

(1961) 09 CAL CK 0011
In the Calcutta High Court
Case No : Matter No. 179 of 1959

In Re: J. Sen Gupta Private Ltd., (In Liquidation)

Date of Decision : 08-09-1961

Acts Referred:

Companies Act, 1956 — Section 536(2)

Citation : AIR 1962 Cal 405 : (1962) 32 CompCas 768 : 66 CWN 128

Hon'ble Judges : S.P. Mitra, J

Bench : Single Bench

Judgement

S.P. Mitra, J.—This is an application for an order that the sale of a truck by the Company, now in liquidation, to the applicant be declared valid and binding on the Official Liquidator. Briefly, the facts are that on the 10th September, 1958 there was a resolution of the Board of Directors of the Company authorising the sale of some of its assets. Then on September 15, 1958, a creditor's petition for winding up of the Company was presented. The applicant on the 3rd October, 1958 purchased from the Company, Motor Truck No. WBL 1614 for the sum of Rs. 11,000/- and obtained possession thereof. On the same date the Company wrote a letter to the Director of Public Vehicles Department, Calcutta, informing him of the sale. On the 21st October, 1958 the applicant applied to this department for registration of his name as the owner of the truck. On the 2nd, 4th and 13th December, 1958 advertisements came out in the newspapers of the winding up petition. The order for winding up was made by this Court on the 5th January, 1959. Then on May 15, 1959 on the advice of the Public Vehicles Department the applicant wrote to the Official Liquidator for verification of his papers. On the 20th May, 1959 the Official Liquidator replied that an order from this Court validating the sale u/s 536(2) of the Companies Act 1956 was necessary.

2. The application has been tried on evidence before me. I have heard, the evidence of Gabriel Albert Gasper, the applicant and also of Radhagobinda Sana, the head cashier of the Company at the relevant time who was summoned by the applicant. Gasper is a transport, forwarding and clearing agent. He says that in the middle of September, 1958 a broker came to him with the information that

the company was selling a truck. He went and inspected the vehicle. In two instalments he paid to the Company a sum of Rs. 11,000/- in cash and obtained a final receipt. Along with the truck a fork lift was also sold in which Gasper was not interested. The price of the lift was about Rs. 4,800/-. Gasper has produced the receipt that was granted to him dated the 3rd October, 1958 by one of the Directors of the Company. The receipt has been marked as Ex. "A". Gasper had no knowledge of the winding up proceedings. He has obtained possession of the vehicle and has overhauled it. At the time of the purchase the truck, according to Gasper, was worth only Rs. 5,000/- or Rs. 6,000/-. But he paid Rs. 11,000/- as it had the requisite ""permit." Gasper has also produced various letters made over to him by the Company in support of the transaction. In cross-examination Gasper has stated that in his own books of account there are entries relating to payments to the Company but he has not disclosed those books.

3. The evidence of Radhagobinda Saha is that pursuant to a resolution of the Board of Directors a truck was sold to Gasper. The resolution was passed ten or fifteen days before the sale took place. The receipt dated the 3rd October 1958 (Ex. "A") has been granted by Byomkesh Chowdhury who was the Managing Director of the Company. The sum of Rupees 11,000/- was received from Gasper by the Company in cash. The entries in the Company's Account Book of Rs. 10,000/- and Rs. 5,800/- at pages 224 and 228 are in the handwriting of Saha's assistant. They represent sale proceeds of the truck No. 1614 and the fork lift. A part of the sum of Rs. 10,000/- paid by Gasper on the 20th September, 1958 was utilised by the Company for payment of Customs Duty amounting to Rs. 7,537.50. This payment was necessary for purposes of the Company's business. The opening cash balance on the 20th September, 1958 was RS. 1984.80. To this sum was added the sum of Rs. 10,000/- which came from Gasper and a few other small sums. The sum of Rs. 7537.50 has also been entered in the Company's ledger under the heading Job Control L. C.; the Job No. is L. C. 137/58; the ledger entry has been marked as Ex. "1A." There are also subsequent entries in the ledger. In September/October, 1958 the Company was short of funds: it could not realise its dues.

