

(1953) 12 CAL CK 0001
In the Calcutta High Court
Case No : A.F.O.O. No. 128 of 1950

Bukhtiarpur Bihar Light Railway Co. Ltd.	APPELLANT
Vs	
Union of India (UOI) and Another	RESPONDENT

Date of Decision : 17-12-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 3, 107
Companies Act, 1913 — Section 162, 162(V), 163, 163(1)

Citation : AIR 1954 Cal 499 : (1954) 1 CALLT 408 : (1954) 24 CompCas 507

Hon'ble Judges : Chakravartti, C.J.; S.R. Das Gupta, J

Bench : Division Bench

Advocate : N.N. Bhose, Sridhar Chatterjea and R. Choudhury, for the Appellant;
G.P. Kar, for the Respondent

Final Decision : Allowed

Judgement

Chakravartti, C.J.—This appeal has taken an inordinately long time and that has been because the facts are in such a confused state that the learned counsel for both parties found considerable difficulty in getting out of them what they required for their respective purposes. It must also be said that the carriage of the proceedings before the learned Judge below was slovenly to a degree on the part of both parties. They did not seem to have considered it necessary to examine what their opponent was saying, nor to apply their minds to deciding what facts they had themselves to prove in order to obtain an order in their favour.

2. The appellant is a public Limited Company which was formed for the purpose of constructing and maintaining a Railway, operating between the Station of Bukhtiarpur on the East Indian Railway and the town of Behar, There appears to have been an agreement between the promoters and certain local authorities which entitled those authorities to take over the Railway in certain circumstances. In pursuance of that agreement, the Company appears to have established a Railway running between Bukhtiarpur and Rajgir-kund which was a

distance of about 30 miles. The line was connected with the East Indian Railway and naturally some mutual adjustments between the appellant Railway and the East Indian Railway became necessary. It is stated in the petition that there was interchange of coaching and goods traffic of every description between the two Railways and the East Indian Railway afforded to the Light Railway joint station facilities as also the right of conveyance over Its lines of materials required by the Light Railway for its own purposes.

3. The case of respondent No. 1, the Union of India who really represent the East Indian Railway, is that as a result of the interchange of coaching and goods traffic between the East Indian Railway and the appellant Railway, a large sum came to be due from the latter by 1950 and on June 6 of that year, a notice of demand was served on the Light Railway, claiming payment of a sum of Rs. 5,22,313-12-6. That amount was made up of the alleged dues of the East Indian Railway under certain traffic bills and a variety of bills of other descriptions.

No payment was made in compliance with the notice but a reply was sent on June 10, 1950, in which it was stated that the company was not liable for the whole of the demand in any event, inasmuch as till a certain date, the management had been in the hands of Martin & Company. Who it was, who was making the statement is, by no means, clear, since formally at least, it was the Railway itself which was writing and the language used in the letter "prior to our taking over charge from Martins" which suggests that the Railway was taking over charge from itself is plainly meaningless. Be that as it may, it was further stated in the course of the reply that if the District Board of Patna had taken over the Railway, the East Indian Railway should look to the District Board of Patna for payment, inasmuch as the Railway could have been taken over only as a going concern, comprising assets as well as liabilities. The only other statement contained in the reply to which it is necessary to refer is that the company was not in a position to accept the entire amount claimed "off hand", inasmuch its Accounts Section would have to check the same and make a report to it as regards its liability for payment.

4. I should state here that although the company's reply of the June 10 purports to be a reply to the East Indian Railway's letter of the 6th June, the reference to the acquisition of the Railway by the District Board is extraneous to the latter and no mention thereof can be found in it. It was however explained to us by Mr. Bose who appears on behalf of the appellant that the matter of acquisition must have cropped up and must have been discussed between the representatives of the Light Railway and the Law Officer of the East Indian Railway to which a reference is to be found in the third paragraph of the Light Railway's reply,

5. The next thing which happened was that on 30-6-1950, the Chief Commercial Manager of the East Indian Railway, addressed another letter to the Light Railway, this time claiming payment of two several sums of Rs. 5,23,203-13-6 and Rs. 61,530-15-3. No reply to this letter is said to have been received.

