

(2012) 07 DEL CK 0559
In the Delhi High Court
Case No : Co. Petition 209 of 2004

Espn Software India (P) Ltd.	Vs	APPELLANT
Modi Entertainment Network Ltd.		RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 44A
Companies Act, 1956 — Section 433(e), 434, 439, 450, 450(2)
Limitation Act, 1963 — Section 18(1)

Citation : (2012) 10 AD 363 : (2012) 173 CompCas 465 : (2012) 191 DLT 734

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : N. Ganpattay, for the Appellant; Arvind Nigam and Mr. Vibhu Bakhru with Mr. Praveen Bahadur, \ Ms. Mallika Joshi, Kishan Rawat, Mr. Avinash and Mr. Rajan Narain for the Company. Mr. Mayank Goel, for the Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.

Co. Application No. 143/2012

1. This is an application filed by the petitioning creditor seeking appointment of a provisional liquidator. The present petition had been filed u/s 433 (e) & (f) read with Sections 434 and 439 of the Companies Act; the petitioning creditor is M/s ESPN Software (India) Ltd.; it had succeeded in satisfying the Court that the respondent is unable to pay its debts within the meaning of Section 433 (e) of the Act; Company Petition had been admitted on 02.03.2009; a provisional liquidator had also been appointed. Admittedly this Company Petition was unaccompanied by any separate application for appointment of a provisional liquidator.

2. The respondent company was aggrieved by the order dated 02.03.2009. It had preferred an appeal before the Division Bench. The Division Bench had inter-

alia recorded the following order:

6. After hearing the learned counsel for the parties, we are not inclined to interfere with the impugned order dated 2March 2009 insofar as it admits the company petition. Suffice it to state that the learned Company Judge has taken into consideration various aspects of the matter and concluded therefrom that the debt is due and payable by the appellant to the respondent and the appellant is unable to pay the said debt. No doubt, the decree is passed by the Supreme Court of New York which is not a reciprocal territory. The only bar would be that such a decree is not executable u/s 44A of the Code of Civil Procedure. However, such a decree which is passed by a competent Court of law, albeit, of a foreign jurisdiction, can be utilized as a mere corroboration of the respondent's principal plea that the appellant is unable to pay its debt and justify the order of the High Court. It is also not in dispute that on the basis of such a decree a suit can be filed and the question as to whether such a decree is to be acted upon or not, is to be decided on the touchstone of the provisions of the conditions stipulated in Section 13 of the Code of Civil Procedure. We find that plea to this effect has been taken by the appellant. Learned counsel for the appellant had pointed out certain purported irregularities/defects in the proceedings which culminated into the said decree and it appears that on that basis it was sought to be argued that this decree would not be enforceable since the company petition is only admitted and these arguments would be available to the appellant, before the Court proceeds further and decides winding up of the appellant company, orders are to be passed or not, such issues can be thrashed out at that stage.

7. We may only note that by relying on the aforesaid decree, the learned Company Judge had taken into consideration some alleged admissions made by the appellant company of the debt, in certain communications as well as the balance sheet. The learned Company Judge has also taken into consideration of the fact that no reply was given by the respondent u/s 433 (e) of the Act. The learned Company Judge has also taken into consideration the Directors Report dated 21st June, 2002 mentioned under the hearing "Performance Review" that the company had suffered loss of Rs. 7579 lacs in the previous year and also incurred loss of Rs. 5039 lacs in that year with specific averment that the appellant company did not have substantial source of income during the year. Once we find that the company petition is admitted taking into consideration all these aspects, we find no reason to interfere with the impugned order.

8. However, while passing the order on admission and directing the publication of citation in para 58 of the impugned order the learned Company Judge has also appointed the Provisional Liquidator. The discussing in this behalf is contained in para 59 which reads as under:-

59. The Official Liquidator attached to this Court is appointed as the provisional liquidator of the company. The provisional liquidator shall forthwith take charge of the assets and records of the company and submit a report to this court within six weeks from today.

