

(1952) 08 CAL CK 0006
In the Calcutta High Court
Case No : Company Matter No. 529 of 1951
In Re: Ko-Ku-La Ltd.

Date of Decision : 22-08-1952

Acts Referred:

Companies Act, 1913 — Section 163(1)

Citation : AIR 1953 Cal 387 : (1953) 1 CALLT 401 : (1953) 23 CompCas 81 : 57 CWN 136

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : B.C. Dutt, R. Chaudhuri, for the Appellant;

Judgement

P.B. Mukharji, J.—This is an application by the judgment-creditor for the winding up of the company called Ko-Ku-La Ltd. The grounds on which the petition is being prosecuted by the judgment-creditor are first, that the company is unable to pay its debts and secondly, that the statutory notice of demand was given to the company as required by S. 163, Companies Act. The statutory demand is pleaded in para. 9 of the petition and a copy of the demand is annexed to the petition as Ex. B and it is pleaded that it was sent by registered post.

2. The facts briefly are as follows: The petitioner instituted a title suit in 1947 in the Subordinate Judge's Court at Asansol claiming possession of certain lands which the company had contracted to purchase from her and Rs. 10,000/- for breach of contract, Rs. 4,000/- for price of cattle and Rs. 1,000/- for deterioration of the cattle and Rs. 2,000/- as the value of the produce of the arable lands and Rs. 1,000/- as damages for demolition of certain buildings. There was a written statement by the defendant company, but at the time of the hearing it did not appear and on 26-5-1949, a decree was passed in that suit in favour of the petitioner against the company for the sum of Rs. 18,000/- and for Rs. 3419/3/3 for costs, aggregating to Rs. 21,419/3/3.

3. This decree of 26-5-1949 still remains unsatisfied. Certain steps were taken in execution of this decree. In execution the petitioner caused certain lands belonging to the company to be attached. The lands were attached and sold by

the executing Court by public auction and the petitioner was the highest bidder purchasing the same for Rs. 9,000/-. The executing Court allowed the purchase money to be set off in part satisfaction of that decree. The sale was duly confirmed and a sale certificate has since been issued.

4. It is now said that in spite of demand the company did not pay the balance of that decree which including interest calculated upto 29-8-1951, amounted to Rs. 11,976/9/6, for which sum the statutory notice was given on that date, i.e. 29-8-1951. In that notice given by the petitioner herself the demand is clearly made for the sum of Rs. 11,976/9/6 being the balance of the decretal amount in Title Suit No. 33 of 1947 of the Court of the Subordinate Judge, Asansol and the company was also notified that on failing to pay this amount within three weeks, the petitioner will consider the company to be unable to pay its debts.

5. On these allegations the petition was presented by the judgment-creditor on 20-11-1951.

6. In the affidavit-in-opposition filed on behalf of the company by Sunil Krishna Roy Chowdhury he described himself to be at present the Manager in the "New Selected Dhoori Colliery". This affidavit-in-opposition was filed on 16-2-1952. According to this deponent he was the Managing Director of the company at the relative period. His whole case on behalf of the company is that the petitioner would not have got a decree if he had not tendered his resignation and left the company when the said decree was obtained. Although he was not in the company when, according to him the ex parte decree was obtained, he is not slow to make the vaguest allegation that the decree was falsely and fraudulently and/or in collusion or conspiracy obtained by the petitioner with some officers and employees of the company.

No mention of any particular officer or employee is made to even remotely suggest by way of particulars of bona fides regarding the allegation that is made against the petitioning creditor who happens to be also the judgment-creditor, so that she is not even in a position to meet such allegation. The execution is admitted by him. But that also is charged as being false and fraudulent. No particulars are given and no grounds are shown on which such allegations of fraud are made. It is admitted in the affidavit-in-opposition that execution was levied pursuant to the decree, that attachment was levied under that decree and that a tractor was sold. The allegation again is made that the tractor was sold at an undervalue. It is admitted that the decree remains unsatisfied.

7. While the decree is being challenged as fraudulent, no step whatever has been taken to set aside the ex parte decree which, according to this deponent, came to be passed because he happened to be ill and was absent at the time. An application under p. 9, Rule 13, Civil P.C. would have been the simplest way to get the ex parte decree set aside if the company could have proved that it could not appear because the deponent happened to be ill and there was none in the company who could come and appear in Court because of the illness of a certain

individual. An allegation is made that necessary legal action for setting aside the execution proceedings and sale has been taken.