6. Thereafter, on July 18, the Union of India made an application to this Court for a winding-up order in respect of the Light Railway Company. The petition referred to the dues alleged to have been owing by the Light Railway Company to the East Indian Railway and alleged further that in spite of the two letters of demand sent on June 10 and June 30, 1950, respectively, no payment had been made. The amount of the dues was stated to be Rs. 5,91,784-2-0. It was also stated in the petition that the Light Railway had been taken over from the appellant company by the District Board, Patna, on or about 25-6-1950, and that according to the information of the petitioner, a sum of Rs. 10,00,623/- or thereabouts had been paid by the District Board to the Light Railway Company as purchase price or compensation.

7. On the above allegations the Union of India asked for a winding up order on the ground that the Light Railway Company was unable to pay its debts and on the further ground that the substratum of the company was gone.

8. The allegations made by the Union of India in its petition for winding up were sought to be answered on behalf of the appellant company by a so-called affidavit. Why I describe it as "so-called", I shall explain later. The affidavit however stated that if the District Board of Patna had really taken over the Light Railway on 25-6-1950, as alleged in the petition, then on the petitioner's own case, it was the District Board which was liable to meet its claims and therefore the petitioner was not a creditor of the Light Railway Company at all. Without prejudice to that basic contention it was further stated that, in no event, could the Light Railway Company be held liable for the petitioner's dues for any period prior to three years and that the amount of the dues and the liability to pay the same were both denied. It was said in the last place that it was not a fact that the District Board of Patna had purchased the Light Railway and that the Railway Company did not admit that possession of the Railway had been taken by the District Board. It was added that there was already an injunction against the District Board not to interfere with the Company's possession.

9. There was an affidavit in reply, filed on behalf of the Union of India and the only statement contained in that affidavit to which it is necessary to refer is the statement contained in paragraph 8. By that paragraph, the Union sought to meet the case put forward by the appellant company that the Railway had not, in fact, been taken over by the District Board, as alleged. The declarant of the affidavit who was one Section Khanda-swami, describing himself as connected with the Traffic Accounts Department of the East Indian Railway referred to and set out copies of a telegram said to have been sent by the Chairman of the District Board of Patna to the General Manager of the East Indian Railway on 25-6-1950, and a letter from the District Board to the General Manager dated June 28 following. It appears from the telegram that according to the sender, possession of the Light Railway had been peacefully assumed and regular train services were running. It appears from the letter that according to the writer the purchase price of the Railway had been deposited with the Imperial Bank of

India, Patna. Nothing was said in the reply as regards the injunction which, according to the affidavit in opposition, had been issued against the District Board.

10. These were all the materials before Mr. Justice Bachawat when he made the winding up order, appealed from. Unfortunately, the learned Judge did not deliver any judgment and so we are deprived of the benefit of knowing what view he took of the facts. All that can be safely presumed is that the learned Judge thought that a case had been made out for his passing a winding up order.

11. I have omitted to state that there appears to have been another creditor before the learned Judge, viz., the Bengal Nagpur Railway Administration which, through an affidavit affirmed by their Deputy General Manager, D. K. Hopkins, put forward a claim of Rs. 1,78,498-14-0. The manner in which this debt was said to have been incurred by the Light Railway Company was the same as in the case of the debt alleged to be due to the East Indian Railway. What part the Bengal Nagpur Railway Administration took in the proceedings before the learned Judge is not at all clear and it appears that in the recital of the papers read before the learned Judge, as contained in his order, the affidavit of D. K. Hopkins is not included.

12. The present appeal, I need hardly point out, is by the Bukhtiarpur Bihar Light Railway Company Ltd. On behalf of the company Mr. Bosc took two points before us. He urged, in the first instance, that there had been no valid statutory notice of demand at all and in the second place that, in any event, there was a bona fide dispute about the alleged dues and therefore the present case was not one where the company was unable to pay its debts, nor one where it was just and equitable to pass a winding up order. Mr. Bose did not seem to set much store by his first point, inasmuch as he himself stated that he took it so that it might not be said against him that he had overlooked or abandoned it. His principal argument was concentrated on the second point.