9. Mr. Nigam, learned counsel appearing for the appellant submits that while appointing the provisional liquidator, mandate of Section 450 of the Companies Act, 1956 read with Rule 106 of the Companies (Court) Rules, 1959 was not kept in view by the learned Judge. These provisions read as under:-

Section 450 of the Companies Act, 1956

Appointment and powers of provisional liquidator:-

(1) At any time after the presentation of a winding up petition and before the making of a winding up order the (Tribunal) may appoint the Official Liquidator to be liquidator provisionally.

(2) Before appointing a provisional Liquidator, the (Tribunal) shall give notice to the company and give a reasonable opportunity to it to make the representation, if any, unless for special reasons to be recorded in writing, the (Tribunal) thinks fit to dispense with such notice.

Rule 106 of the Companies (Court) Rules 1959

"Appointment of Provisional Liquidator"

(1) After the admission of a petition for the winding-up of a company by the Court, upon the application of a creditor, or a contributory, or of the Company, and upon proof by affidavit of sufficient ground for the appointment of a Provisional Liquidator, the Court, if it thinks fit, and upon such terms as in the opinion of the Court shall be just and necessary, may appoint the official liquidator to be Provisional Liquidator of the company pending final orders on the winding-up petition. Where the company is not the applicant, notice of the application for appointment of Provisional Liquidator shall be given to the company unless the Court, for special reasons to be recorded in writing, dispenses with notice.

10. It is clear from the reading of sub-section (2) of Section 450 of the Act that before the order is made appointing a provisional liquidator, it is mandatory to give notice to the company and also to give reasonable opportunity to the company to make the representation, if any. This requirement can be dispensed with only by giving special reasons which are to be recorded in writing. To the same effect is the Rule 106 of the Companies (Court) Rules which makes a provision for appointment of provisional liquidator "after the admission of a petition for a winding-up of a company by the Court" and stipulates the requirement of giving notice before making such an order.

11. In the present case there was no application moved by the respondent for appointment of the provisional liquidator along with the winding up petition or thereafter. Had there been such an application and notice of this application served upon the applicant, situation could have been different as that would have constituted notice to the appellant company. In that event, the appellant company would have got an opportunity to give reply thereto which could have

amounted to giving reasonable opportunity to make representation against the proposed move. That has not happened.

12. We further find that no reasons, much less special reasons are given by the learned Company Judge in the impugned order justifying the appointment of the provisional liquidator and therefore the impugned order is not in accordance with the provisions of Section 450 of the Act.

13. We, therefore, set aside the order of the extent it appoints provisional liquidator. However, we make it clear that it would not preclude the learned Company Judge from passing fresh orders in accordance with law after giving notice to the appellant company and after giving it a reasonable opportunity to make representation there against .

14. It would be open to the respondent company as well to move appropriate application in this behalf or even make prayer for appointment of provisional liquidator if there are reasons to dispense with such notice.

15. Appeal is partly allowed in the aforesaid terms without any orders as to costs.

3. As is evident from this order, the Division Bench was not inclined to interfere with the order dated 02.03.2009 in so far as it had admitted the company petition. It had also granted liberty to the petitioner company to move an appropriate application for the appointment of the provisional liquidator which application is now the subject matter of this present decision.

4 Notice of this application had been issued to the respondents. Replies have been filed.

5 The averments made in this application are largely detailed in para 8 onwards. In para 12 it has been pointed out that the Directors' Report dated 21.06.2002 relating to the "Performance Review" of the company reflected that the company had incurred a loss of Rs.5,039 lacs against a loss of Rs.7,579 lacs in the previous year; the company did not have any substantial source of income during that year; the balance-sheet and accounts of the company also disclosed an unfortunate state of affairs; it shows that the company is unable to pay of its debts. The application further avers that the petitioner apprehends that the company may alienate/transfer its assets/ properties which would be detrimental to the interest of the petitioning creditor as also to its other creditors; the company could become completely defunct and thus would be successful in its design of defeating the claims of the petitioner as also of the other creditors. In para 14 it has been pointed out that after the date of the appointment of the provisional liquidator (dated 02.03.2009) a sum of Rs.1,09,48,886/- had been withdrawn by the respondent i.e. during the pendency of this petition; under the directions of this Court dated 23.09.2011, this amount has been directed to be re-deposited in this Court which also again reflects upon the conduct of the respondent; it has been submitted that every attempt is being made to siphon off the funds of the company. The prayer for appointment of the provisional

liquidator was accordingly made.