But Mr. Dutt has failed to furnish any particulars at all on the point and in fact has submitted before me that he is not in a position to say what steps, if any at all, had been taken in this respect. This much is quite clear that neither an application to set aside the ex parte decree nor even a suit to set aside the decree has been filed by the company against the petitioning creditor, although this decree was passed on 26-5-1949 and although even the presentation of this petition was on 20-11-1951 and although today it is August, 1952.

8. On the question of the service of the statutory notice of demand u/s 163, Companies Act, the traverse by this deponent is most curious. What he says in affidavit-in-opposition is to be found in para. 20 and the only illumination one gets from this particular paragraph is "Save as aforesaid, I deny the allegations contained in paras. 1, 8, 9 and 10 of the said petition". Paragraph 9 of the petition for winding up specifically pleaded this notice mentioning that it was sent by registered cover. I would have normally expected a stricter and a more pointed denial and not a vague denial in an omnibus statement as the one I have just quoted including many other paragraphs.

The reason for vagueness of the denial has been apparent now although it was not apparent at the time when the affidavits were filed. Since these affidavits were filed an affidavit was affirmed by Narendra Nath Palit on 18-8-1952, in these proceedings disclosing the registered acknowledgment. Narendra Nath Palit has given evidence in support of his affidavit today, as Mr. Dutt suggested that Banerjee J. wanted to be satisfied about the service of the statutory notice, although Mr. Chowdhury, appearing for the company, has denied that there was any question of trial on evidence. In the list of course the matter does not appear as one to be tried on evidence.

Nevertheless, accepting Mr. Dutt's position, Mr. Chowdhury for the petitioning creditor called Narendra Nath Palit to the box. His evidence is that the notice of demand, dated 29-8-1951 addressed to the company was duly posted by him, it was addressed to the company at its registered address and he received back the acknowledgment due in the usual course of business on or about 30-8-1951, which is also the date borne on the rubber stamp seal of the company on the acknowledgment, Mr. Dutt, appearing for the company, has cross-examined Mr. Palit and has said that it has not been duly proved because Mr. Palit could not say as to whether the signature on the acknowledgment due was by someone on behalf of the company.

It would be the most unreasonable law to assume that a person sending a letter by registered post would have to know each and everyone of the company's employees to be able to say as to who has signed any particular letter and Mr. Palit rightly and frankly said that he could not say who signed it but he was satisfied that it bore the rubber stamp seal of the company which he had seen on

many other occasions in the usual course of business and he had inferred that it must have been duly delivered because it was duly addressed at the registered office and duly returned to him through the post office. Mr. Dutt has argued that this presumption can be rebutted. That is an acceptable proposition, but his difficulty is that it has not been rebutted.

On the one hand, I find a postal acknowledgment duly sent and addressed and duly returning in the usual course of business, and on the other the sworn evidence of the person who actually sent the letter and actually posted that letter and the presumption must operate until it is rebutted by someone coming from the company to deny and dispute the receipt of such letter. Here is the crux of the matter. But no one has come forward on behalf of the company to dispute the receipt of this statutory demand notice, although according to Mr. Dutt this was the very point which was to be tried on evidence.

Therefore, not only the presumption must prevail but I must come to the finding that the service was proper and effective in the absence of any proof to the contrary and having regard to the evidence already given by Mr. Palit. This explains why there has not been a direct denial by Sunil Krishna Roy Choudhury affirming the affidavit on behalf of the defendant company on this point of the receipt of this statutory demand notice. I unhesitatingly accept in this context the evidence given by Narendra Nath Palit.

9. It is necessary to refer at this stage also to the language of Section 163(1)(i), Companies Act which requires such demand notice to be "delivered by registered post or otherwise at its registered office". The best evidence available on behalf of the petitioning creditor has been given by calling the person who actually delivered the letter to the post and sent it by the post and got the acknowledgment back in due course by postal administration. On the Bide of the petitioning creditor nothing more could have been done." Mr. Dutt suggests that the peon should have been called. I do not see any reason why the peon should be called as the ordinary presumption is that a letter duly addressed and posted would reach the address which is given in the envelope and confirmed in this case by return back through the post. If delivery was to be disputed, the company to whom it was intended to be delivered was the best authority to dispute it. But no one from the company has come to pledge his oath to Bay that there was no delivery of this letter.