13. It appears to us, however, that although the learned counsel for the appellant did not himself lay much stress on his first point, it is yet a point which must succeed. According to the petition for winding up itself, the registered office of the Railway Company is situated at No. 135, Canning Street, Calcutta. That being so, if a notice of demand was to operate as a valid statutory notice u/s 163(1)(i) of the Indian Companies Act, it would have to be delivered to the Company at its registered office. The letter of June 6, however, was addressed to "Fraser Road, Patna" which was not the appellant Company's registered office. That fact is sufficient to prevent the Union of India from relying upon the notice of 6-6-1950, for the purposes of Section 163(1)(i) of the Act.

There was indeed a second notice as well which was delivered at the registered office of the appellant company, but that notice was sent only on 30-6-1950, and therefore it could not serve as a statutory notice of demand, seeing that the petition for winding up was made on July 18. The interval between the service of

the notice of demand and the making of the petition for winding up was less than three weeks. I ought to state here that on behalf of the Union of India, Mr. Kar admitted that there was no statutory notice of demand in the case on which his client could rely and he also informed us that the court of appeal had already so held in connection with the application for a stay of the order which is under appeal before us now.

14. But the fact that the Union of India cannot rely upon any statutory notice of demand merely means that no presumptive or constructive liability to pay the debts, as contemplated by Section 163(1)(i) of the Act, is available to the Union. They are at liberty to prove still, in other ways that, in fact, the company was unable to pay its debts within the meaning of Item (v) of Section 162. On that question, we listened to an interesting argument from the Bar as to when a company could be held to be unable to pay its debts and as to what the nature of the dispute must be if cases of disputed debts were to be excluded. It seems to me, however, that in view of one special fact in the case, it is unnecessary for us to embark upon an examination of the question debated before us.

As I have already said, the demand of the Union of India is for an amount in the neighbourhood of Rs. 6,00,000/-. Even if the demand of the Bengal Nagpur Railway be added, the total would not be more than Rs. 8,00,000/-. Yet, on the admission contained in the petition itself, there is an amount of Rs. 10,00,623/- which belongs to the company and it must therefore be available for the payment of the company's debts. In those circumstances, it is quite impossible for the Union of India to contend that although the appellant company has, according to its own case, a sum of Rs. 10,00,623/- waiting to be paid over to it and although the claims of itself and of the Bengal Nagpur Railway do not exceed Rs. 8,00,000/-, it must yet be held that the company was unable to pay its debts.

In my view, even assuming that the company was deliberately avoiding or delaying payment, this was not a case of inability to pay, but a case where the company was failing and neglecting to pay. I am, by no means, holding that between the first demand and the making of the petition there was any deliberate failure or neglect, because in order to arrive at a decision on that point, a much closer examination of the facts would be necessary than is possible on the very meagre materials which are to be found in the paper book. Suffice it to say, for the purposes of the present case, that when the financial position of the company is such that against the admitted assets of the value of Rs. 10,00,000/- there is a debt of Rs. 8,00,000/- only, it can by no means be said that the company is unable to pay its debts.

15. Mr. Kar referred us to a passage in Palmer's Company Law, 19th Edition, pages 377-78, which reads as follows:

"Where the debt is undisputed, it is futile for the company to say, 'We are able to pay our debts, but we do not choose to pay this particular debt'. The court will not listen to such a defence."

Mr. Kar's point was that the mere existence of sufficient funds did not preclude a creditor from contending that in reality the company was unable to pay its debts. If, in spite of being possessed of sufficient funds, the company resorted to device or obstruction in order to avoid the claims of creditors, such, a case also would be a case of inability to pay the debts. The reason, according to Mr. Kar, was that the only solvency which the Company Law recognized was commercial solvency.

