

(2009) 12 CAL CK 0024

In the Calcutta High Court

Case No : A.C.O. No. 31 of 2009, A.P.O. No. 116 of 2009 and C.P. No. 242 of 2008

Dabriwala Vanijya Udyog Ltd.

APPELLANT

Vs

Smt. Alka Dalmia and Another

RESPONDENT

Date of Decision : 17-12-2009

Acts Referred:

Companies Act, 1956 — Section 466

Citation : (2010) 154 CompCas 131

Hon'ble Judges : Bhaskar Bhattacharya, Acting C.J.;Prasenjit Mandal, J

Bench : Division Bench

Advocate : Debasish Kundu, S. Maitra and A. Dutta, for the Appellant;Amitava Das, Ruma Sikdar, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, Actg. C.J.

1. This appeal is at the instance of a petitioning creditor and is directed against an order dated April 24, 2009, passed by the learned single judge in C.A. No. 344 of 2009 arising out of C.P. No. 242 of 2008 by which the said learned judge stayed the previous order of winding up passed by his Lordship with a direction upon the official liquidator to hand over possession of the hotel owned by the company in liquidation to the said company. His Lordship, accordingly, stayed the order of winding up and the official liquidator was directed to hand over possession of the hotel in question in the course of that day. His Lordship further recorded that the company in liquidation was ready to hand over a pay order amounting to Rs. 2,11,500 and as the petitioning creditor was not in a position to accept the same on that day, the question would be considered on the next adjourned date.

2. Being dissatisfied, the petitioning creditor has come up with the present appeal.

3. The following facts are not in dispute:

The appellant before us instituted C.P. No. 242 of 2008 thereby praying for an order of winding up of the company in liquidation, namely, Rose Berry Agencies P. Ltd. According to the appellant, the claim arose out of unpaid rent and non-furnishing of tax deducted at source certificate by the company. The company was a tenant in respect of approximately 3,000 sq. ft. at premises No. 17/1F, Alipore Road, Kolkata paying a monthly rental of Rs. 99,000 approximately. The said company, according to the appellant, defaulted in making payment of rent since April, 2006, as a result, the application was filed.

4. The defaulter company appeared in the winding up proceedings and filed an affidavit-in-opposition and supplementary affidavit and by order dated December 12, 2008, the said winding up petition was admitted for the sum of Rs. 4,85,030 and the company was directed to pay the said amount together with 5 per cent. interest in 10 instalments from the month of December, 2008. It was further ordered that in default of payment of any one instalment, there would be a direction for publishing an advertisement in The Statesman and Dainik Statesman within two weeks from the date of first default.

5. After passing of the said order the company duly made payment of the first instalment. However, the company issued a cheque for a sum of Rs. 51,500 drawn on the Centurion Bank of Punjab dated January 6, 2009, towards payment of the second instalment. The said cheque was, however, dishonoured on presentation.

6. In view of the terms of the order dated December 12, 2008 and the consequent default committed by the respondent, the appellant made necessary publication in the newspaper on January 20, 2009 and affirmed the affidavit dated February 16, 2009 and submitted the same before the learned single judge.

7. The matter appeared before the learned single judge from time to time and on March 17, 2009, his Lordship was pleased to direct the official liquidator to take possession of the assets of the company.

8. Pursuant to such direction, the official liquidator convened a meeting of the creditors on April 22, 2009, where a decision was taken to take over the registered office of the company on the selfsame date.

9. On April 22, 2009 at about 4 p.m., the official liquidator went to the office of the company and took over possession of the same after putting a padlock.

10. On April 23, 2009, the appellant came to know that the respondent was trying to move an application without notice to the appellant for vacating the order dated February 17, 2009 and immediately upon coming to know about the same, the appellant went to the company court and opposed the said application. On the appellant's intervention, the learned single judge directed the respondent to serve a copy of the application upon the appellant and the matter was directed to appear on April 24, 2009.

11. Pursuant to the direction of the learned single judge, the respondent affirmed an affidavit although the judges' summons was not served upon the appellant. It would appear from the said affidavit that the application was totally silent on the fact that the cheque dated January 6, 2009, issued by the company for payment of such second instalment was dishonoured on presentation. In paragraph 5 of the said affidavit, it was alleged that on January 7, 2009, the company tendered a draft to the petitioning creditor. It would, however, appear from the annexure of the said affidavit that the alleged draft was posted on January 10, 2009.

