(2000) 02 CAL CK 0034

In the Calcutta High Court

Case No : Ordinary Original, Civil Jurisdiction C.A. No. 751 of 1998 C.P. No. 310 of 1997

Gajanand Commercial Pvt. Ltd. APPELLANT

Vs

Shree Krishna Trading Co. RESPONDENT

Date of Decision : 15-02-2000

Acts Referred:
Companies Act, 1956 — Section 433

Citation : (2000) 2 CALLT 323

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Mr. Amitesh Banerji, Mr. M.C. Ghosh, Mrs. U.B. Mookherjee and Mr. Utpal Bose, for the Appellant;

Judgement

The Court

This is an application under a Judge''s summons praying, Inter alia, :

"(a) The order dated 13th May, 1998 passed by the Hon''ble Justice Amitava Lala in C.P. No. 310 of 1997 (Gajanand Commercial Pvt. v. Sree Krishna Trading Company) be recalled, rescinded, modified and/or varied;

(b) Ad interim orders in terms of prayer above:

(c) Costs of and incidental to this application be borne by the respondent company as also the petitioning creditor;

(d) Such further or other order or orders be passed and/or direction or directions be given as to which this Hon''ble Court may deem fit and proper",

2. The Judge''s summons taken out by one Shri Saroj Kumar Banerjee with a supporting affidavit dated 19th December, 1998.

3. Applicants herein are different companies, when, such Shri Saroj Kumar Banerjee filed his affidavit of competency by describing himself as partner of

Messrs N.C. Banerjee & Sons working for gain, inter alia, at 34A, B.K. Pal Avenue, Calcutta-700 005.

4. It is not very clear from the affidavit of competency that whether the petitioner is authorised as a constituted attorney to represent of the Companies or any of the Company since it is categorically stated in such affidavit that he is partner of the named concern who is a constituted attorney of the "application''s above named.''''

5. However, it is clear from the affidavit of competency that he is representing on behalf of at least any of the applicant companies.

6. The applicant or applicants contended before this Court that the alleged debtor company was or still Indebted to the applicants/creditors for a sum of Rs. 48,95.487.34 paisa. The original petitioning creditor was initiated a winding up petition being C.P. No. 310 of 1997 as against such company. By an advertisement in the newspaper on 24th December, 1997 inviting notice of intention of any creditor, contributory of any person desirous of supporting or opposing the making of an order in the petition. A notice of support dated 9th January, 1998 bearing No. RN 15/0040/30 was sent by the applicant/creditors to the Advocate-on-Record of the petitioner.

7. On 2nd March, 1988 a single Bench of this Court was pleased to pass an order of winding up of the Company in accordance with the provisions of the Companies Act. The official liquidator was directed to take possession of the assets of the company as expeditiously as possible. Subsequently, by another order dated 11th March, 1998 such single Bench of this Court was pleased to direct the Official Liquidator to stay his hands until further orders that such order was directed to be Incorporated in the order dated 2nd March, 1998 which was passed in the earlier occasion.

8. According to the applicant/applicants above, the said order dated 11th March, 1998 was obtained by the alleged debtor company in collusion and conspiracy with the original petitioning creditor. No notice of such obtaining order from the Court was given to any of the applicants.

9. The alleged debtor company is commercially insolvent and is unable to pay its debt to the creditor or creditors and if the company is permitted to continue its business it will create further liabilities to the extreme prejudice and detriment to its present and future creditors. Therefore, it is just and equitable that the company be wound-up under the provisions of the Companies Act and the creditors supported the contention of the original petitioning creditor.

10. On 30th March, 1998 such single Bench of this Court was pleased to direct the applicant/applicants to file affidavit in support of the winding-up petition in the department. Accordingly, the same was done by them. In the said affidavit, the applicant/applicants were claimed for appointment of Official Liquidator, winding-up of the company and other Incidental prayers.

11. On 14th May, 1998, the applicant/applicants filed application in this Court for recalling of the order dated 11th March, 1998 by which hands of the Official Liquidator was stayed. In the said application, directions were given for filing affidavits. From the affidavits the applicant/applicants further came to learn that the petitioning creditor in collusion and conspiracy with the respondent company had mentioned the matter before this Court on 13th May, 1998 and fraudulently obtained an order on the basis of a terms of settlement filed by the original petitioning creditor and alleged debtor company without any knowledge and notice of the other applicants. Therefore, they are entitled for the order or orders prayed for before this Court as above.

