(1981) 02 CAL CK 0025

In the Calcutta High Court

Case No : Company Petition No. 415 of 1980

In Re: M.L. Bose and Co. Pvt. Ltd.

Date of Decision : 24-02-1981

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 11
Companies Act, 1956 — Section 433, 434
Evidence Act, 1872 — Section 115

Citation : AIR 1982 Cal 71

Hon'ble Judges : Salil K. Roy Chowdhury, J

Bench : Single Bench

Advocate : Bhaskar Gupta and P. Chowdhury, P.K. Roy, P.K. Mallick and Jayanta Banerji, for the Appellant;

Judgement

Salil K. Roy Chowdhury, J.—This is a winding up petition which was presented on 25th September. 1981, On the returnable date notice was directed to be served on the company along with copy of the petition. The company appeared and took direction for filing affidavit to show cause why the winding up petition should not be admitted. The petitioning creditor also filed a reply to the said affidavit. The petitioning creditor is a Deity Sri Sri Biswamata Debi which presented this petition through her Sebait and next friend Salil Kr. Mitra, trustee of the said deity.

2. The claim arises out of a fixed deposit of Rs. 45,000/- made on or about 1st Oct. 1953 evidenced by 45 fixed de-posit receipts of Rs. 1,000/- each issued by the company bearing serial numbers 21 to 50. The terms and conditions of the fixed deposit are printed at the back of the said fixed deposit receipts. The fixed deposit was for a period of 21 years from 1st Oct. 1953 and would carry interest at the rate of 5% per annum under the terms and conditions of the said fixed deposit. It appears that the company failed to pay the interest at the agreed rate for certain period which resulted in a notice u/s 434 of the Companies Act issued on behalf of the petitioner dated 17th July, 1969 and finally a winding up petition being C. P. No. 258 of 1969 was filed in this court on the 16th Jan. 1970. The said company petition was disposed of after the company filed an affidavit and

the terms of settlement were put in by which the company petition was admitted and the respondent company was directed to pay the arrears of interest accrued on the said fixed deposit before the filing of the terms and other conditions as laid down in the said order passed by R.M. Datta, J. One of the terms of the said order is as follows:

"Without prejudice to the rights and contentions of the parties the respondent shall be at liberty to file a suit if deemed necessary to establish its contentions within 15 days from the date of the order to be made herein.

In the event of the filing of the said suit within the period as aforesaid, the respondent undertakes to Court to pay unconditionally to the petitioner the annual interest on the said fixed deposit within a month from the accrual thereof and to continue such payment until the suit is finally disposed of.

In the event of the non-filing of the suit within the period as aforesaid, the respondent will be deemed to have admitted the contention of the petitioner in this application and the respondent will be entitled to raise the same dispute specifically."

The said order makes it quite clear that unless the said suit is filed within the time stipulated by the said order dated 16th Jan. 1970 the question of disputing the said fixed deposits on any ground whatsoever will be lost and the company will be deemed to have accepted the said fixed deposit receipts as valid and binding on the company. It is now an admitted fact that the company has not filed any such suit pursuant to the order of the court and, therefore, it necessarily follows as consequence that the company has admitted the fixed deposits as valid and binding and that order was made as far back as on 16th Jan. 1970.

3. The company must be deemed to have been estopped by procedure to raise any question regarding the validity of the said fixed deposits and the company is bound by the principle of res judicata as the same is by an order of the court. It also appears that the company having failed to pay the interest as per the said order made in C. P. No, 258 of 1969 a contempt petition was filed and a rule was Issued by R.M. Datta. J.

4. Subsequently the matter was disposed of on the terms as mentioned in paragraph 16 of the petition by an order dated 3rd Dec. 1976 by R.M. Datta, J. In terms of the said order, the company has paid the arrears of interest after deducting the Income Tax at source and the company went on paying interest for the year 1384 B. S. by a letter dated 3rd July. 1978. Another contempt application was filed and Rule Nisi was issued on the 18th Dec. 1979 but the said application was dismissed by R.M. Datta. J. on the ground that the same was barred by limitation under the Contempt of Courts Act, 1971.

5. In due course the fixed deposit receipt matured on the 30th Sept. 73 and the claim of the petitioning creditor together with accrued interest amounted to Rs.

45,000/- for principal of the fixed deposit which matured on the 30th Sept. 1978 together with accrued interest upto 30th April, 1978 totalling to Rs. 48,281.25 p. (sic). The petitioning creditor caused a statutory notice u/s 434 to be issued through its advocate''s letter dated 14th May, 1980. The company, through its advocate''s letter dated 23rd May, 1980, tried to raise the same question for which they were given leave to file a suit by the said order of R.M. Datta, J, passed in the previous Company Petition No. 258 of 1969 on the 16th Jan. 1970 alleging that the said fixed deposit receipt has been given mala fide and fraudulently by the uncle and cousin of the present managing director of the company and no amount in fact reached the till of the company against the fixed deposit receipt. Thereafter the present petition was filed and the same question which was raised in the previous application was raised again. The whole question is whether the company can in law or in fact raise the question for which liberty was given to the company by the said order of R.M. Datta. J. referred to above the relevant portion of which has been quoted previously.