16. The passage in Palmer is shown as based on "Company Precedents" by the same author, Part II, Edition 15th, pages 36 and 37. Out of the decisions cited in the relevant pages of the "Precedents", Mr. Kar drew our attention to the decision of -- "In re, The World Industrial Bank, Limited", which, unfortunately, is to be found reported only in (1909) 1 WN 148 (A). It appears, however, from the very brief report that the case was a very peculiar one. The company there concerned had been incorporated with a capital of 50,000?, divided into as many shares of 1? each but of those only 1,007 shares had been issued. Again, out of the 1,007 shares issued, only a sum of 1s. per share had been called up on 1,000 of the shares. The company had never started any business at all, but had employed the petitioner in some work for which it had incurred to him a liability for a small sum. Even that small sum the company did not pay, so that the petitioner had to go to court and recover judgment for it. After that, the company made it impossible for the petitioner to realise his dues, because it declined to call up any further capital and defied the petitioner to realise his assets from wheresoever he could.

It was only in circumstances of such an extraordinary kind that Mr. Justice Neville observed that he could not allow the Companies Acts to be used as instruments of fraud and that in view of the deadlock which the company had created by refusing to make calls and keeping itself deliberately out of the ample means which it could easily command, he thought that it was just and equitable that a winding up order should be made. It appears to me that the decision cannot be read as laying down any general rule and so far as it was a decision on its own special facts, it need only be pointed out that the facts of the present case are very different. I would, therefore, hold that the Union of India failed not only to establish that there had been a non-compliance with the statutory notice of demand, but also to establish otherwise that the company was unable to pay its debts within the meaning of Section 162(v), Companies Act.

17. There remains the other ground upon which also the Union of India relied. The ground is that the substratum of the company having gone, it was just and equitable that a winding up order should be made. In the course of the argument, I ventured to express some doubt as to whether a creditor could ordinarily be allowed to urge as a ground, in support of his petition for winding up that the substratum of the company had gone. Having listened to an interesting argument on that question as well, I still entertain that doubt, although I must hasten to add that if a creditor will not ordinarily be heard to urge that a wind-ing up order should be made, because the sub-stratum of the

company is gone, it is not for the reason that he is technically and as a matter of law barred from taking that ground at all, but for the reason that it is not a proper ground for a creditor to urge, except in very special circumstances.

Whether the substratum of a company is gone and the object with which it was formed, has become impossible of further pursuit, is usually the proper concern of only its share-holders and contributors; a creditor cannot properly be allowed to use it as a ground for breaking up the company, unless, by the disappearance of the substratum, the recovery of his debt has been imperilled. I need not, however, enlarge further on that point, because it appears to me that the present case can be disposed of on the facts. On the facts, it seems to me almost precisely on all fours with the case reported -- *In re, Eastern Telegraph Co., Ltd.*" (1947) 2 All ER 104 (B). Indeed, in regard to practically every detail of the facts, the similarity between the two cases is striking.

In the English case, a company had been incorporated with the object of acquiring the undertakings, telegraph lines, property etc., of four companies, and the establishment of telegraph stations, carrying on the business of a telegraph company. Subsequently, a second company acquired the ordinary share capital of that company and still later a third company bought the whole of its physical assets. Thereafter, came a statute which provided for compulsory acquisition by the Treasury of the shares of the third company which had purchased the physical assets. After that, proceedings were commenced for the assessment and payment of compensation in respect of the compulsory transfer, but before the termination of those proceedings, an application was made by certain preference stock-holders for a compulsory winding-up of the company on the ground, "inter alia", that the substratum of the company had gone.

18. Pausing here for a moment, it will be evident that in the present case also, the appellant-company had been formed with the object of constructing and maintaining a railway line under the terms of an agreement with certain local authorities and that on the petitioner's own case, the District Board of Patna acquired the physical assets of the company, namely, the railway itself, presumably under the terms of the agreement. In the present case also, there was a certain sum which had been set apart, at the time when the application was heard by the trial Court, as compensation payable to the appellant-company, but neither the question of the right of acquisition, nor the question of the quantum of the compensation had been finally decided. It would thus seem that the circumstances in which, and the point of time at which, the application for winding up was made in the present case, were precisely the same as those in -- "*In re Eastern Telegraph Co. Ltd.* (B)".