10. I, therefore, hold that there was proper delivery by registered post of the statutory demand notice contemplated u/s 163(1)(i), Companies Act.

11. The main argument advanced on behalf of the company is on the basis of the observations of Lord Esher, M. R. in -- "Ex parte Lennox" (1886) 16 QBD 315 . There it is said by that very eminent Master of Rolls that the Bankruptcy Court can enquire into a judgment debt. To use his exact language at p. 323 which has been quoted out of context by Mr. Dutt,

"The Court is entitled to enquire into the alleged debt and the Court exercising a

judicial authority, is bound to do so upon a "sufficient" case being shown. Circumstances may be alleged which would show that the judgment ought to be disregarded in bankruptcy."

This has been relied upon by Mr. Dutt as an open invitation to the bankruptcy Court to undermine the basis and the validity of every judgment debt that happens to be questioned by the judgment-debtor, disregarding the wholesome observation of the Master of Rolls at the beginning of the paragraph in which that passage occurs and which I find necessary to quote:

"It cannot be doubted that a judgment is prima facie evidence of a debt, and that judgment or order to which a debtor has consented is far stronger evidence against him of the validity of the debt for which it purports to be given than a mere judgment by default. It is very strong evidence against him."

This will show that there cannot be any doubt that a judgment debt will carry a great weight even in a bankruptcy Court and it is the presumptive evidence of the highest order, and even on the passage quoted by Mr. Dutt, mere allegations and assertions of fraud or collusion will not justify upsetting and reopening a judgment debt. It is there said by the Master of Rolls that a "sufficient case" must be made out, A difference is made between the case of fraud and the case of collusion to which I will make a reference. But in no view of either the Insolvency Law or general jurisprudence can it be suggested that the mere assertion of fraud will at once in every case entitle the judgment-debtor to an enquiry into the validity of the judgment debt on the basis of which a petition for insolvency is presented.

12. The reason why a judgment debt may be enquired into by a bankruptcy Court is obvious and that reason must be clearly understood in order to discover the limits of this seductive doctrine that a bankruptcy Court can go behind a judgment debt. On the petition of one single creditor the bankruptcy Court is asked to make an order in insolvency or as in the case of a company, an order for winding up, which means that all the creditors will be affected and that is the reason why a single judgment debt may be questioned lest a spurious or fraudulent or collusive debt of "a party should be the foundation for making the debtor bankrupt for all other creditors and for the rest of the world.

But that does not mean that the judgment debt is of no value and is no evidence and it can be just disregarded by the judgment-debtor by merely making an allegation that it has been obtained by fraud or collusion. I should have thought that such baldest and vaguest allegations which I have found in this affidavit of the company challenging the decree do not even amount in law to an averment of fraud or collusion. That is all that I need observe on this case of "Ex Parte Lennox (A)" except saying also that this is not a case under the Companies Act and not a case in the winding up of a company but relates to the bankruptcy of an individual.

13. The law appears to me to be clearly and correctly stated in the case of -- "In

re, Amalgamated Properties of Rhodesia (1913) Ltd." (1917) 2 Ch 115 where Sargant J. observes at p. 121 that

"the petitioners, as judgment-creditors for this very large sum, are prima facie entitled "ex debito justitiae" to a winding up order, and it seems to me to be impossible to displace that prima facie position without the "very strongest proof that the petition is being improperly made use of for some ulterior motive."

14. While, therefore, the correct view is that the judgment of a Court is a very strong presumptive evidence that the debt exists, it is not conclusive in a bankruptcy Court and although the bankruptcy Court as a Court of conscience can enquire into the basis of and in that sense go behind a judgment debt it will equally as a Court of conscience do so only in a proper case on proper grounds being shown that the decree or the judgment debt is tainted with fraud or collusion. This branch of the law in England is to be found also from the leading case on the point of -- "Bowes v. Hope Life Assurance and Guarantee Co." (1865) 11 H L C 389 and in such well-known cases on the point as -- "In re. General Company for Promotion of Land Credit" (1870) 5 Ch 363 and -- "In re. National Permanent Benefit Building Society" (1869) 5 Ch App 309.

