(2017) 09 CAL CK 0056

In the Calcutta High Court

Case No : 900 of 2015

Dankuni Hatcheries Pvt. Ltd. — APPELLANT

Vs

Prosanto Saha — RESPONDENT

Date of Decision : 21-09-2017

Acts Referred:

Companies Act, 1956, Section 434(1)(a) - Company when deemed unable to pay its debts.

Citation : (2017) 09 CAL CK 0056

Hon'ble Judges : I.P. Mukerji

Bench : SINGLE BENCH

Advocate : Suman Dutta, Subhra Das, Arindam Mukherjee, Anjan Kumar Mukherjee

Judgement

1. This is a winding up application at the admission stage. This is the second round. On 4th February, 2016, Mr. Justice Somadder had admitted the winding up application. This order was set aside by the Division Bench presided over by Mr. Justice Sanjib Banerjee, on 10th April, 2017, on the ground that no opportunity had been given to the respondent company to file an affidavit-in-opposition. In those circumstances, the company petition was heard by this Court.

2. The claim of the petitioning creditor arises out of a mortgage-cum-loan agreement dated 22nd May, 2013 between Mr. Subrata Indu and the petitioning creditor. In furtherance of this agreement, the title deeds of a property belonging to Mr. Indu, one of the directors of the Company, was deposited with the petitioning creditor.

3. From 22nd May, 2013, till 18th August, 2013 periodically sums were lent and advanced by the petitioning creditor to the company. Some amounts were also repaid. The interest payable on the loan was at the rate of 18% per annum.

4. On 21st September, 2015, the petitioning creditor caused to be issued a

statutory notice to the respondent company claiming Rs. 64,50,000/- on account of principal and Rs. 25,84,035/- on account of interest till 31st August, 2015. The respondent company did not reply to the statutory notice.

5. Learned Counsel for the petitioner showed me a balance sheet of the company where this loan was shown as part of the company''s short term borrowings, under current liabilities.

6. Placing these facts Mr. Suman Dutta, learned senior Counsel appearing for the petitioner submitted that the respondent company had no defence whatsoever to the claim of the petitioning creditor. Mr. Mukherjee for the respondent Company argued that if one perused the agreement dated 22nd May, 2013, one would notice that it was between Sukumar Indu describing himself as a borrower and the petitioning creditor. The loan was against mortgage of the borrower''s individual property. Therefore, the company had no liability thereunder. Secondly, he said that the debt was a secured one by mortgage of the said property. The petitioning creditor had the alternative remedy of realizing the secured debt through a civil action by sale of the property.

7. Let us ignore the mortgage-cum-loan agreement dated 22nd May, 2013. There is no doubt that the sums as mentioned in the statutory notice were credited into the account of the company from the petitioning creditor''s account. The company petition was affirmed on 21st December, 2015. The claim in the petition is Rs. 64,50,000/- on account of principal and Rs. 25,64,035/- on account of interest. After giving credit to the part payment of Rs. 12,99,390/- received by the petitioning creditor, the total sum claimed is Rs. 77,35,645/-.

8. There is also no dispute that part payments were made by the company of Rs. 12,99,390/- between 13th August, 2013 and 19th June, 2015, aggregating to Rs. 12,99,390/- which were debited from the account of the company and credited into the account of the petitioning creditor. I do not accept the explanation of Mr. Mukherjee that the balance sheet of the company admitting liability was prepared by mistake. If it were really so, it should have been mentioned in a reply to the statutory notice. No reply to the statutory notice was made by the company, which immediately raised a presumption of insolvency under Section 434(1)(a) of the erstwhile Companies Act, 1956.

9. The existence of a secured debt or an alternative remedy is no bar to the maintainability of this company petition.

10. Even without considering the mortgage cum loan agreement, receipt of this large sum of money by the company from the petitioning creditor is to be presumed to be a debt inasmuch as there is no evidence on record to suggest otherwise.

11. There is no prima facie case that the respondent company has been able to raise so as to impel this Court to send the petitioning creditor to a civil remedy. Conversely the petitioning creditor has been able to establish a case from which

this Court can safely come to a conclusion that the above amount is payable to them by the company.

12. For all these reasons, this winding up application is admitted for the sum of Rs. 77,35,645/- inclusive of interest upto 18th December, 2015. The petitioning creditor is entitled to further interest at the said rate from 19th December, 2015 till realization.

13. Let this winding up proceeding be advertised once in the Times of India, Kolkata edition and once in Bartaman (All Bengal editions). Publication in the Official Gazette is dispensed with. The above advertisement is to be published by 10th November, 2017. List this winding up application as Company Matter (new) on 11th December, 2017.

14. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.