19. The judgment of Jenkins, J., (as he then was) in the English case contains an elaborate review of the well-known cases on the propriety or otherwise of making a winding-up order on the ground that the substratum of the company was gone. It is not necessary, as I have already said, to discuss principles for the purposes of the present case. It would be sufficient to say that in so far as the

application of the preference stockholders was based on the ground that the substratum of the company had gone, the learned Judge refused it, on certain considerations of fact as also on a ground of convenience and equity.

He pointed out that there had been no failure of the contemplated objects of the company "ab initio". Similarly, there had been no initial failure of the contemplated objects of the appellant-company in the present case. It was pointed out in the next place that there had been no suggestion that the directors should launch upon some adventure not warranted by the Memorandum of Association and not contemplated when the company was formed. Similarly, there is no such suggestion in the present case. It was pointed out next that there had been no confiscation of the property of the company. So has there been no confiscation in the case before us.

It was said further that the transfer to the Treasury of the shares of the company which had acquired all the physical assets of the company, sought to be sent to liquidation, was a transaction which the company, proceeded against, was bound to carry out under the Act of 1946. The point in that observation obviously is that if a failure of the objects of the company had occurred, it had occurred not by reason of any improvidence or wastefulness on the part of the company, but by reason of circumstances over which the company had no control and as a natural offshoot of the terms and conditions under which the company had come into existence. Similarly, if, as the Union of India contends, the physical assets of the railway and indeed the railway itself have been taken over by the District Board of Patna, they have been so taken over for no fault of the appellant-company, as far as the materials before us show, but because of the existence of the power of acquisition contained in the agreement in pursuance of which the company was formed.

It is pointed out, in the next place, in the English case that the transaction of transfer had not been completed at the time when the winding-up order was asked for, because the assessment and payment of the compensation remained to be made. Once again, the similarity is striking, because in the present case too, the transaction of acquisition had not been completed at the time when the application for winding up was made, because all that had happened was that the District Board was making an offer of Rs. 10,00,623 as compensation which had not yet been finally settled or finally accepted by the appellant-company. That being the background of the facts, Jenkins, J., gave it as his reason for refusing a winding-up order that it was eminently desirable that the directors of the company themselves, and not a liquidator, should act on behalf of the company in the matter of settling the compensation.

He gave another reason as well, which is not pertinent here. But it appears to me that the reason I have first mentioned is a good reason and sufficient for the disposal of the present case. The reason that the substratum of a company is gone is not one of the specific grounds given in Section 162 of the Act for making a winding-up order. The disappearance of the substratum is a circumstance, in

view of which the Court may, in a given case, consider it just and equitable that a winding-up order should be made. In the present case, having regard to the fact that the sum of Rs. 10,00,623/- is already available for application to the payment of the debts of the company, which do not amount to more than Rs. 3,00,000/-, it appears to me that whether the substratum of the company is gone or still subsists is a matter of no concern to the creditor, the Union of India, and there is no reason why we should make a winding-up order at the instance of the Union of India on that ground. There is sufficient money belonging to the debtor company against which the Union can prove in the ordinary way for the realisation of their debt.

On the other hand, it is plainly preferable that the negotiations for the settlement of a just amount as compensation should be carried on by the directors of the company who may be expected to be more zealous about the interests of the share-holders than an Official Liquidator who will probably not exert himself beyond a routine performance of his duties. It appears to me in all the facts of the case that whatever the technical right of a creditor may be to obtain a winding-up order in a fit case on the ground that the substratum of the company is gone, there is no reason whatever in the present case to induce us to make an order on that ground at the instance of the Union of India.

A winding-up order may be a form of equitable execution, but there is no equity in making such an order when the debt of the creditor is not in peril, although the substratum of the company may be gone, and when matters remain outstanding which can be best attended to in the interest of the share-holders by the company functioning as a company through its directors. A winding-up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of debts due from it.

