

(1998) 08 P&H CK 0098

In the Punjab And Haryana At Chandigarh

Case No : Review Application No. 2 of 1998 in Company Petition No. 196 of 1997

Bharti Telecom Ltd.

APPELLANT

Vs

Altos India Ltd. (No. 2)

RESPONDENT

Date of Decision : 03-08-1998

Acts Referred:

COMPANIES ACT, 1956 — Section 450

Citation : (1998) 94 CompCas 929 : (1999) 1 RCR(Civil) 4

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Judgement

Swatanter Kumar, J.—Vide order dated June 11, 1998, passed in C.P. No. 196 of 1997, winding up petition, against the respondent-company, was admitted and it was directed that notice be published. For the reasons stated in that detailed order, vide order of the same date passed in C.A. No. 442 of 1997, a provisional liquidator was appointed by the court.

2. On an appeal preferred by the company, the Hon"ble Division Bench of this court, vide its order dated July 8, 1998, in C.M. Nos. 29-31 of 1998, the extract of which are relevant for the purpose of disposal of the present application, reads as under :

"If that is so, we are of the view that an appropriate application should be moved before the company judge in that regard that the order dated June 11, 1998, in C.A. No. 142 of 1997, has been passed without hearing the appellant or its counsel.

We are adjourning this appeal to July 13, 1998. However, the pendency of this appeal would not debar the learned company judge to decide any application that may be moved by the appellant."

3. In furtherance of the above-quoted order of the Division Bench, the company filed the present Review Application No. 2 of 1988, under rule 9 of the Companies (Court) Rules, 1959, for recalling of order dated June 11, 1998,

passed in C.A. No. 442 of 1997.

4. The two reasons for recalling of the order dated June 11, 1998, as stated in paragraphs 3 and 5 of the application, read as under :

"3. That during the summer vacation on June 11, 1998, counsel was informed that the order in the company petition has been announced. Counsel also come to know that the order in C.A. No. 442 of 1997 has also been passed and appointed the provisional liquidator of the respondent company and also ordered that he shall take over all the assets and complete management of the respondent-company without any further delay.

5. That when the case came up for hearing on May 28, 1998, there was no occasion for counsel to argue the matter nor was C.A. No. 442 of 1997 was argued and even in the order dated June 11, 1998, the management of the company is ordered to be taken over which would frustrate the appellant from approaching the Board for Industrial and Financial Reconstruction for defending the case in the court."

5. It needs to be noticed here that no relevant and necessary facts were pleaded in this application which would constitute valid and proper grounds for review of the order dated June 11, 1998. The position remained unchanged despite the fact that the case was listed on various dates for hearing. However, subsequently, on July 20, 1998, an application was filed for placing on record the affidavit and some documents (being C.A. Nos. 415 and 416 of 1998), which were allowed and the documents were taken on record. The official liquidator has also filed reply thereto by way of affidavit. Thereafter, the matter was heard at some length and judgment in this application was reserved on July 28, 1998.

6. It is a settled principle of law that a party seeking review of an order or judgment is expected to place on record all the material facts and take up all the grounds which are available to the parties for review of the said order. As already noticed, the application for review does not give any facts, figures or grounds which could constitute valid grounds for recalling or reviewing the order dated June 11, 1998.

7. Keeping in mind the above circumstances, I would now proceed to discuss the respective contentions raised on behalf of the parties before me.

8. Learned counsel appearing for the applicant/respondent company has argued that :

(i) The applicant had no notice and was not heard while the order dated June 11, 1998, in C.A. No. 442 of 1997 was passed.

(ii) Neither any ground/facts existed nor the order dated June 11, 1998, provides any reason which would justify appointment of provisional/official liquidator.

(iii) The appointment of official liquidator if not revoked would obstruct and bring impediments in the way of the applicant-company to approach other forums like

BIFR, etc.

(iv) It is not just and equitable to continue the official liquidator because it would amount to ousting the company's management from its affairs. Further alleged that the company would lose its entity and management.

9. While seriously opposing this application, learned counsel for the applicant as well as for the official liquidator submitted that the order has been passed in consonance with the statutory provisions and no ground has been made out for reviewing the order dated June 11, 1998. The application in the present form is not maintainable. There is complete instability in the financial status of the company. Its liabilities are much in excess of its assets. The liability is accruing disproportionate to its assets every day and in the near future there would be no possibility even of proportionate payments to its creditors. The assets of the company are already mortgaged to financial institutions on account of heavy financial assistance admittedly taken by the company. It is contended that conduct of the company fully justifies the appointment and continuation of the provisional liquidator.