4. Mr. Sabyasachi Mukharji, learned counsel for the liquidator, made a few comments on the evidence of Gasper and Radha Gobinda Saha. He submitted that the entry in the Company's books of the 20th September 1958 for the sum of Rs. 10,000/- shows that it was an advance for the lorry and the fork lift, but it appears from the evidence of Gasper that the entire amount was paid by him for the lorry only. With regard to the second entry of Rs. 5,800/- there is no evidence that this money or any part thereof was actually utilised for the Company's business. Moreover, it appears from the Company's books that it hardly undertook any substantial business after this transaction. But Mr. Mukherji agreed that generally speaking on the evidence adduced before the Court it was difficult for him to contend that Gasper did not pay the price of the vehicle or to dispute his bona fides.

5. Now Section 533(2) of the Companies Act, 1956 is as follows:

"In the case of a winding up by or subject to the supervision of the Court, any disposition of the property (including actionable claims) of the Company and any transfer of shares in the Company or alteration in the status of its members, made after the commencement of the winding up, shall unless the Court otherwise orders, be void."

The corresponding section in the Old Act was Section 227(2). This section also corresponds to Section 227 of the English Act of 1948. Mr. Mukherji places strong reliance on the observations of the Madras High Court in *Andhra Bank Ltd., Bhimavaram Vs. D.P. Narayana Rao, Provisional Liquidator, Godavari Sugar and Refineries Ltd., Madras*, that, in exercising the discretion u/s 227(2) of the Old Act to validate a transaction entered into with a Company in liquidation, the fundamental principle should be borne in mind, namely, that the assets of the Company should be made available for distribution *parsi passu* amongst the creditors of the Company and that no creditor should obtain an advantage over his fellow creditors. A transaction *bona fide* entered into and completed in the ordinary course of the Company's current trade should be protected; for, otherwise the result would be that the presentation of a petition, groundless or well-founded, would *ipso facto* paralyse the trade of the Company, and great injury would be done to those interested in the assets of the Company. Even if a winding up petition is well founded, if the disposition is made for the purpose of preserving the business as a going concern, then also the discretion of the Court should be exercised. Merely because an applicant u/s 227(2) is a *bona fide* lender it does not at once follow that the transaction in his favour should be validated. It is for the applicant to make out a case why he should be preferred to the general body of creditors and why the discretion of the Court should be exercised in his favour u/s 227(2).

6. Mr. Mukherji has urged that it is not enough that Gabriel Gasper is a *bona fide* purchaser of the truck. The transaction was not entered into and completed in the ordinary course of the Company's current trade. It was no part of the business of the company to sell trucks in the ordinary course. In these circumstances, Mr. Mukherji submits the Court has to look to the interests of the general body of creditors and the transaction should not be validated.

7. On the basis of the argument advanced before me the point for consideration in this application appears to be whether the court must insist on the transaction having been entered into in the ordinary course of the company's current trade in order to use its discretion under Sub-section (2) of Section 536. All the relevant English authorities on the subject were reviewed by Wynn-Parry J. In *re: T. W. Construction Ltd.* 1954-1 All ER 744. In this case on March 25, 1952, W., the Managing Director of a limited Company produced to a Bank, at which the company had a current account, documentary credits relating to the export of machinery by the company and asked for a temporary overdraft of ₹1,000/- to be cleared by April 15, 1952. The credits were to be collected by L. and Sons and