6. Mr. Bhaskar Gupta appearing with Mr. P. Chowdhury for the petitioning creditor submitted that after the fixed deposit matured on the terms of the said fixed deposit it became payable to the fixed deposit holder which appears in the face of the said fixed deposit The photostat copy is annexed to the winding up petition and there is no defence to the claim of the petitioning creditor and the company is not and cannot raise any dispute in respect of the same. Mr. Gupta also submitted that reference to another matter in which similar defence was taken and the petitioning creditor was relegated to a suit and in the suit the city civil court has set aside the fixed deposit receipt cannot be of any assistance to the company or constitute any defence either in fact or an law. The said case which is relied on by the company arising out of a winding up petition in which the petitioning creditor was relegated to a suit, cannot be binding on the petitioning creditor or affect in any way the admitted position as to the facts of this case and the law applicable hereto. Here the company was given liberty to file a suit within 15 days of the order as hereinbefore stated and in default of filing, the company must be deemed to be admitting the claim of the petitioning creditor under the said fixed deposit and they have lost the said opportunity and any claim to be made by the company must be deemed to be barred and the question of the company raising any defence is far from being bona fide or in good faith and it must be held that the company was trying to raise the said defence mala fide and with a view to weave a cobweb and throw cloud on the undisputed claim of the petitioning creditor which the company must be deemed to have admitted pursuant to the previous order of this Court.

7. Mr. P.K. Roy appearing with Mr. P.K. Mallick and Mr. Jayanta Banerji submitted that the said fixed deposits are fraudulent and not binding on the company and the same group of persons and their uncles and cousins have brought it into existence and no money came into the till of the company, These questions were the questions which were raised in the previous winding up petition being C. P. No. 258 of 3969 which resulted in the order dated 16th Jan. 1970. Reliance was

placed on the other winding up petition which was directed to be taken off the file by me by an order dated 13th May 1975 in C. P. No. 242 of 1974 (Balananda Brahmachari Seva Sadan v. M.L. Bose & Co.) where the petitioning creditor was relegated to a suit and the company petition was directed to be taken off the file. It is being submitted that a suit was filed in the City Civil Court and the game has been dismissed. In my view, that has got nothing to do with the facts of this case where the petitioning creditor''s claim is deemed to be admitted pursuant to the consent order dated 16th Jan. 1970 by the company. The relevant portion of the order I have already quoted and the company is estopped by procedure and admission that there is no defence to the claim of the petitioning creditor in respect of the said fixed deposit which must be deemed to be admitted by the company, in fact, the company has not filed any suit pursuant to the leave given by the said order dated 16th Jan. 1970 and, as such, the company by its conduct and deed is estopped from raising any dispute about the said fixed deposit receipt which must be deemed to have been admitted by the company pursuant to the consent order.

8. Moreover, it appears on the face of it, that no suit by the company is maintainable as the same is barred by limitation at this stage. The question is the same and the cause of action, if any, arose long time back as recorded in the said order dated 16th Jan. 1970 and it is also an admitted position that the company has not filed any suit pursuant to the leave given to the company and, consequently, the petitioning creditor''s claim under the said fixed deposit must be deemed to have been admitted, The company''s contention, if any, in respect of the challenge thrown to the'' said fixed deposit now is also barred by the principle of res judicata by the said order dated 16th Jan. 1970. Further it appears that the company has paid interest on the said amount up to the year 1384 B. S., and, therefore, the company has admitted the fixed deposit being valid and, as such, payment of interest makes it clear that the question of the validity of the said fixed deposit is abandoned and cannot be raised by the company once again in this proceeding, Nobody can take advantage of his own default and further one cannot raise a question indirectly which cannot be raised directly,

9. Mr. P.K. Roy, in his usual forensic ability, tried to contend that the company is not raising the question by way of sword but as a shield. But having regard to the said clear order by consent dated 16th Jan. 1970 the said defence is no longer open to the company as the company, under the Evidence Act, is deemed to have admitted the fixed deposit amount in terms of the said fixed deposit receipt which has matured on the 30th Sept. 1978, There is no question of sword or shield but it is a pure question of admitted facts and evidence which is binding on the company and the company is estopped from raising that question once again by creating confusion and suspicion in the mind of the Court. It is a clear case for which the company is liable and it has got no relevancy in the facts of the other case which stands on a different footing and that cannot throw any light on the present winding up petition in any way whatsoever.

10. After careful consideration of the facts of this case I cannot but hold that the winding up petition is not an abuse of the process of the Court. On the other hand, the company is trying to play fast and loose and blow hot and cold with this Court after committing several contempts of the previous order and being bound by the said order dated 16th Jan. 1970 passed in C. P. No. 258 of 1939 is estopped from raising any question challenging the validity of the said fixed deposit receipt which is the subject matter of the present winding up petition. It must be held that the company is unable to pay its debt and the company has not raised any bona fide defence either in law or in fact and the dispute sought to be raised has no substance or merit whatsoever and the company seems to be highly dishonest and trying to violate the Court''s order flagrantly and trying to raise a question which is not only barred by limitation but also barred by the principle of res judicata and also estoppel and waiver. It is a clear case where the company is unable to pay its debt and is a public danger and should be wound up as early as possible. In that view of the matter, I am making the following order:--

11. The winding up petition is admitted. The same to be advertised once in the Statesman, once in the Basumati and once in the Calcutta Gazette and the matter to appear in the list on 27th April 1981.

Stay asked for is refused.