10. Learned counsel appearing for the non-applicants Mr. Patwalia at the very outset took a preliminary objection with regard to the maintainability of this application. He contended that under the provisions of Order 47, rule 1(a) of the CPC as applicable to the Companies Act an application for review is not maintainable if the appeal is pending for hearing against the same order, before the appellate court. In the alternative while relying upon the Full Bench of the Karnataka High Court in the case of Town House Building Co-operative Society Ltd. v. Special Deputy Commissioner, AIR 1988 Kar 312, he contended that even on the facts of the case the review application is not maintainable.

11. There may be some merit in the submission of learned counsel which deserves consideration but in view of the clear order of the Division Bench dated July 8, 1998, judicial propriety demands and this court feels obliged to dispose of the application and all the contentions raised on behalf of the applicant on the merits. In view of the order of the Division Bench this submission raised by learned counsel is only academic in nature and substance and any discussion in this regard would be futile.

12. Consequently, I proceed to discuss the other contentions raised on the merits by learned counsel appearing for the parties.

13. Contention No. 1. - The first contention raised on behalf of the applicant is devoid of any merit. It is clear from the record that notice of the C.A. No. 442 of 1998 was issued along with C.P. No. 196 of 1997, vide order dated November 21, 1997, returnable on December 12, 1997. On that date and on January 29, 1998, learned counsel appearing for the respondent-company had taken time to file reply to this of several opportunities and the case being adjourned no reply was filed either to the company petition or to the company application. C.P. No. 196 of 1997 was heard on the merits on May 28, 1998, and this C.A. was also listed

for arguments on that date. In view of the conduct of the respondent-company before the court in the company petition and for the reasons recorded in C.P. No. 196 of 1997, vide order dated June 11, 1998, the provisional liquidator was appointed. The requirements of section 450 of the Companies Act have been fully satisfied in the present case and provisional or official liquidator under the provisions (ibid) can be appointed at any time after presentation of the petition. Under sub-section (2) of section 450, notice is to be given to the other party and the court can exercise such powers as it may deem necessary in the facts and circumstances of the case upon the provisional/official liquidator so appointed. Thus, I am of the view that statutory requirement underlying the spirit of the provisions of section 450 of the Companies Act were fully satisfied. Nobody else can be blamed if the company fails to take benefit of opportunities repeatedly granted to it. At this stage even it would be appropriate to make a reference to the case of Punjab Pictures Ltd. v. Jhabbar Mal Chokhani [1948] 18 Comp Cas 274 (East Punjab) where, of course, it was held that notice should be given to the company for appointment of provisional liquidator but for reasons to be recorded by the court, even notice for appointment of provisional liquidator can be dispensed with. However, that question does not arise in the present case.

14. In any case this contention raised on behalf of the applicant remains no consequence now because the counsel for the applicant has been heard at great length and whatever documents the company wanted to place on record have been placed on record by them with affidavit in C.A. No. 416 of 1998.

15. Contention No. II. - Relying upon the case of Northern Airways Ltd., Ire, AIR 1949 Lahore 9, and Punjab Pictures Ltd. v. Jhabbar Mal Chokhani [1948] 18 Comp Cas 274; AIR 1949 East Punjab 139, learned counsel contended that there have to be serious allegations and grounds for appointment of a provisional/official liquidator, while it is contended by learned counsel for the other side that sufficient material and reasons existed which remained unrefuted at the date of passing of the order dated June 11, 1998.

16. As already noticed the various averments made in the petition and the application remained unrefuted for all this period. The conduct of the company before this court and for the reasons recorded in C.P. No. 196 of 1997, it was considered just and proper to appoint a provisional liquidator of the respondent-company. Whether the reasons were good or bad is a question different than no reasons. It is not possible for this court to come to the conclusion that the order dated June 11, 1998, does not provide any reason whatsoever.