15. I should like to insist here that on my reading of the cases I have come to the conclusion that the mere allegation that the judgment was obtained by fraud does not require the bankruptcy Court to enquire into its foundation and validity. The allegation must be attended with such particulars as will not only amount to a proper averment in law of fraud but also show a prima facie case of fraud requiring investigation. It appears to me quite clear from the observations of Lord Esher, M. R. in the case of--"In re Ex Parte Lennox (A)". The latest legal position is clearly stated in Buckley's Companies Act, Edn. 12, edited in 1949, p. 453. The learned editor of that great work says:

"If the petitioner has already obtained a judgment in his favour, he cannot, upon an allegation that the judgment was obtained by fraud, be called upon as a preliminary to his right to an order to go into further evidence in support of his claim. But upon the respondents undertaking to bring an action to set aside the judgment, the petition may be ordered to stand over. If, however, the judgment is shown to have been obtained by collusion, the petition may be dismissed although the judgment has not been impeached in an, action."

16. It is fundamental to remember that even in the case of charge of collusion it must be "shown" that the judgment was obtained by collusion. The authorities quoted in support of that proposition are the decisions of the House of Lords which I have mentioned, and -- "In re United Stock Exchange Co." (1884) W N 251 ; -- (1886) 16 QBD 315 (A) and -- (1917) 2 Ch 115 (B).

17. Now from the statement of the law in, Buckley it is quite clear that even if the petition for winding up is allowed to stand over the respondent should undertake to bring an action to set aside the judgment. But no such undertaking has been offered by Mr. Dutt's client probably for the reason that he feared that

such an action had perhaps become barred by limitation. Ever since May 1949 when the decree was passed more than three years ago from now and from the presentation of this winding up petition in November 1951 there has been neither an application to set aside the ex parte decree nor even a suit to set aside the ex parte decree.

18. The position u/s 163, Companies Act, is quite clear on the point. The petition in this case before me comes within the two grounds for winding up expressly stated in that section. The fact remains that execution of this decree is admitted and that it has remained unsatisfied. That obviously brings this case within the clear provision of Section 163(1)(ii), Companies Act. Then again there is in this case the statutory demand notice as required u/s 163(1)(i), Companies Act. The company must therefore be deemed to be unable to pay its debts under the statute. The language of the section is that in the events mentioned in three different cases u/s 163 the company shall be deemed to be unable to pay its debts.

One such event is when the creditor to whom the company is indebted in sum exceeding Rs. 500/- then due, has served on the company by causing the same to be delivered by registered post or otherwise at its registered office, a demand requiring the company to pay the sum that was due and the company has for three weeks thereafter neglected to pay the same or to secure or to compound for it to the reasonable satisfaction of the creditor. There is no doubt in this case that this demand remained unsatisfied for three weeks.

On this point I do not want to discuss in detail the well-known case of -- Japan Cotton Trading Company Ltd. Vs. Jajodia Cotton Mills Ltd., . Yet it is necessary only to observe that in that case at p. 352 Rankin. C.J. makes it quite Clear that Sub-section (i) to Section 163 means that the company has to be served with a demand notice under rather special precaution so that if it makes further default for a period of three weeks "the question of the inability to pay its debts" is set at rest. That as I read the judgment means that the inability to pay the debt must be deemed to be there under the language of Section 163 when such a demand notice duly delivered remains unsatisfied for three weeks.

19. Secondly under Sub-section (ii) of Section 163(1) the other event "when the company shall be deemed to be unable to pay its debt" is

"if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part."

Here the decree is there and it is also admitted that it has remained unsatisfied even after attachment of the properties. It is true that the decree has been challenged but I have already observed that nothing has been shown in the affidavit which will even justify any enquiry to go behind the decree.

Before I leave this branch of the law I should like to observe that the moving consideration in this branch of law as laid down by Lord Esher in -- "Ex Parte

Lennox (A)", was the language of the particular Bankruptcy Act which his Lordship was considering, namely, that the Court had to be "satisfied". This expression is not used in Clauses (i) and (ii) of Section 163(1) but is used only in Clause (iii) where the company cannot be deemed to be unable to pay its debts unless it is proved to the satisfaction of the Court that the company is unable to pay its debts. That proof to the satisfaction of the Court is not in my judgment required in the events mentioned in Clauses (i) and (ii) of Section 163 (1). Companies Act.

20. For these reasons there will be an order for winding up of the company. Certified for counsel. Costs to come out of the assets of the company.