applied in the discharge of the overdraft. On April 9 1952, W. explained to the Bank that the credits had been extended to April 26, 1952, and asked for the overdraft facilities to be extended to that date, which the Bank agreed to do. For a similar reason on May 2, 1952, the overdraft was extended until May 15, 1952, and also the amount was increased to ₹1,200/-. On May 7, 1952 a petition was presented for the compulsory winding up of the Company. At that date the company was indebted to the Bank for ₹803/11. On May 9, 1952, the amount of the overdraft was increased by a cheque drawn for the payment of the wages amounting to ₹165/-. On the same day W. informed the Bank that he was going abroad on business, and that L. and Sons would be collecting a credit expiring on May 20 1952, and would be paying to the Bank between ₹1,200/- and ₹1,300/-. The overdraft facilities were extended until the money should he received through L. and Sons. The petition was advertised on May 13 and May 14, 1952. On May 16 1952, when the overdraft stood at ₹1,142/2/10, W's co-director obtained permission from the Bank to draw a (sic) cheque for ₹100/- and the cheque was drawn on May 20, 1952. On May 21, 1952, when the overdraft stood at ₹1,368/8/10, ₹1,308/6/10 was paid to the credit of the company's account at the Bank by L. and Sons. The Bank did not become aware of the petition until May 22, 1952. On June 23, 1952, the company was ordered to be wound up, and the Liquidator claimed repayment from the Bank of ₹1,308/6/10. The Registrar ordered the Bank to repay ₹803/11 (being the amount of the overdraft when the petition was presented). On appeal the matter came up before Wynn-Parry J.

8. After quoting Section 227 of the English Act of 1948 the Learned Judge observes as follows:--

"A number of authorities have been referred to and to them I shall have to refer shortly myself. If may be convenient if I turned in the first place to the recent case of *Re: Steane's (Bournemouth) Ltd.* 1950-1 All ER 21 a decision of Vaisey J. In the course of his judgment in that case, Vaisey J. said--

The legislature by omitting to indicate any particular principle which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion".

In the older case of *re : Repertoire Opera Co. Ltd.* (1895) 2 Mans 314 Vaughan Williams, J. said--

"I have an absolute discretion to validate this transaction or not. If the transaction is one which would be valid under the protective sections of the Bankruptcy Act, that would be a very strong reason for my validating it here. That is what Lord Cairns means in *re: Wiltshire Iron Co. Ex. p. Pearson* (1838) 3 Ch A 443"

With that statement I respectfully agree. Vaughan Williams, J. goes on (*ibid*) :

The cases On Section 153 (of the Companies Act, 1862, (the corresponding

section to Section 227 of the Act of 1948) are an adoption by the court of the principle of the protective sections in Bankruptcy. It would be very unfortunate if the principles of administration in Bankruptcy and in the winding up of Companies were not as far as possible the same."

I have some difficulty in following the reasoning in these two sentences because the protective section in the present Bankruptcy Act, 1914, Section 45, confers no discretion on the Court. A transaction to be protected under that section must fulfil the conditions laid down in the section, otherwise it does not obtain the protection, whereas as Vaughan Williams, J. himself recognised, there was under the section corresponding to Section 227 of the present Act an absolute discretion as was clearly stated by Vaisey J. in the passage in his judgment to which I have referred.

"The case to which Vaughan Williams J. refers is (1868) 3 Ch. A. 443 and the facts can be simply stated by reading from the head-note

"Where a customer of a trading company had bona fide ordered and paid for goods, and the company had loaded the goods on a railway to his address and sent him the winding up order: Held, that the disposition of the property was complete before the winding up order, and the goods were ordered to be delivered to the customer."

In the course of his judgment Lord Cairns LJ said:--

"Section 153 no doubt provides that all dispositions of the property and the effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up shall, unless the court otherwise ordered, be void. This is a whole-some and necessary provision, to prevent during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition which may fail or may succeed, if it were to be supposed, that transactions in the ordinary course of its current trade bona fide entered into and completed would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well founded would, ipso facto, paralyse the trade of the company, and great Injury, without any counter-balance "of advantage, would be done to those interested in the assets of the company."

In the later case of *Re: Park Ward and Co. Ltd.* 1926 Ch. 828 Romer J. applied (1868) 3 Ch. A 443 to which I have just referred. In the course of his judgment, having quoted the passage from the judgment of Lord Cairns which I have myself quoted he says....."

