

(1955) 03 CAL CK 0020
In the Calcutta High Court
Case No : Matter No. 44 of 1955

In Re : AIR Transport Ltd and Chandbali Steamer Service Co. Ltd.

Date of Decision : 07-03-1955

Acts Referred:

Citation : 60 CWN 64

Hon'ble Judges : Bachawat, J

Bench : Single Bench

Advocate : Ranadeb Chaudhuri, for the Appellant; S.M. Bose, Advocate - General for the Union of India, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—This is an application for extension of time of the registration of the mortgage, dated the 15th September, 1954, u/s 120 of the Indian Companies Act. Messrs. Chandbali Steamer Service Co., Ltd., hereinafter referred to as the Company owns a ship, named S.S. RAMRAJA.

2. By an instrument in writing dated the 15th September, 1954, the company executed a mortgage of S.S. Ramraja, in favour of the petitioner to secure repayment of the sum of Rs. 1,50,000- being incurred on the balance of a loan said to have been advanced by the petitioner to the Company.

3. It is common ground that S.S. Ramraja is a ship registered with the Calcutta Port, being a port of registry in India.

4. On the 15th September, 1954, both the company and the petitioner presented a joint petition to the Ministry of Transport, Government of India, praying for approval of the mortgage. The petitioner and the company also sent a joint letter, dated the 17th November, 1954, to the Secretary, Ministry of Transport, asking for approval of the mortgage.

5. The omission to register the Mortgage was not due to any other sufficient cause. The invalidity of the mortgage is not a sufficient cause for non-registration.

6. I am not satisfied that the omission is not of a nature to prejudice the rights of

the creditors and share-holders of the company or that it is just or equitable to grant relief. Sufficient foundation for the grant of relief on these grounds is not laid in the petition. Learned "Counsel for the application relying on *Thuppan Nambudiri v. Sankara Menon*, (1) (A.I.R. 1955 Mad. 35), contends that where a condition of relief such as inadvertence is made out the Court should grant relief even after an order for winding up of the Company is made.

7. In this present case none of the alternative conditions for the grant of relief u/s 120 has been made out.

8. In the last case a Division Bench of the Madras High Court held that an unsecured creditor does not acquire any right in respect of any particular property under a winding up order and is not protected by section 120(2) of the Indian Companies Act and that therefore an order for extension of the time to register the mortgage should be made though an order of winding up of the company has intervened. With respect I am unable to agree.

9. In my opinion if a winding up order is made the unsecured creditors of the company will acquire a right under the order in respect of the properties of the company including S.S. Ramraja and such rights will attach as from the date of the presentation of the winding up petition.

10. In *Buckley on the Company Acts*, 12th Edition, page 238 the following passage appears:

if the company has gone into liquidation the creditors have acquired rights against property.

11. u/s 167 of the Indian Companies Act an order for winding up of a company operates the favour of all the creditors of the company and as a result of the order the creditors are entitled to have all the assets of the Company administered and applied for their benefit and such right attaches and commences as from the date of the presentation of the petition for winding up.

12. See *Re. Enrmann Bros.*, (2) (1906) 2 Ch. 697, 704, 705, 708, 109]; *Re. M.I.G. Trust Ltd.* (3) (1933) 1 Ch. 542, 561.

13. Assuming that the creditors do not acquire any right in respect of any property under a winding up order it does not follow that the Court is bound to grant relief u/s 120 of the Indian Companies Act. The Court has a discretion and may refuse to grant the relief on the ground that the rights of unsecured creditors have been crystallised by the winding up order; See *Palmer's Company Precedents*, 16th Edition, Vol. II, 418-19.

14. The position is somewhat different where no winding up order has been made and a winding up petition is pending.

15. Before the winding up order is made the rights of the unsecured creditors are not crystallised but on the making of such order their rights will attach and commence as from the date of presentation of the petition. During the pendency

of the winding up petition their rights are inchoate and are in suspense.

16. In *re. L. H Charles & Co.*, (4) (1935 W.N. 15), consideration of a notice of a resolution for the voluntary winding up of a company was pending and the Court granted the relief conditionally. This case was distinguished in *re. Kris Cruisers*, (5) [(1949) 1 Ch. 139], where no winding up petition nor consideration of a resolution of voluntary winding up was pending and the relief was granted unconditionally.

17. In *re. M.I.G., Trust Ltd.*, (3) (1933) 1 Ch. 542, 571-2, Romer, L.J., was of the opinion that the question of the pendency of a winding up petition was wholly irrelevant in such application.

18. In the present case not only a winding up petition has been presented but a provisional liquidator has been appointed. In my opinion the appointment of a Provisional Liquidator is a material consideration in deciding if the discretionary relief should be granted.

19. It is not alleged that any mortgage relief should be granted on the 15th Sept., 1954; and the Court is not called upon to extend the time of registration of a mortgage other than the mortgage, dated the 15th September, 1954.

20. The application is dismissed. The petitioner will pay one set of costs to all parties opposing this application. Certified for counsel.