(2004) 08 CAL CK 0017

In the Calcutta High Court

Case No : CP No. 362 of 2001, APOT No. 399 of 2002 and ACO No''s. 76 and 97 of 2003

Evergreen Plywood Industries (P.) Ltd. APPELLANT

Vs

Circular Leasing and Resources (P.) Ltd. RESPONDENT

Date of Decision : 04-08-2004

Acts Referred:
Companies Act, 1956 — Section 433

Citation : (2005) 128 CompCas 698 : 108 CWN 984 : (2005) 58 SCL 189

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—This winding-up petition was filed by the petitioner against the company alleging non-payment of a sum of Rs. 5 lakhs lent and advanced by the petitioner to the company. The company confirmed the balance as would appear from the confirmation of account as on 1st April, 1998. The company also paid agreed interest from time to time. Last of such payment was made on 16th November, 1998. The statutory notice of demand was attempted to be served upon the registered office. However, the same came back with the endorsement "Not known".

2. The winding-up petition was heard by Girish Chandra Gupta, J. when His Lordship by his judgment and order dated 16th May, 2002 admitted the winding-up petition and directed advertisement to be published once in the "Statesman" and once in the "Pratidin". His Lordship granted liberty to the company to pay off the admitted sum together with costs of the application assessed on Rs. 10,000. Before His Lordship, the company took a plea that no statutory notice was served in the eye of law. His Lordship held that there was bona fide attempt on the part of the petitioner to serve statutory notice at the registered office, however, it came back with the remark "Not known" and for that the petitioner could not be held responsible and as such His Lordship held that the notice was duly served.

3. An appeal was preferred from His Lordship''s judgment and order dated 16th May, 2002. The Appellate Court by judgment and order dated 11th December, 2002 set aside the judgment and order of His Lordship and directed hearing of the matter afresh. Their Lordships were also of the view that while considering the matter afresh it should also be considered that even in absence of service of statutory notice whether the petitioning creditor on the existing pleadings had been able to make out a proper case for winding up.

4. The company filed an application for review before the Division Bench and kept it pending for so long. The matter came up before me for hearing afresh in terms of the order of the Division Bench and was first heard by me on 6th May, 2004, and thereafter was heard from time to time and the matter was kept pending at the instance of the company so that they could have the review application disposed of. Ultimately, the review application has been dismissed by the Court of Appeal by an order dated 30th July, 2004. The matter was kept by me for judgment for a long time and it was from time to time adjourned only at the instance of the company for the reasons recorded hereinbefore.

5. On merits it appears that the claim of the petitioning creditor arose out of money lent and advanced for a sum of Rs. 5 lakhs. The said fact is not disputed by the company. It is also an admitted fact that the company paid from time to time interest on the said sum. The confirmation of account was also signed by the petitioner as would appear from the documents annexed to the winding-up petition. The company also furnished TDS Certificate for the income lax deducted from the interest income accrued to the petitioner. Hence, there cannot be any dispute whatsoever with regard to the payability of the amount as claimed by the petitioning creditor. Assuming the winding-up notice was not served upon the company, it is evident that the company is unable to pay its debt. There is an admitted sum due and payable. The company paid interest from time to time and thereafter stopped making payment of interest. It is not the case of the company that the amount has since been repaid or the amount is not payable. If a company wilfully neglects to pay the admitted sum just due and payable to the petitioner, it should be presumed that the company is unable to pay its debt. In this regard, let us examine the Affidavit-in- Opposition filed by the company. The company admitted receipt of the sum. According to the company, money was advanced by the petitioner in lieu of diverse supplies made by the company to one M/s. Joy Hanuman Plywood on the basis of the "verbal assurances" of the petitioner. The company also admitted payment of sum of Rs. 28,864 to the petitioner. According to the company, since Joy Hanuman Plywood defaulted in making payment of the bills for a sum of Rs. 92,477.43, there had been a "bona fide and serious" dispute between the parties which requires to be adjudicated in a proper civil suit. The company also contended that there was no valid licence under Bengal Money Lender''s Act for which the petitioner could claim repayment of the said sum. In the Affidavit-in- Opposition neither any document was annexed in support of their so called agreement for supply of goods to Joy Hanuman Plywood involving the petitioner as guarantor nor any sufficient ground

was disclosed for which the admission of winding-up petition could be resisted by the company. The company admitted payment of the said sum of Rs. 5 lakhs. The company paid interest from time to time as would appear from the documents annexed to the pleadings. The company deducted tax at source out of the interest income. Even after this I am unable to find out any dispute at all far to speak of bona fide which could at least prima facie show that there is a triable issue. The court of appeal already held that there was no statutory notice served upon the company in law. The aforesaid facts, however, depict that the company is not in a position to pay the just dues of the petitioner. Failure and negligence to pay the admitted sum is also an instance of involved circumstances. The aforesaid fact would clearly show that the company is unable to pay its debt. If the company is unable to pay its debt and is in involved circumstances, the order of winding up is the only course of action. At least at the admission stage I prima facie find that the petitioner deserves an order of admission.

6. Hence, the winding up petition is admitted for the said sum of Rs. 5 lakhs together with interest at the rate of 15 per cent per annum on and from 1st November, 1998 till 29th June, 2001 when the winding up petition was filed and thereafter @ 9% until payment.

7. The company is given liberty to make payment of the aforesaid sum by 12 equal monthly instalments commencing from 1st September, 2004 and thereafter on the first day of each succeeding month.

8. In case of default of payment of any one instalment the petitioning creditor would be entitled to publish notices of this petition once in "Dainik Statesman (Bengali version)" and once in "Financial Express". Publication in Calcutta Gazette is dispensed with. Returnable 6 weeks from the date of default.

9. The petitioner is, however, directed not to publish advertisement for a period of 2 weeks from date.

ORDER

1. This review application is made against a Judgment and Order dated 11th December, 2002 passed in an appeal. The said appeal arose out of the Judgment and Order dated May 16, 2002 passed by the learned Company Court admitting the winding up petition of the respondent/petitioning creditor. The Division Bench of this Court, by its aforesaid Judgment and Order dated 11th December, 2002, had set aside the order of the learned Company Court and the matter was sent back to the Trial Court for hearing of the winding-up petition afresh on merits in terms of the observation made therein.

2. It is not in dispute that pursuant to the said Judgment and Order of the Division Bench, the winding-up petition has already been heard and the same is pending for delivery of Judgment.

3. In view of such fact and more particularly regard being had to the fact that the above review application was not filed soon after the delivery of the

Judgment of the Division Bench and more so, when steps were not taken for hearing of the review application before the conclusion of hearing of the matter by the Trial Court upon remand, we are of the view that this review application, for all practical purposes, is not entertainable at this stage. That apart, we are also not convinced of the explanation as given in the review application for filing the same beyond the prescribed period of limitation by about 150 days. Upon such consideration, this review application is dismissed.