"If I were to adopt the view put forward by Mr. Clayton, a company would in very few cases be able to obtain the assistance necessary to enable it to carry on

business as a going concern. Lord Cairns evidently regarded the power given to the court by the section as one given for the benefit and in the interest of the company, so as to ensure that a company which is made the subject of a winding up petition may nevertheless obtain money necessary for carrying on its business and so avoid its business being paralysed. If, therefore, I were to hold that no one who knows of the presentation of a petition can safely enter into any arrangement with the company, I think I should be depriving the company of the benefit which, according to Lord Cairns the provision of the section was intended to secure to it."

That was a case in which between the date of the presentation of the petition and the date of the order for its compulsory winding up a debenture was issued by the company to secure to the debenture holder the repayment of ₹1,200/- advanced to enable the company to pay wages due to its staff. Apart from the circumstance that in this case the Bank did not go so far as to demand a debenture, the facts appear to me to have a distinct similarity. It is true that only part of the overdraft here was applied in the payment of wages, but it is clear from the evidence and, to my mind, it is the only possible inference from the facts that the accommodation arranged was arranged for a limited period for the express purpose of enabling the company to continue to carry on its business. Therefore, to use the language of Romer J. it was a transaction "for the benefit of and in the interests of the company."

In the case before Vaisey J. 1950 1 All EP 21 a debenture was issued to secure moneys which were advanced for the purpose, as stated by Vaisey J. in his judgment, of keeping the company going or of keeping things going generally. Those three authorities appear to me to govern the present case and to bring it within the benefit of Section 227.

Against that there are said to be two cases to which reference was made. The first is re: Liverpool Civil Service Association Ex. p. Greenwood (1874) 9 ChA 511. That case appears to be distinguishable from the present case, in course of his judgment Mellish L. J. said:

"I do not mean to express any dissatisfaction with the cases which have been cited by Mr. North, as deciding that all bona fide transactions in carrying on the ordinary business of a company, which take place between the petition and the winding up order and have been completed before the winding up order is made, should be confirmed. But here the question is, whether the very creditor who has prosecuted the petition should be allowed to retain money which he has obtained by means of the petition, when the result of the petition is that the assets of the company are to be divided equally amongst its creditors."

The second case is re : Civil Service and General Store Ltd. (1887) 57 LJ Ch. 119. Apart from the circumstance that the Wiltshire Iron case was not cited, it appears to me that that case is clearly distinguishable from the present case. That was a case in which on the same day on which the petition for winding up

was being presented the company agreed to pay to a trade creditor who was ignorant of the presentation of the petition ₹175/-, being a part of a debt of ₹320/- previously due to him On the condition that he continued to supply the company with goods for a cash payment. The ₹175/- was paid after the presentation of the petition, and also ₹13/- for goods supplied. The winding up order was subsequently made, and the payment of ₹13/- was allowed but ₹175/- was ordered to be repaid. Chitty. J. in his judgment, states the case as put forward on behalf of the creditors in this way--

"The argument of the respondents is a somewhat strange one. They say that the part payment of their debt was a condition of their supplying goods, and that they are therefore entitled to treat the transaction as a new and complete transaction."

As the learned Judge makes clear, that was the case of the creditor. Small wonder then that he goes on to say--

"But to affirm a transaction of that kind under the discretion conferred upon the court by Section 153, would be to exercise such discretion upon a totally erroneous principle."

He further relies on the circumstance, as he put it--

"..... The respondent at the least, knew at the date of the agreement that the company was in embarrassed circumstances, although they do not seem then to have had knowledge of the presentation of a petition."

Then in the next sentence there is a circumstance stated which would of itself, I think, be sufficient to distinguish that case from the present case:

"When, however they actually received the payments of ₹100/- and ₹75/-, they were, in my judgment, aware of a petition having been presented. I can only treat the transaction as an attempt to get a preference over other creditors."

Therefore, it appears to me that these two cases do not in any sense govern the present case or stand in the way of the disposition in question being validated.

