

(1976) 04 PAT CK 0009
In the Patna High Court
Case No : Company Petition No. 2 of 1973

Central Bank of India

APPELLANT

Vs

Sukhani Mining and Engineering Industries Pvt. Ltd. and
Others

RESPONDENT

Date of Decision : 22-04-1976

Acts Referred:

Companies Act, 1956 — Section 433, 443(1)

Citation : (1977) 47 CompCas 1

Hon'ble Judges : Madan Mohan Prasad, J

Bench : Single Bench

Advocate : Sailesh Chandra Sinha, for the Appellant; K.D. Chatterji and K.N. Choubey, for the Respondent

Judgement

Madan Mohan Prasad, J.—This is an application filed by the company on the 7th of April, 1976, for dismissing the petition for a winding-up order filed by a creditor.

2. The Central Bank of India, a creditor of the company, filed the petition for winding-up u/s 433(e) of the Companies Act, 1956 (hereinafter referred to as "the Act"), on the ground that the company was unable to pay the debt due to the bank. Before the petition aforesaid was admitted, the company was heard and it filed a show-cause petition. The application was, however, admitted. As against that there was a Letters Patent Appeal which was summarily dismissed. The petition for winding-up is thus awaiting hearing on merits.

3. It appears that during the pendency of the application for winding up, the bank filed a suit for realisation of the money, being Title Suit No. 320 of 1975, in the court of the subordinate judge at Patna. In view of that the company has come up with the present application.

4. In this application it has been stated, and this was stated earlier too, that the account of the dues submitted by the bank is not correct and that the bank is not

entitled to charge compound interest. Further, it has been stated that this being a disputed matter it should be gone into in a regular civil suit. Then it is said that the bank has already filed a suit and the matter relating to the correctness of the account has become sub judice on that account. In view of these reasons a prayer has been made that the petition for winding up be dismissed.

5. At the hearing, I may add, the counsel for the company prayed that, if not dismissed, the hearing may be adjourned until the decision of the suit aforesaid.

6. The point for decision thus is whether the institution of a suit by a creditor in the civil court for the realisation of the debt is or ought to act as a bar to the continuance of a winding-up proceeding. The point is one of first impression and counsel for the parties have failed, in spite of sufficient time being given for this very purpose, to produce before me any direct decision on the point.

7. Looking at the Act, I do not find any provision which either ousts the jurisdiction of this court in continuing and deciding the winding-up proceeding in spite of the fact that there is a suit by the creditor for the realisation of the debt. The relevant provision which entitles a creditor to file a petition for winding up of a company is to be found in Clause (e) of Section 433 which merely says that a company may be wound up by the court if the company is unable to pay its debts. Section 434 of the Act states the circumstances in which a company shall be deemed to be unable to pay its debts. That need not detain me, for there is nothing relevant therein to the issue for decision. Then comes Section 443 of the Act which provides for the final order which the court is entitled to pass, the relevant part of which reads :

" 443. (1) On hearing a winding-up petition, the court may--

(a) dismiss it, with or without costs ; or

(b) adjourn the hearing conditionally or unconditionally ; or

(c) make any interim order that it thinks fit; or

(d) make an order for winding up the company with or without costs, or any other order that it thinks fit;

Provided that the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

8. The other parts of the section are not relevant to the questions at discussion. It would be relevant to refer to two other sections which would be useful to the present discussion. They are Sections 442 and 446 of the Act, Section 442 provides as follows :

" At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company, or any creditor or contributory, may--

(a) where any suit or proceeding against the company is pending in the Supreme Court or in any High Court, apply to the court in which the suit or proceeding is pending for a stay of proceedings therein ; and

(b) where any suit or proceeding is pending against the company in any other court, apply to the court having jurisdiction to wind up the company, to restrain further proceedings in the suit or proceeding;

and the court to which application is so made may stay or restrain the proceedings accordingly, on such terms as it thinks fit."