17. As already pointed out, even in the review application no fact, which could persuade the court to recall the said order, has been stated. The application is vague, indefinite and gives no requisite particulars which is the primary obligation of the applicant for pressing such an application. From July 9, 1998, till July 20, 1998 (when C.A. Nos. 415 and 416 of 1998 were filed) no effort was made in spite of the observations of the court to place any relevant information much less material documents on the record. Even now the company has failed

to bring any material on record which can justify any of the arguments raised during the course of hearing. An affidavit has been filed by a commercial manager of the company. The affidavit does not even indicate if the said manager is duly competent and authorised to file that affidavit on behalf of the respondent-company which would bind the said company for all material proceedings and resultant orders. In fact, in law the said affidavit cannot even be looked into. Ignoring this aspect of the matter, I would even consider the merits of this affidavit. The affidavit has very cleverly given the figures as on December 31, 1996, and no figures from January 1, 1997, to June, 1998, have been provided. Withholding of this material information cannot be taken to the advantage of the company at least. Either no figures were available with the company because of non-availability of records or it had the requisite material to provide all figures to the court. If the manager concerned had memorised the figures, as reflected in the affidavit, then such manager would be able to remember the recent figures more correctly than the ones which were nearly two years old. In the affidavit it has been averred that the company has different units working at Gurgaon, Delhi and at Narnaul. It is stated that in the factory the work had come to a standstill and stopped on February 27, 1998. The other unit is stated to have been closed on the same date. The entire affidavit does not even mention properly much less in complete details with financial data and financial status of the company of any viable or workable scheme to discharge its debts and revival of the company in its manufacturing and sale activities. Undisputedly the working units of the company are lying closed since February, 1998. The falsehood of this affidavit is demonstrably apparent on the face of the record. The official liquidator had filed a short affidavit and it may be relevant to refer to the contents of the said affidavit at this stage :

"1. That the respondent-company's unit at 278, Udyog Vihar, Gurgaon, was sealed on July 7, 1998, and the said unit was located in a rented premises and its manufacturing operations were stopped since October, 1997. That similarly, the unit at Plot No. 300, Udyog Vihar, Gurgaon, was sealed on July 7, 1998, and the said unit which was in rented premises had stopped working from June, 1997.

2. That the unit at B-312, Okhla, Industrial Area, Phase I, New Delhi, was also in a rented premises where approximately 45 employees were working and the same was sealed on July 8, 1998. That another unit at B-64, Okhla Industrial Area, Phase I, New Delhi, was to be sealed on July 15, 1998, but on inspection it revealed that the company had vacated the premises on May 16, 1998, and possession had been handed over on behalf of the company by Sh. Deepak Saraf along with three items of machineries, which were not lifted. That the landlord stated that Altos India Limited owed to them an amount of Rs. 21,83,882 as overdue rent. The official liquidator after inspection of the aforesaid premises at B-64, Okhla Industrial Area, New Delhi, on July 15, 1998, found that in addition to the three machines as stated in letter dated May 16, 1998, whereby possession of the premises was handed over there was one more equipment of the company namely electric panel lying in the said premises. The said four

machineries have been given on sapurdari to the landlord on July 15, 1998.

3. That the registered office of the company situated at Agarsen Chowk, Narnaul, was sealed on July 12, 1998, and at the time of sealing the office it was found already locked and there was only one room (commercial) being used as the registered office, which was already locked. That the said premises was also rented."

18. From the facts narrated in the affidavit of the official liquidator it is clear that the affidavit filed by the manager of the company is factually incorrect and is intended to withhold the correct facts from the court. The official liquidator has stated that manufacturing business of the company was stopped in October, 1997, while the unit at Gurgaon was not working since June, 1997. The fact that 800 workers were working was nothing but a plain lie on the part of the manager as three units were already closed and only one unit was open where officials relating to administration and accounts were functioning and no worker was found even in that unit. These units had been closed in June, 1997, i.e., more than a year back from the date of the visit of the official liquidator. All that the official liquidator has done is to put his lock on the locks of the company. The so-called registered office of the company at Narnaul which consists of one room, a table and a chair there, indicates the seriousness with which this company claim to be functioning.

19. During the course of arguments, it was conceded by learned counsel for the applicant that whatever assets the company possesses have been mortgaged or hypothecated to the financial institutions from whom loans running into crores have been taken by the company. As such the company admittedly is in heavy debts. The manager intentionally concealed the information as to whether there were any movable assets owned by the company. As is clear from the report of the official liquidator the units of the company are located in rented premises and even there the company is indebted to the landlord to the extent of Rs. 21,83,882 on account of rent. The court cannot lose sight of the facts stated in the order of admission dated June 11, 1998, passed in C.P. No. 196 of 1997, including that other winding up petitions for considerable heavy amounts were also filed against the respondent-company. In addition to showing its bona fides the onus was on the respondent-company to show that it has means and capacity to repay its debts and carry on business. It also was the onus of the respondent-company to show that it does not intend to dispose of the assets of the company and has no intention of pilfering the movable properties of the company. As is clear from the above narrated facts the company has miserably failed to satisfactorily discharge the onus.