It appears to me, viewing the evidence as a whole and drawing the inference that I do, that this was a transaction which is directly within the passage which I have read from the judgment of Lord Cairns. I can myself see no ground for distinguishing between the amount of the debit existing immediately before the presentation of the petition viz. ₹803/11 and the amount by which the overdraft became increased after the presentation of the petition."

9. The appeal was allowed by Wynn-Parry, J.

10. In the case of *Re: International Life Assurance Society; Gibbs and Wests Case* (1870) 10 Eq. 312 between the presentation of a petition and the winding up order the Directors, being in negotiation for the transfer of the company's business and liabilities to another company, and being pressed by the company's

bankers for payment of their overdrawn account, passed a resolution giving the Bankers a charge on the proceeds of calls made before the presentation of the petition and gave their own Promissory Note for the amount of the debt, as sureties for the company. It was held that the charge on the calls having, under the circumstances been given with the bona fide intention of preventing the ruin of the company, ought to be confirmed by the court in the exercise of the discretion given to it by the Companies Act, 1862 Section 153; and that the Directors, having paid the debt of the Bankers, were entitled to a lien on the proceeds of the calls. It was argued in this case on behalf of the Official Liquidator that the court would exercise the power given to it by Section 153, of sustaining transactions affected by that section only in the case of a bona-fide transaction in the ordinary course of the current trade of a company. This was not such a transaction, but a charge on the property of the society to secure an antecedent debt--in other words, a fraudulent preference of one creditor which it was the very object of the section to prevent. In spite of this argument Sir R. Malins V. C. observes at page 324 as follows:

"I am therefore, of opinion that, although the circumstances required very careful consideration, it is a case for the exercise of the power vested in the court by the 153rd section of the Act, of holding that this transaction should not be void when the matter is brought before the court it must have regard to all the surrounding circumstances, and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the court under the 153rd section, to say that the transaction is not void."

11. The authorities cited above tend to indicate that it is not correct to say that the court can validate bona fide transactions entered into in the ordinary course of the current trade of a company. In fact, I find that the Judicial Committee in the AIR 1932 1 (Privy Council) had confirmed a transaction which could not be said to have been entered into in the ordinary course of current trade. In this case a petition by some of the shareholders for winding up the company was dismissed. Subsequently a lease for 10 years of a factory owned by the company was granted pursuant to a resolution of the company at a General Meeting. In the meantime, an order winding up the company was passed on appeal from the order of dismissal. The lessee had been in possession and paying rent regularly until an application was made by the Official Liquidator to declare the lease void. It was held that the transaction ought to be confirmed instead of being declared void.

12. It seems to me, therefore, upon considering various authorities on this subject that the following principles are doubtless applicable to Sub-section (2) of Section 536 of the Companies Act, 1956:

1. The Court has an absolute discretion to validate a transaction.
2. This discretion is controlled only by the general principles which apply to every

kind of judicial discretion.

3. The court must have regard to all the surrounding circumstances and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the court, u/s 536(2) to say that the transaction is not void.

4. If it be found that the transaction was for the benefit of and in the interests of the company or for keeping the company going or keeping things going generally, it ought to be confirmed.

13. Keeping these principles in view in the present case it appears that the applicant without any knowledge of the winding up proceedings bona fide entered into this transaction for valuable consideration. A substantial portion of the money paid by the applicant to the company was utilised for meeting the company's liabilities to the Land Customs Authorities. The company was in need of funds and the truck was sold to the applicant to keep the company going or for keeping things going generally. It may be that only a part of the sum of Rs. 11,000/- paid by Gasper was utilised by the company to liquidate its indebtedness to the Land Customs authorities; but on the evidence available to me I shall be justified in drawing the inference that the truck was sold to enable the company to continue to carry on its business, inter alia, of clearing forwarding and shipping agents, if that was not the case the company's directors would not have been anxious to meet their liabilities to the Customs authorities. In my opinion therefore, this transaction ought to be validated.

14. In the premises, I make an order in terms of Clause (a) of the Summons. But I make no order as to costs except that the Liquidator shall retain his costs out of the assets.