9. And Section 446 lays down :

"446. (1) When a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of--

(a) any suit or proceeding by or against the company ;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made u/s 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company ;

whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

10. There is one more section which I would like to refer to and that is Section 466 of the Act which provides that the court may at any time after making a winding-up order, on the application either of the official liquidator or of any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order

staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

11. It is on the basis of Section 443(1)(a) and (b) of the Act that the learned counsel for the company has urged that the petition ought to be dismissed or at least adjourned until the decision of the suit. In my view, the order to be passed u/s 443 of the Act is to be passed after the hearing of the petition for winding up on its merits. The scheme of the Act makes it clear too. Part VII of the Act deals with winding-up. Chapter I begins with Section 425 relating to the modes of winding up; Sections 426 to 432 relate to contributories. Then begins Chapter II of the Part relating to winding up by the court. Section 433 deals with circumstances in which the company may be wound up ; Section 434 with the circumstances when the company is deemed to be unable to pay its debts ; Sections 435 to 438 relate to transfer of proceedings; Sections 439 to 441 deal with provisions as to the application for winding up, the right to present the petition where the company is being wound up voluntarily or subject to the court's supervision and Section 441 with the commencement of winding up by the court. In the case of winding up of a company by the court it is deemed to commence at the time of presentation of the winding-up petition. Section 442, which I have quoted earlier, provides the court with power to stay or restrain proceedings against a company during the period of presentation of the petition for winding up and before the passing of a winding-up order. And then comes Section 443. It will be important to bear in mind that the wordings of Section 443 begin with "on hearing a winding-up petition..." The order u/s 443, therefore, in my view, is to be the order which has to be passed on the hearing of the winding-up petition itself. It may either result in dismissal of an order for winding up or adjournment of the hearing or any other interim order deemed fit by the court.

12. The rules relating to the procedure of the hearing of a petition for winding up are to be found in Part III of the Companies Court Rules, 1959, The application has thus to be heard on its merits and then the court is entitled to pass any of the orders u/s 443.

13. What is important to be noticed next is that the legislature has provided for the situation where there is a suit pending before a winding-up order has been passed or even thereafter, as will appear from Sections 442 and 446. The provision of Section 442 shows that where the suit or proceeding is pending in the Supreme Court or the High Court the application has to be made to that very court for a stay of the suit or proceeding and if it is pending in any other court, the application has to be made to the court having jurisdiction to wind up the company, to restrain further proceedings in the suit or proceeding. Similarly, Section 446 lays down that no suit or legal proceeding shall be commenced or if pending at the date of the winding-up order, shall be proceeded with, except by the leave of the court. The court in this case is the court where the suit or proceeding is pending. According to Sub-section (2), however, the court which is

winding up the company has jurisdiction to entertain or dispose of any suit or proceeding by or against the company, whether such suit or proceeding has been instituted or is instituted before or after the order for the winding up of the company. What has to be noticed from these provisions is that the legislature intended to provide for the stay of the suit or proceeding itself. I venture to think that if the legislature had intended that on account of the fact that a suit or proceeding has been filed in another court, the court in seisin of the winding-up application will stay the winding-up proceeding on that ground alone, there would have been a provision to that effect in the Companies Act. But I find none. The reason is not far to seek. To my mind, a winding-up proceeding is not merely for the benefit of the petitioner but of all its shareholders, creditors or contributaries. When a court is seized with a winding-up application it can stay the suit or proceeding in the other court. In view of Sub-section (3) of Section 446 such a suit or proceeding can be transferred to the court which is winding up. Therefore, the intention of the legislature appears to be to clothe the court in seisin of the winding-up proceeding with all the powers to restrain suits or proceedings to get them transferred to itself to hear them in order to be able to adjudicate finally upon the rights and claims of the various kinds of persons interested in a company and its working. It seems to me that for that reason the legislature has not provided that as soon as a suit is instituted in any court, the winding-up proceeding itself should be stayed.

14. In *In re Metropolitan Railway Warehousing Company Ltd.* [1867] 36 LJ Ch 827 although the point at issue was whether the court should order the winding up of the company which had not yet commenced its business. Lord Justice Cairns was invited to adjourn the hearing of the petition and he observed as follows:

" I am averse to adjourning or suspending the petition, for this reason, that I think it is always a very inconvenient thing for a company to have a pending petition for a winding-up order hanging over their heads. I think the court should, as far as possible, either make an order upon the petition for the winding up of the company, if it is a fit case, or, if not, dismiss the petition."

15. His Lordship further observed :

".....because it is well known if the petition is adjourned, it is adjourned with the consequences imminent over the company, if the winding-up order is made, the winding up will date back to the presentation of the petition, and avoid, therefore, or imperil anything that is being done by the company in the meantime."