12. On April 24, 2009, the matter appeared before the learned single judge as Item No. 99. However, the learned advocate-on-record of the appellant was present in court, when at the time of mentioning of matter, the said Item No. 99 was mentioned by the learned advocate for the respondent and the learned single judge assured the said learned advocate that the said Item No. 99 would be taken up in the list on that date. It was specifically indicated in the list that the learned single judge would take up items Nos. 1, 2, 3, 6 and 10 at 10.30 a.m. and thereafter, the listed matters would be called.

13. According to the appellant, suddenly after item No. 2 was called, item No. 99 was called on and the learned single judge started proceeding with the matter ex parte. The learned advocate for the appellant requested the learned judge to allow him to inform learned Counsel but such prayer was refused and the learned court enquired from the learned advocate-on-record as to whether the appellant was ready and willing to take a sum of Rs. 2,00,000 and settle the dispute. The learned advocate-on-record, however, informed the learned judge that as on date, a total sum of Rs. 33,00,000 was due and payable by the company and such matter could be settled only on payment of that amount.

14. On hearing of such submission, the learned trial judge passed the order impugned.

15. The only question that arises for determination in this appeal is whether there was justification for passing the direction for handing over possession of the property to the company in liquidation which had already been taken by the official liquidator pursuant to the earlier order of the company court consequent to the default already committed by the company in liquidation.

16. After hearing learned Counsel for the parties and considering the provisions contained in Section 466 of the Companies Act, 1956, we are unable to approve the order passed by the learned single judge. As pointed out by this Court in the case of *In Re. Sonajuli Tea and Industries Ltd. (in liquidation)*, while exercising discretion for stay u/s 466 of the Act, the court should bear in mind the following principles:

- (1) The court must be satisfied that the application for stay was a bona fide one.
- (2) The court should be guided by the principles and should definitely come to the conclusion that the principles are applicable to the facts of the given case.

- (3) Mere consent of all the creditors for stay of winding up is not enough.
- (4) The offer to pay in full or to make satisfactory provisions is not enough.
- (5) The court will consider the interest of commercial morality and not merely the wishes of the creditors and the contributories.
- (6) The court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation.
- (7) A firm and acceptable proposal for satisfying all the creditors must be before the court with material particulars.
- (8) The jurisdiction for stay can only be used to allow in proper circumstances a resumption of the business of the company.
- (9) The court is to consider whether the proposal of revival of the company is not only for the benefit of the creditors but also whether the stay will be conducive or detrimental to the commercial morality and to the interest of the public at large.
- (10) Before making any order the court must see whether the former directors have complied with their statutory duties as to giving information to the official liquidator by furnishing the statements of affairs.
- (11) Any other relevant facts which the court thinks fit to be considered for granting or refusing stay having regard to the peculiar facts of a particular case.

17. In the case before us, there is no dispute that the second instalment pursuant to the initial order passed by the company court was not paid and consequently, the official liquidator had taken possession of the property of the company. It appears from the application filed for stay supported by an affidavit that the application was totally silent on the fact that the cheque dated January 6, 2009, issued by the company for payment of such second instalment was dishonoured on presentation. In paragraph 5 of the said affidavit, it was alleged that on January 7, 2009, the company tendered a draft to the petitioning creditor. It would, however, appear from the annexure of the said affidavit that the alleged draft was posted on January 10, 2009. Thus, the order impugned was obtained with mala fide motive after suppression of material facts of dishonour of the cheque dated January 6, 2009. The mere fact that after committing default, the company on a subsequent date was in a position to pay the entire dues was not sufficient to order stay as pointed out above. It appears from the order impugned that the learned single judge has without recording any reason directed the official liquidator to return possession already taken pursuant to the earlier order and fixed a date for further hearing. The procedure adopted by the learned single judge was totally irregular as mentioned above and was opposed to the well-settled principles which are required to be followed before exercising the discretion of stay.

18. We consequently allow the appeal, set aside the order impugned and reject the application filed by the company in liquidation on which the order impugned

has been passed as the averments made therein do not make out a case for recalling the earlier order. The payment made by the respondent pursuant to an order passed by a Division Bench of this Court in connection with this appeal should be adjusted towards the claim of the appellants.

19. In the facts and circumstances, there will be, however, no order as to costs.

Prasenjit Mandal, J.

20. I agree.

21. Later: In view of our earlier order, the official liquidator is directed to take possession of the property pursuant to the earlier order passed by the company court.

22. Urgent xerox certified copy of this order be made available to the parties within a week, if applied for, upon compliance of all requisite formalities.