i.e., the Companies Act or any other law for the time being in force, in the winding up of a company, workmen's dues and debts due to secured creditors to the extent such debts rank under Clause (c) of the proviso to Sub-section (1) of Section 529 pari passu with such dues, shall be paid in priority to all other debts.

10. It would, thus, appear that Section 529A containing provisions regarding preferential payment of the workmen's dues and debts due to secured creditors, *pari passu*, with such workmen's dues, also contains a non obstante clause. In *Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another*, , the Supreme Court held that where two Acts contain non obstante clauses, the provisions of the latter Act shall prevail. Section 529A of the Companies Act, it appears, was inserted by the Companies (Amendment) Act, 1985, i.e., in the year 1985, while Section 46B of the SFC Act, had been inserted earlier by the State Financial Corporations (Amendment) Act, 1956. It is, therefore, obvious that the workmen's dues have to be treated at *par, pari passu*, with the claim/debts due to the BISCICO and/or other secured creditors (said to be only the Central Bank of India). The BISCICO, therefore, cannot be given a free hand in the matter of sale of the assets. This is really not what the BISCICO seeks in the present application.

11. I may observe that it has been a sad experience of this court that in similar other matters, the court has not been able to find suitable buyers. There has been absolutely no response to the advertisement of sale. And in those matters suggestion has been made to allow the banks and financial institutions, the concerned secured creditors, to take steps for sale of the assets on their own, under the control and direction of this court. And this court has been actively considering giving such opportunity to them. Oral observations have, in fact, already been made in some matters. In this background, if BISCICO has already taken steps for the sale of the assets, before the winding up order was passed, it would not be proper to stall the process. There may be justification for issuing directions from time to time so that the assets are sold at a proper price and the interests of other creditors, shareholders, not to mention about the workmen, can be properly taken care of.

12. I, however, find substance in the submissions that the possession of the entire records has to be delivered to the official liquidator so that he may discharge his obligations under the Companies Act. The obligation of the company under different statutes, such as the Income Tax Act has also to be discharged and being the liquidator of the company, the official liquidator has to discharge those obligations as well. It would be in the fitness of things if a committee is constituted, consisting of the official liquidator, the managing director of BISCICO and a senior officer of the Central Bank of India, to oversee the management of the company, without disturbing the status quo. In other words, while BISCICO will continue to retain the possession of the assets of the company, it will hand over the custody of the entire records to the official liquidator, so that he may discharge his statutory obligations under the Companies Act. The general management of the company shall, however, vest in the said committee. It is that committee which will be responsible for discharging the obligations of the company under various statutes, pay taxes, etc. The matters pertaining to the sale of the assets shall also be dealt with by the said committee, subject to directions of this court, as may be issued from time to

time. The committee shall submit quarterly statements of accounts of income to this court. At the first instance, the first statement shall cover the period up to March 31, 1998, the subsequent statements will cover the period of three following months each. The order dated December 5, 1997, shall stand modified to this extent.

13. The application (flag "11") and the connected affidavits/reports filed by the company-petitioner, opposite parties Nos. 1 and 2 and the official liquidator, accordingly, stand disposed of.