6. Reply filed by respondent No. 1 to this application denies these submissions; learned counsel for the respondent has pointed out that the appointment of a provisional liquidator which is based on the primary submission that the company is undergoing a financial stringency is not by itself a sufficient ground for the appointment of the provisional liquidator in terms of Section 450 of the Companies Act; the financial health of the company is subject to change from time to time; the company was only undergoing a temporary financial difficulty which by itself is not a ground to wind up the company. Further submission being that the averments disclosed in the said application are hollow; the application is lacking in all material particulars.

7 Learned senior counsel for the respondent has placed reliance upon a judgment of the Madhya Pradesh High Court reported in (1988) Comp Cas. 63 810 Kailash Prasad Mishra and others Vs. Medwin Laboratory P. Ltd. and others; submission being that the appointment of a provisional liquidator is a very drastic step and must be taken only when it is absolutely necessary and in the facts of the instant case, the appointment of a provisional liquidator is wholly unnecessary; further submission being that apart from the present petitioner, no other creditor has approached the Court.

8 Counsel for the respondent further points out that a counter claim had in fact been filed by the petitioner before the Court at United States (in the suit filed by the respondent) which has been decreed in April, 2004; the petitioner has a remedy which is to execute the said decree; this petition is being pressed for only for the reason that he has a legal hurdle to cross before the said foreign decree can be executed. In the rejoinder affidavit filed by the petitioner it has been disclosed that pursuant to decree obtained by him (for US\$ 2 million-approximately Rs.8,32,00,000) the execution proceedings had been prosecuted in the US Court and a sum of Rs.4,13,71,193/- (approximately USD 949,970) has since been recovered in garnishee proceedings; the balance amount of Rs.3,86,29,207/- is yet due and payable by the respondent.

9. The submission of the respondent on this score being that admittedly this amount has been recovered by the petitioner and as such inability of the company to repay its debts is even otherwise not founded as part payment has already been effected by the petitioner.

10. This argument of the learned counsel for the respondent has no force. Admittedly this part recovery has been effected in garnishee proceedings; the petitioner had to necessarily resort to coercive steps to recover the said amount; the admitted liability of the respondent company in terms of the accounts reflected in the balance-sheet as on 31.03.2004 being Rs.8,00,04,000/- and even as on date i.e. one decade later, a sum of more than Rs. 3,86,00,000 still due and payable by the respondent which inspite of its clear and unequivocal admission has not been paid clearly supports the submission of the petitioner

that the respondent is unable to liquidate its debts.

11. Relevant would it be to also state that in this reply filed by respondent No. 1 there is no specific denial to the averments made in para 12 of the application qua the Directors' Report dated 21.06.2002 i.e. about the "Performance Review" of the company or even about the losses incurred by the company was reflected in the balance-sheet for the year ending 31.03.2002; submission only being reiterated that the financial ill-health of the company is not by itself a ground to appoint a provisional liquidator.

12 Official Liquidator has also filed his reply dated 22.03.2012; he has supported the stand of the petitioner.

13. It is not in dispute that after the order of the Division Bench, the respondent had also preferred an appeal before the Apex Court which has been disposed of on 16.03.2012; the following order was inter-alia passed as under:

Since the petition has been merely admitted, we do not wish to express any opinion on expressly kept open to be decided by the learned Company Judge. Subject to above, the SLP is dismissed.