16. It will be noticed that Section 443 of the Indian Companies Act is equivalent to Section 225 of the English Companies Act, 1948. I have not been able to lay my hands on any case directly on the point. There are, however, a few cases which may have some bearing and I propose to notice them. In the famous case of *In re St. Thomas Dock Company* [1875] 2 Ch D 116 (Ch D) a petition for

winding up a company formed to repair and work a floating dock in the West Indies was filed by one of the debenture-holders and was opposed by the company. In that case the petition for winding up was ordered to stand over for six months upon the company undertaking not to consent to a winding-up order on another petition or to winding up voluntarily, etc. The reason for the order will appear from the judgment of Jessel M.R. to be entirely different. The creditor there had filed the petition that there was no probability of the creditor getting anything at all because the whole of the property of the company was subject to a mortgage exceeding its value. The learned Master of the Rolls, therefore, found that there would be no use ordering the winding up of the company. On behalf of the company it was said that the dock which had not been completed earlier because of unfortunate accidents, had started earning money and it was likely to be a very prosperous concern and earn profit and, therefore, time was asked for. On that ground the aforesaid order was passed.

17. In the case of *In re Great Western (Forest of Dean) Coal Consumers' Company* [1882] 21 Ch D 769 773, there was a creditor's petition for winding up of the company. In that case Fry J. observed :

" As against the company I conceive that, prima facie, a person who is shown to have a debt which the company does not satisfy has a right *ex debito justitiae* to a winding-up order. But that prima facie right may be rebutted.....the moment it is shown that there is a large mass of other

creditors who are opposed to the winding-up."

18. In this case also the prayer for winding up was rejected because the learned judge found that there was to be no practical good resulting from the winding-up order and the petition was ordered to stand over for a period of six months on the company giving certain undertakings.

19. In *In re Chapel House Colliery Company* [1883] 24 Ch D 259 (CA), there was a petition by the debenture-holder for the winding-up of the company, which was being opposed by other creditors. Mr. Justice Kay had directed the petition for the winding-up to stand over for two months. As against that there was an appeal. The property of the company, the colliery, was subject to a large mortgage and it appeared that if it was so it would not realise enough to pay the mortgage and there would be nothing left for the debenture-holders. Lord Justice Baggallay held that in that case the petitioner would not be in a better position by obtaining a winding-up order. His Lordship rejected the prayer for a postponement on the ground that it would do the company great harm, for, it would almost paralyse the company and the order of winding up, if at all passed, would relate back. Their Lordships, Cotton and Bowen L, JJ., agreed.

20. There is thus no decision either of the Indian or of English courts which I could lay my hands on or which could be brought to my notice to show that the mere fact that a creditor files a suit for the realisation of the debt could debar him from proceeding with his petition for winding up the company. There is

nothing either to show that the court in such circumstances has no jurisdiction to proceed with the winding-up proceeding or that it would even be proper to stay the winding-up proceeding itself or dismiss the petition for that reason alone.

21. What am I asked in this case to do ? I am asked to stay this proceeding because there is a suit for realisation of the money by the creditor.

22. The petition for winding up has not yet been heard. The wishes of the other creditors are not known to me. We have not yet gone into the evidence to find out whether the company is running at a loss or at a profit and whether it is likely to run at a loss, whether the creditor's dues are disputed or otherwise. And yet I am asked to dismiss the petition for winding up or at least to adjourn its hearing, merely because the creditor has filed a suit. And obviously a creditor is bound to file a suit in order to escape the rigours of the law of limitation. And that is a remedy open to a creditor in law,

23. For the reasons aforesaid, I do not find any justification for dismissing the petition for winding up or to adjourn the hearing of that petition on the ground urged on behalf of the counsel. This application is accordingly dismissed.

24. Like Lord Jessel M.R. in the case of *St. Thomas' Dock Company* [1875] 2 Ch D 116 I have a very strong impression, to adopt his words, that this is not a bona fide petition by a company. Before I admitted the application for winding up, I allowed the company a hearing. It was said that the matter had been compromised between the parties and the parties would abide by that and for that reason I deferred the publication of the advertisement in the newspapers lest the company's reputation was harmed by that. For a considerable period, the matter of compromise was kept hanging and for that reason the proceeding was delayed. Ultimately, the company failed to pay the dues by instalments as agreed to between them and thereafter the advertisements were ordered to be published on the 5th of April, 1974, after nearly one year of the date of its admission on April 27, 1973, for various reasons. The petition has not been heard during two years which have elapsed since then. To a large extent, I find from the records, the fault lies with the company for delaying the present proceeding. I was, therefore, at first inclined to pass an order for costs, but I am conscious that award of costs should not be done by way of punishment and I, therefore, refrain from doing so.