20. I should add that reference was made before us in the course of the argument to various proceedings, said to have taken place subsequently. About the effect of those proceedings, we say nothing at all, nor have we taken into consideration anything which does not appear in the paper book. No attempt has also been made to bring before us any other material in a proper form. As I have said, the allegation that an injunction had been issued against the District Board of Patna was not traversed by the Union of India and it would appear from the dates that if the allegation be correct, the District Board took forcible possession of the Railway in the face of an injunction. It would be strange to make a winding-up order on the ground that the substratum of the company was gone, if that state of things was brought about by the high-handed action of a third party who would perhaps yet have to answer for his act.

What the real facts were, have not been made clear by proper materials. Nor is there any material in support of another allegation made before us that there was a risk of the compensation money being taken out of India. Our sole duty as a Court of Appeal and so a Court of error is to see whether the order of the trial Judge was right at the date it was made and since the grounds upon which it was

sought to be supported cannot be sustained on the materials on record, and no other materials have been properly placed before us, we feel bound to set it aside.

21. For the reasons given above, this appeal is allowed, the order of Mr. Justice Bachawat, dated 29-8-1950, is set aside and the application for a winding-up order made by the Union of India on 18-7-1950, is dismissed.

22. One word is necessary about costs. Earlier in the course of this judgment, I referred to the infirmity of the affidavit-in-opposition filed on behalf of the appellant-company. That was an affidavit affirmed by one Syed Mohamed Hashmatullah who described himself as a representative of the appellant-company and which he affirmed by saying that "several paragraphs of this affidavit" were "true to his knowledge or knowledge derived from his reading of the records of the case." An affidavit affirmed in that manner is not fit to be looked at. It is next to be observed that there appears practically to have been no contest in the trial Court at all and there is no trace of any of the points urged before us having been raised there. In those circumstances, although the appellant-company will have the costs of the appeal, there will be no order for costs, so far as the trial Court is concerned.

23. Certified for two Counsel in this appeal.

S.R. Das Gupta, J.

24. I want to add a few words to what my Lord the Chief Justice has said. In paragraph 8 of the petition it is alleged that the Bukhitiarpur-Bihar Light Railway was taken over from the said company by the District Board, Patna, on or about 25-6-1950, and the petitioner had been informed that a sum of Rs. 10,00623/- or thereabouts had been paid by the District Board to the company as the purchase price and/or compensation. It is on those allegations that the contention of the respondent, namely, that the substratum of the company is gone has been founded. Those allegations are not admitted by the appellants and in the affidavit affirmed by Syed Mohamed Hashamatullah, intended to be used in opposition to the respondent's application for winding-up, it has been clearly stated that the District Board has not purchased the railway and the company has not accepted a single pice as purchase price and in fact even the amount of the purchase price has not been settled or fixed.

Thus it appears to me that the facts on which it is urged by Mr. Kar that the substratum of the company is gone are very much in dispute between the parties. It is impossible to come to a definite finding one way or the other on the materials before us. It is not possible to come to a definite conclusion that the railway was taken over from the company by the District Board of Patna and unless we can do that, the question that the substratum of the company is gone cannot be entertained as the basis for making an order for winding up.

In this connection I should point out that although in their letter, dated

10-6-1950 the appellant company made a definite statement that there was already an injunction against the respondent by the High Court and in the affidavit affirmed by Syed Mohamed Hashmatullah the same allegation has been repeated, nothing has been said with regard to the said statement in the affidavit-in-reply filed on behalf of the Union of India. Only reference has been craved to a certain telegram and a circular letter dated 28-6-1950, addressed by the Chairman, District Board, Patna, to the General Manager, East Indian Railway. The person who affirmed the said affidavit on behalf of the Union of India has kept completely silent over the question as to whether or not an injunction has been granted by the High Court as alleged on behalf of the appellant. In these circumstances, as I said before, it is impossible to come to a definite conclusion on the facts, on which alone the question as to whether or not the substratum of the company is gone can be decided. I, therefore, hold that this ground taken by Mr. Kar cannot succeed.

25. On other points I entirely agree with the views expressed by my Lord the Chief Justice.