14. Today before this Court, learned counsel for the respondent fairly concedes that he is not seeking a review of the order dated 02.03.2009 in so far as the petition was admitted; he is only laying a challenge to the appointment of a provisional liquidator; submission being that in all cases even where a winding up petition has been admitted, the appointment of a provisional liquidator is not called for; unless and until the petitioner is able to show that there are dire circumstances qua the respondent company which are necessitated for the appointment of a provisional liquidator the necessary consequence of which will be to stop the business of the company which would be against the interest of all persons related to the company including the public at large; in this factual scenario, the prayer made in this application is not called for.

15. Section 450 of the Companies Act deals with the appointment of a provisional liquidator; Section 450 (2) necessitates that before a provisional liquidator is appointed, notice must be given to the company and gives a reasonable opportunity to it to make its representation; unless there are special circumstances for dispensing with this notice. The Court ordering the appointment of a provisional liquidator may also limit and restrict the powers of the provisional liquidator. The object of the appointment of a provisional liquidator is to protect and preserve the assets of the company pending an order of winding up; in the converse, if the liabilities are dissipated for one reason or the other, such an order may not be made. This power is a discretionary power available to the Company Judge which has to be exercised carefully and judicially; the Court has to watch the interest of all shareholders in the company including the public interest.

16. In the instant case, the respondent company has admitted its liability to the

petitioner in the statement of account for the year ending 31.03.2002 in the sum of Rs.8,00,04,000/-. This was first admitted in the balance-sheet for the year ending 31.03.2001 (page 48 of the paper book) and thereafter reaffirmed in the balance-sheet for the year ending 31.03.2002 (page 61 of the paper book); the admission reads as under:

Consequently, no accounting entries have been made for the claims made by the company and against the company pending decision except for an amount of Rs.800.04 lacs considered as liability in the previous year in accordance with terms of the contract. The company does not foresee any further liability and hence no provision is considered necessary at this stage.

17. Admission in balance-sheet is per-se an admission of liability and it is not equivalent to an entry in the books of account as has been sought to be argued by the learned senior counsel appearing on behalf of the respondent.

18 A coordinate Bench of this Court in 1 (2012) BC 502 Bhajan Singh Samra Vs. M/s Wimpy International Ltd. has held that admission of debt either in the balance sheet or in the form of a letter/communication would amount to an acknowledgement extending the period of limitation in terms of Section 18 (1) of the Limitation Act, 1963.

19. This entry clearly states that an amount of Rs. 8,00,04,000/- is due and payable by the respondent in accordance with the terms of the contract. This document has been signed by the directors of the company and its Company Secretary on 31.10.2002.

20. The performance review of the company as is evident from the Directors' Report dated 21.06.2002 (page 64 of the paper book) also shows that during the year under review i.e. for the year ending 31.03.2002, the company had incurred a loss of Rs.5,039 lacs as against a loss of Rs.7,579 lacs. This is also reflected in the balance-sheet of the company for the year ending 31.03.2002. These admissions are of the year 2002; a decade has passed; even the admittedly liability by the respondent has not been liquidated; no doubt certain moneys have been recovered by the petitioner in garnishee proceedings in the U.S. Court but this was under a coercive process.

21. It is also relevant to note that in the entire reply filed by the respondent he has merely averred that the financial ill-health of the company is not by itself a sufficient ground to order the appointment of a provisional liquidator; he has qualified this submission by stating that the health of the company is changing day to day; however, this reply is totally silent as to how the health of the company has improved over this period of 10 years; there is not a whisper in this reply that the financial condition of the company has either improved or is improving; no document i.e. no balance-sheet/statement of account of any year after 2002 has been filed to substantiate an argument which is now being pitched that the company has in fact gained a momentum; this submission is wholly un-substantiated.