12. The main contesting respondent is the alleged-debtor company, who, in turn, filed an affidavit in this application opposing such respondent stated that the application is barred by law of limitation or suffers for delay in further since the order passed on 2nd March, 1998 stood merged with the order dated 11th March, 1998 as a consequence whereof, the winding-up order remain stayed. In the circumstances, there could have been no occasion for granting any relief to support the winding-up order on 30th March, 1998, when, in fact, there was no subsisting order of winding-up on that date. Since the winding-up order was stayed as on 11th March, 1998, the question of giving any notice to the supporting creditors did not arise. In as much as the company wanted to pay off the dues of the petitioning creditors, the matter was mentioned before this Court and a terms of settlement have been filed tn the winding-up petition which has been permanently stayed by this Court under order dated 13th May 1998. Since the winding-up proceeding has been stayed much prior to the advent of the applicants and the subsequent order passed tn their Instance on 30th March, 1998. There was no occasion of giving any notice for mentioning to the applicants or to any supporting creditors. In fact, the applicants have no locus standi to make this application and cannot claim any order of recall in view of the fact that the winding-up order had been stayed way back on 11th March, 1998.

13. The argument and counter arguments in this respect has brought me loan Interesting question of law. As rightly pointed out by the applicant/ applicants herein that after advertisement the winding-up application cannot be regarded as a sole action on the part of the original petitioning creditor but Is, in fact, a representative action. Under such circumstances, unless a notice is given to the other applicants who have joined their hands, an appropriate order cannot be passed in this respect. Similarly, the respondent''s contention is also interesting to the extent that when the order dated 2nd March, 1998 about winding-up of the Company was recalled or stayed by an order dated 11th March, 1998, the applicant/applicants have no locus standi to make such application. Therefore, under this situation, I have to read again and again the true purport and import of the order of the single Bench dated 2nd March, 1998 and 11th March, 1998 respectively in this respect. I feel to set out the order serially to understand the situation :

March 2, 1998.

The Court : None appears for the Company. The Company is directed to be wound up in accordance with the provisions of the Company Act. The Official Liquidator is directed to take possession of the assets of the Company as expeditiously as possible.

All parties are to act on a signed copy of the minutes of this order on the usual undertaking",

"March 11. 1998.

The Court : The Official Liquidator is directed to stay his hands until further orders.

This is to incorporate in the order dated March 2, 1998.

The Official Liquidator and all parties are to act on a signed copy of the minutes of this order".

14. According to me, there is no stay of winding-up of the Company as directed under the order dated 2nd March, 1998. But the order of winding-up of the Company was suspended from its Implementation by staying the hands of the Official Liquidator from taking possession of the assets of the Company, otherwise there is no necessity of incorporation of such part of the order dated 11th March, 1998 in the order dated 2nd March, 1998.

15. In the premises, if a terms of settlement is filed upon executing the same by or between the alleged debtor company and original petitioning creditor as on 13th May, 1998 by putting a terms of settlement and by obtaining order for permanent stay of winding-up petition, then obviously right of such applicant/ applicants suffers or suffer irreparably. Has it been the position that the terms of settlement filed and dispute is settled in between the alleged debtor company and original petitioning creditor alone, the same should have been different but when an order was obtained for the purpose of permanent stay of the winding-up. It has definitely infringed the right and interest of the applicant/applicants. There is no occasion for a single Bench of this Court to direct the supporting creditor or creditors to file affidavit by an order dated 30th March, 1998. Therefore, the intention was very clear of the single Bench i.e. hear-out of the parties concerned before passing a final order in this respect.

16. Under this circumstances, I think that action on the part of the alleged debtor company, being not outcome of fraud, but transpires as fraudulent or mis-representation or misleading action before the Court of law which is sufficient material for the purpose of passing an appropriate order in this application. Therefore, when the element of fraud is present, the application cannot suffer for lapse of time or delay as pointed out by the respondent hereunder. Such type of action rightly can be made when element of such action is available to the party or parties.

17. Under such circumstances. I allow this application by modifying the order passed on 13th May, 1998 by Incorporating the sentence, "the winding-up petition is permanently stayed as far the original petitioning creditor i.e. Sree Krishna Trading Company is concerned by not against each and every applicant/ applicants" in the place and stayed of "the winding-up petition is permanently stayed of "the winding-up petition is permanently stayed".

Thus the application stands disposed of. Cost of this application will be costs of the winding-up petition.

Applicant or applicants, if any, will be entitled to take steps in accordance with law before the appropriate Court.

All parties are to act on a signed copy minutes of the operative part of the judgment on the usual under taking.

18. Application disposed of