20. The following amongst others are the reasons which persuaded this court not to recall the order dated June 11, 1998, and continue the appointment of provisional official liquidator at this stage :

(a) It is not only just and equitable but is necessary to appoint a provisional

liquidator to protect the interest of the petitioner and other financial institutions.

(b) The respondent-company has no assets which are free of charge or mortgage or hypothecation, to the banks or financial institutions in addition to it being in heavy debts to the unsecured creditors.

(c) No viable scheme or proposal has been placed on record which could indicate that the respondent-company is capable of reviving its business while sincerely intending to pay the debts of its creditors.

(d) Conduct of the respondent-company during the pendency of the company petition, applications including the present application for review is one which tilts more in favour of continuing the order rather than vacating such an order.

(e) Withholding of information in regard to the financial status of the company and what steps the company had taken after December 31, 1996. Also that what steps the company had taken from that date to pay its admitted debts during this period of one year and seven months.

(f) No denial of the fact that the extent of the debts of the company was rapidly increasing and was becoming disproportionate to its assets i.e., liability of the financial institutions was increasing and so were the claims against the company by its other secured or unsecured creditors.

(g) The majority of the valuable assets of the company consists of movable property, like machines, etc. The possibility of their pilferage, removal or disposal cannot be ruled out, keeping in view the present state of affairs.

(h) No public or private interest can be served by recalling the order.

21. It is true that settled principles of law clearly indicate that appointment of provisional liquidator is a serious step and the courts would normally avoid provisional liquidator unless there were compelling circumstances. I have no doubt in my mind that the present case is one which certainly falls within the exception applicable to the general rule. In order to protect the interest of the creditors, secured or unsecured, and to prevent pilferage and disposal of assets of the company which in any case are very limited keeping in mind the undisputed heavy liability, it is necessary to continue the provisional liquidator. In other words in order to protect the interest of the company itself and its properties, and even to consider workable solution in that regard, it is pertinent that prevention must be taken at this stage itself.

22. Learned counsel for the petitioner while placing reliance upon the case of *Kailash Prasad Mishra v. Medwin Laboratory P. Ltd.* [1988] 63 Comp Cas 810 (MP) and *Virendrasingh Bhandari v. Nandlal Bhandari and Sons P. Ltd.* [1979] 49 Comp Cas 532 (MP) argued that the appointment of a provisional liquidator is a drastic step and keeping the public interest in mind the order of the provisional liquidator should be recalled. He further contended that it will put a stop to the business of the company.

23. As already noticed there can be hardly any dispute to the legal proposition but it is the application of these well enunciated principles to the circumstances of the present case which is of importance. Even in the case of *Kailash Prasad Mishra v. Medwin Laboratory P. Ltd.* [1988] 63 Comp Cas 810 (MP) the court itself restricted the application to the facts of the case, i.e., their Lordships found that the company was able to meet its liabilities as and when they arise and, secondly, it was against the public interest. In this very judgment the court said that the liquidator could be appointed where the court was satisfied that it was necessary to do so or it was just and equitable. In the present case, nothing has been brought on record to show as to what public interest is involved and how the company could clear its admitted liabilities. The liabilities are admittedly much more than its assets. The properties are mortgaged to the financial institutions. In addition thereto there are huge amounts due to the unsecured creditors including even the landlord and the petitioner. No manufacturing or assembling unit was found to be working practically. The units were lying closed for more than a year and the plea of 800 workers on the face of it has been found to be false and incorrect.

24. Having cogitated over the matter with seriousness and having considered its various dimensional effects, I find no reason to recall the order. At this stage reference to some settled principles of law governing the matters in controversy would be appropriate. At the outset, I would refer to the following paragraph from Halsbury's Laws of England (Vol. 7) Fourth Edition :

"1045. Provisional liquidator before winding up order. - The court may appoint a provisional liquidator to take possession of and protect the company's assets at any time after the presentation of a winding up petition and before the making of a winding up order. The occasion for the appointment is not limited to special circumstances : other factors, such as the public interest, may be taken into account. Either the official receiver or any other fit person may be appointed. A person other than the official receiver is occasionally appointed, but the almost invariable rule is to appoint the official receiver.

