(2009) 12 AHC CK 0217

In the Allahabad High Court

Gateway Leasing Pvt.Ltd.Through Its Managing Director APPELLANT

Vs

J.R. Organics Ltd. Having Its Registered Office At Somai RESPONDENT

Date of Decision : 18-12-2009

Acts Referred:

Citation : (2009) 12 AHC CK 0217

Hon'ble Judges : Shabihul Hasnain, J

Final Decision : Dismissed

Judgement

Shabihul Hasnian, J.—There are three company petitions being 10/2008, 12/2008 and 13/2008 filed against one opposite party M/s. J.R. Organics formerly known as Somaiya Organics. Various orders have been passed on different dates in different petitions but more or less to the same effect. On 27.5.2009 all these three petitions were finally connected . Since the issue of winding up of the opposite party no. 1 in all the petitions is common, hence it will be proper that a combined order may be passed governing all the petitions.

1. Heard Sri S.K. Gaur learned counsel for the petitioner of Company Petition No. 12 and 13 of 2008, Sri Vishal Dixit counsel for the respondent no. 1 in all the companies, Sri S.M.K. Chaudhary learned Senior Advocate assisted by Sri Amit Jaiswal.

2. Official Liquidator of the court was appointed as provisional liquidator on 6.2.2009 who was directed to take over the charge of the assets of the company. Prior to this pursuant to an order dated 26.9.2008 notice of the petition was published in a daily newspaper ''Dainik Jagran'' on 21st October 2009. By an order dated 19.2.2009 the official liquidator was restrained from taking charge of the assets of the company till 25.2.2009. Meanwhile an application of impleadment was moved by the Punjab National Bank as well as an application for dismissal of the company petition by the respondent company. On 23.3.2009 it was ordered that till the next date of listing the company shall not transfer any assets and shall not withdraw any amount from the companies account. On 27.5.2009 the Punjab National Bank was impleaded as responded no. 3 in the

company petition. Moreover, the interim order restraining the company from selling the assets of the company vide order dated 23.3.2009 was vacated and it was permitted for the company to sell the assets of the company for satisfying the demands of the creditors in accordance with law. The sale of any movable and immovable asset was to be done under the supervision and permission of the Punjab National Bank respondent no. 3. This was done with the consent of the parties.

3. So far the petitioner of company petition no. 10 of 2008 is concerned he was paid back his complete dues on 2.9.2009, hence the dispute regarding Gateway Leasing Private Limited of Company Petition No. 10 of 2008 was put to rest.

4. Meanwhile an application for intervention on behalf of the employees of the Somaiya Organics through its President and Secretary was moved by Mr. S.M.K. Chaudhary Senior Advocate. According to this the payment to the employees/ workers was not made by the company and a representation before the Assistant Labour Commissioner, Faizabad was also pending in this regard. Objections were filed by the company as well as by the petitioner against this intervention application.

5. Mr. Vishal Dixit very strongly argued that since they have made all the payments to the petitioner through cheque, hence nothing remains to be decided in this company petition. This fact was accepted by Mr. S.K. Gaur the counsel for the petitioner in Company Petition Nos. 12 & 13 of 2008. He openly stated that all his dues have been cleared by the respondent company and he does not want to press this petition any more. Mr. S.M.K. Chaudhary Senior Advocate argued that the workmen had the first charge over the assets of the company and the company can not make the payment to any other creditor prior to making the payment to the workers and labourers of the company. He drew the attention of the court towards the said provision of the Companies Act.

6. Mr. Vishal Dixit has argued that the provision shown by Mr. S.M.K. Chaudhary is not relevant in the present case. He stated that when the official liquidator has been appointed only then the said provison can be invoked. In the present case there is no such order and the process of winding up has not even stared. Unless the court is satisfied and issues specific order regarding the process being started it can not be deemed that winding up process has begun.

7. Mr. S.M.K. Chaudhary referred to Section 441 of the Companies Act. For convenience it is being quoted as below :

"Commencement of winding up by Tribunal.

(1)Where, before the presentation of a petition for the winding up of a company by the Tribunal, a resolution has been passed by the company for voluntary commenced at the time of the passing of the resolution, ans unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the winding up."

8. Mr. S.M.K. Chaudhary stated that Subsection 2 of Section 441 provides that as soon as the petition is presented the winding up shall be deemed to have commenced. Elaborating his arguments Sri Chaudhary has placed reliance on the case of AIR 1962 Punjab 433 Vol. 49 C.120 The First National Bank Limited vs. Om Prakash Sharma & others, 2002 (A.P.) 283 B. Suresh vs. A.P. Mahesh CoOperative Urban Bank Ltd. & Others and Horst Kurves GMBH vs. Essar Oils Ltd. (Guj) 2003, 801.

9. A perusal of the relevant paragraphs as indicated by Sri Chaudhary it could not be established that winding up proceedings can be understood to have started merely by filing of winding up petition before the court. As against this Mr. Vishal Dixit has shown the provisions of Section 439(8), the provision of which are being quoted below:

"439(8) Before a petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the (Tribunal) shall be obtained for the admission of the petition and such leave shall not be granted

(a) unless, in the opinion of the Tribunal), there is a primafacie case for winding up the company; and

(b) until such security for costs has been given as the (Tribunal) thinks reasonable."

10. He has further drawn the attention of the court towards the provision of Section 443 of the Companies Act relevant portion of which provides as follows :

" 443. Powers of Tribunal on hearing petition :(1) On hearing a winding up petition, the Tribunal may

(a) dismiss it, with or without costs, or

(b) adjourn the hearing conditionally or unconditionally; or

(c) make any interim order that it thinks fit; or

(d) make an order for winding up the company with or without costs, or any other order that it thinks fit:

11. It is evident from the above discussion that the argument of Mr. Chaudhary is fallacious and the argument of Mr. Vishal Dixit has force. In the present set of cases few facts are relevant to mention:

(a) after the presentation of the petition immediately the company has come forward and stated that it is willing to pay the dues of the petitioners;

(b) The appointment of the official liquidator was made provisional but before he could take charge the said order was withdrawn by this court;

(c) As on today the petitioner has made a categorical statement before this court that all the dues have been settled and he is satisfied with the payments.

12. Under these circumstances this court can not find any more reason to go on with the winding up procedure because the cause of action has been suddenly withdrawn by the petitioner. The right of intervenor can only be there when the petition is alive. If the petition itself does not survive winding up can not be started on the basis of a stranger to the petition. The rights of the employers and the workers though are very important, can not be made a subject matter of their intervention in a company petition moved by a creditor. For the payment of their dues the workmen have alternative redressal forums. Instead of pursuing their remedy in proper forums they can not be allowed to intervene in a petition which has lost its cause of action altogether.

13. Since the payments due to the petitioner which caused the petitions to be filed have been repaid even before the official liquidator could be appointed in the present petition, hence the company petitions do not survive and are, therefore, dismissed.