22. Learned counsel for the petitioner has also drawn attention of this Court to the conduct of the respondent; admittedly after the date of the appointment of the provisional liquidator on 02.03.2009 certain sums of money had been withdrawn by the Ex-director of the company; contention of the petitioner creditor is that a sum of Rs.1,09,48,886/- has been withdrawn. Vide order dated 23.09.2011 this Court had directed the Ex-director K.K. Modi to deposit the sum of money in the Court; the submission of the learned counsel for the non-applicant (K.K. Modi, Ex-director of the company) on this score is that the figure of Rs.1,09,48,886/- is not correct; only a sum of Rs.14 lacs has been withdrawn by the respondent and this was in the ordinary course of business.

23. Whether this amount is more than Rs. One crore or whether it is Rs.14 lacs may not be relevant for the decision of this application as admittedly after the date of the appointment of the provisional liquidator (whether the order was rightly or wrongly passed), the Ex-management of the company has chosen to act on behalf of the company and made transactions in the account of the company which he was admittedly not permitted to do.

24. In this factual scenario submission of the learned counsel for the petitioner that there is every possibility that the assets of the company will frittered away and the same may be alienated/transferred which will affect not only the interest of the petitioner creditor but the interest of the other creditors at large is also a submission not without force.

25. A last argument has been pitched forthwith by the learned counsel for the respondent that the petition has not been advertized in terms of Rule 99 of the Companies (Court) Rules,1959; form 48 specifically postulates that the petitioning creditor himself has to sign the advertisement form.

26. There is no dispute that in terms of the directions of this Court dated 02.03.2009, advertisements of this petition have been effected in the "Indian Express" (English edition) and "Jansatta" (Hindi edition); this was on 15.12.2010; gazette notification is dated 02.06.2011. Rule 99 specifically postulates that the directions contained in the Rule have to be complied with subject to directions of the Court. On 02.03.2009, the petitioner had been directed to take steps for the publication of the petition for which purpose the petitioner had been directed to deposit a sum of Rs.50,000/- with the Official Liquidator as tentative costs of liquidation; the said amount has been deposited and the advertisements have been effected by the Official Liquidator. There is no irregularity in this procedure. Submission of the learned counsel for the respondent on this count is wholly devoid of merit. The additional submission on this score that the advertisement and the gazette notification have to be of the same date is also not founded on any legal parameter; neither does Rule 24 and nor does Rule 99 contain any such specification/limitation. Reliance by the learned counsel for the respondent on the judgment reported in 2001 Vol. 107 page 401 Lt. Col. R.K. Saxena Vs. Imperial Forestry Corporation Ltd. is misplaced; this judgment lays down the ratio that the advertisement of a winding

up petition is mandatory; discretion vests in the Court only on the time limit for the advertisement. Compliance of this direction has been effected.

27. Keeping in view the aforesaid facts, this Court is of the opinion that there is danger of the properties of the respondent-company being transferred/alienated. It would thus be expedient to appoint a provisional liquidator to protect the assets of the company which appear to be in a jeopardy. Consequently, this Court appoints the Official Liquidator attached to this Court as the Provisional Liquidator of the respondent-company.

28. This court has been informed that part record of the company is already lying with the Official Liquidator. The Official Liquidator shall take forthwith charge of the remaining complete record and the assets of the company and thereafter proceed in accordance with law. For this purpose, Official Liquidator would be entitled to obtain police aid and the local police is directed to render all assistance to the Official Liquidator.

29. In the meantime, respondent-company, its directors, officers, employers, authorised representatives are restrained from selling, transferring, alienating, encumbering and parting with the possession of any movable and immovable assets and funds of the respondent-company. They are also restrained from withdrawing any money from the accounts of the respondent-company. The directors of the respondent-company are directed to forthwith hand over all the records of the respondent-company to the Official Liquidator including its books of account. The directors of the respondent-company are also directed to get their statements recorded under Rule 130 and file their statement of affairs within a period of twenty one days as is provided for in the Companies Act, 1956.

30. With the aforesaid observations, application stands disposed of.

31. Status report be filed by the Official Liquidator. Renotify on 19.11.2012.