When a provisional liquidator is appointed, the court may limit and restrict his powers by the order appointing him. His appointment does not completely oust the powers of the board : it may still cause the company to oppose the winding up petition or to apply to discharge the provisional liquidator."

25. In the case of *Union Accident Insurance Co. Ltd., In re* [1972] 1 All ER 1105, Plowman J. had enunciated the above principles and had observed that appointment of a provisional or official liquidator was not controlled by the limitation of public interest alone. It may be in the interest of all concerned to make such appointment before the liabilities of the company exceed a limit of manageable schedule of payment.

26. In the case of *Andhra Paper Mills Co. Ltd., In re* [1948] 18 Comp Cas 8 (Mad), though the company had no serious objections but the appointment of a

provisional liquidator was seriously opposed by the shareholders and Clark J. observed as under (page 11) :

"The matters stated by him in the counter-affidavit are all matters which it may be necessary to consider when the main petition is heard I cannot regard those matters as relevant to the consideration of the present application. Shortly stated his objection is that the company might be successful if it were suitably and properly managed. What I have to consider at present is whether it is in the interests of all concerned that a provisional liquidator should be appointed. I am satisfied that it is, and accordingly I make the appointment asked for."

27. In the event of appointment of a provisional liquidator the company neither loses its legal entity nor is the company divested of its properties in spite of pendency of the winding up petition and the appointment of the provisional liquidator. The properties are not vested in the liquidator which would require divesting at future time unless the company is finally wound up. All provisions of the Companies Act per se do not become applicable to the appointment of the provisional liquidator and the court can always restrict and regulate the powers exercised by a provisional liquidator. Reference in this regard may be made to *Sri Chamundi Theatre Mysore Talkies Ltd. v. S. Chandrasekara Rao* [1975] 45 Comp Cas 60 (Mad).

28. In view of the above detailed discussion contention IV is also answered against the company as the company was admittedly not carrying on any business. It had no workers but had a skeleton administrative and accountancy staff only. Seeing this in contrast to the interest of the public undertakings, financial institutions, secured and unsecured creditors, landlords and the other afore-referred petitions, it would be averse to public interest if the provisional liquidator is not permitted to continue to take stock of the defaulted record and assets of the company.

29. This takes me to the last contention, i.e., contention III. There may be some meaning in what has been argoed on behalf of the respondent that the appointment would totally hamper the approach of the company to other forums. This contention is misconceived. At no point of time was any attempt made on behalf of the respondent-company that it was desirous of inspecting any record to pursue its remedy before the BIFR. Furthermore from the letter dated June 1, 1998, it is clear that even the application to the BIFR was found defective in more ways than one and there is nothing on record to show that till appointment of the provisional liquidator and his selling the units, any effort was made by the company to rectify the said defects and do the needful. No document showing whether the trading certificate has been extended beyond March 31, 1998, has been placed on record. However, in order to avoid any such misapprehension on the part of the respondent-company I would proceed to give certain directions to the provisional liquidator which would certainly be in the interest of all concerned and even would not cause any avoidable prejudice to the respondent-company.

30. While declining to review the order dated June 11, 1998, or recalling the said order or cancelling the appointment of the provisional liquidator, I would issue the following directions to the provisional liquidator for compliance forthwith :

(a) The official liquidator shall associate three members from the secured creditors (banks to whom the properties of the company has been charged, hypothecated) one representative from the respondent-company for carrying out these directions. The officers shall not be below the rank of senior manager/managing director/official liquidator.

(b) At the outset the official liquidator shall prepare an inventory of all the movable and immovable properties belonging to the respondent-company and/or lying in the premises rented or belonging to the respondent-company.

(c) He shall prepare complete inventories of the record of the company.

(d) If any records are requested for by the respondent-company, copies thereof shall be given by the official liquidator to enable the company to pursue its matters before the competent forum including BIFR.

(e) The committee of the aforestated persons within four weeks from today shall place before the court (in C.P. No. 196 of 1997) a detailed report. This committee would suggest whether it is possible to consider and implement any viable or workable scheme by which the company could revive its business and provide modes of repayment of the secured and unsecured creditors of the company simultaneously.

31. Review Application No. 2 of 1998, is dismissed with the above directions. There shall be no order as to costs. Dasti order prayed for.