(1935) 12 CAL CK 0006

In the Calcutta High Court

In re : Pabna Dhonabhandar Co., Ltd.

Date of Decision : 12-12-1935

Acts Referred:

Citation : (1935) 12 CAL CK 0006

Judgement

McNair, J.—This is an application by the Pabna Co-operative Urban Co., Ltd., one of the creditors of the Pabna Dhonabhandar Co., Ltd., in liquidation for an order that the official liquidators of the Company in liquidation be removed and competent persons be appointed in their place to complete the winding up of the Company. An enquiry is also asked into the affairs of the winding-up and for the winding-up proceedings to be transferred from this Court to the District Court of Pabna. The order for the winding-up of the Company now in liquidation was made on the 18th November, 1929. On the 16th December, 1929, the present liquidators Monmatha Nath Banerji and Ganendra Narayan Mazumdar, were appointed official liquidators of the Company.

2. On the 8th April, 1930, the liquidators obtained an order for an increase of staff and for permission to spend Rs. 1,000 a month to meet the costs of management. Further leave was granted to them to raise a loan not exceeding Rs. 5000 to meet the expenses of liquidation and the cost of suits in which the Company was concerned.

3. On the 16th March, 1931, the liquidators obtained a further order entitling them to raise a loan of Rs. 13,000 and sanctioning a loan of Rs. 4596 which they had already incurred.

4. The petition sets out in paragraph 11 the charges on which the petitioning creditor relies for saying that the liquidators should be removed from their office.

5. The first charge is that the liquidators have never opened any account with a bank.

6. The order of the 16th December, 1929, under which the liquidators were appointed expressly ordered that all monies to be received by the said official liquidators be paid by them into the Imperial Bank of India to the credit of the

account of the said official liquidators within seven days after the receipt thereof, and it was further ordered that all the cheques upon the said banking account drawn by the official liquidators should be counter-signed by the Registrar before being passed for payment by the bank.

7. That provision is in conformity with rr. 76 to 91 of the Rules under the Indian Companies Act in Ch. 31 of the Rules and Orders of the Original Side of this Court.

8. The order of the 8th April, 1930, again ordered that the liquidators should keep a banking account and all books of account and records as they are required to do by the Rules of this Court, namely, rr. 76 to 91 of the Rules under the Indian Companies Act.

9. The liquidators admit that they have collected something like Rs. 1,40,000. They do not deny that no banking account has ever been opened. On behalf of the liquidators Mr. Roy has pointed out that the rules which provide for the opening of an account in the Imperial Bank, though in draft, were not operative at the time of the appointment of the liquidators, but he states quite frankly that he is unable to rely on that fact because of the order which was drawn up as though those rules were in operation and which ordered that an account should be kept as directed by the new rules. On behalf of his clients, he says, however that this was not a deliberate breach of duty but that no banking account was opened because the money which was received by the liquidators was immediately paid out in meeting the numerous dues which were payable on behalf of the Company. He also relies on the fact that the accounts have been passed by this Court every six months without any opposition and those accounts, he says, show the absence of any money in the bank. The accounts are more or less in form No. 33 which is provided in the Rules and Orders but the form requires an account to be made in rather more detail than has been done by the liquidators. They have stated that the total payments into the bank including balance at the date of the commencement of the winding-up " as per book " are "nil." What book they are referring to is not apparent. The form requires them to show the total payments into the bank " as per bankbook." Presumably as no payments had ever been made there was no bank book, and it would appear that a mere form of words was used without considering if it made sense. There should be also items showing the total withdrawal from the bank and the balance in the bank. This is a matter which should have been noticed by the Court Officer who checked the accounts and it should have been brought to the notice of the Judge before the accounts were passed. There is no doubt that the keeping of a banking account is an important and essential part of the carrying on of a liquidation.

10. Mr. Palmer in the 14th edition of Company Precedents in page 322 refers to the banking account as follows:--

An important part of the machinery of winding-up under the present system is the Company''s Liquidation Account. Irregularities by the liquidators and trustees in bankruptcy when they occur are generally due to the temptations incident to the uncontrolled possession of large sums of money. To avoid this danger, and also to facilitate administration of the assets, the winding-up Act of 1890 imported into winding-up from bankruptcy, the scheme of the bankruptcy Assets Account under the title of the ''Company''s Liquidation Account.''

11. That is the scheme in England and that is the scheme which it has been sought to follow in this country.

12. The next matter which is relied upon by the Petitioner is the failure on the part of the liquidators to use monies borrowed for the purposes for which the loan was sanctioned.

13. By the order of 16th March, 1931, the liquidators were empowered to borrow up to Rs. 15,000 and sanction was given to a sum of Rs. 5,000 which had already been borrowed by the liquidators. The petition on which that order was made set out the various purposes for which the loan was required. It is contended on behalf of the Petitioners that the main purpose for which that money was required was to institute suits on mortgages. For these suits the estimated costs and court-fees were about Rs. 4,000.

14. The liquidators state that they were unable to borrow the amount and they contend that the purposes for which the loan was required was not merely the institution of suits, but for payment of Government revenue and legal charges and expenses which were set out in detail in a Schedule to the petition, and among them being establishment charges which had already been incurred of Rs. 3500, and legal expenses considerably over Rs. 3,000. Arrears of rent and Government revenue accounted for over Rs. 10,000. Mr. Roy contends that in fact they only borrowed about Rs. 0500 but in their affidavit the liquidators have set out in paragraph 9 an abstract of the accounts which they filed every six months. In sub-paragraph (c) they deal with the accounts from the 1st January, 1931, to the 30th June of that year, the period within which this order entitled them to borrow was passed. They state that the accounts during that period show realisations of about Rs. 25,000 and monies borrowed Rs. 14,000.

15. Reference has been made to the actual account for that period and it is suggested that this abstract is incorrect. The matter is not quite clear but it does appear on those accounts that there were loans of about Rs. 14,000, but Mr. Roy on behalf of the liquidators states that some of those loans were taken at some period anterior to the period of account. This may be so but the liquidators have made a definite statement in their affidavit that the amount that they borrowed " during that period " was Rs. 14,000. As regards the purpose for which that money was borrowed, as I have already pointed out, the institution of the mortgage suits was only a small part of the expenses for which money was required and it may be that the amount which was sanctioned was used for purposes other than the institution of suits. It is note-worthy that in their petition

on which the order of the 16th March, 1931, was passed, the Petitioners asked for liberty to raise a loan of not exceeding Rs. 24,000 but sanction was only given to raise a loan of Rs. 15,000.

16. With regard to the Bhaduri mortgages the liquidators have been charged with dereliction of duty in not filing suits. They state that they have been in communication with the second mortgagee to sell their first mortgage to him. They point out that much of the mortgaged property is scattered and that the properties are patni properties which it is doubtful whether it would be worth while to acquire.

17. With regard to a mortgage suit which the liquidators got leave to institute against Kafrunnessa, their neglect to institute such suit they attribute to the fact that they took legal advice and allowed the property to be sold for default of payment of the superior landlord''s dues and purchased it at a patni sale for a comparatively small amount excepting four notes of which they state the value is negligible.

18. Objection is then taken by the Petitioner to the Suspense Account which has been kept by the liquidators, and it is shown that throughout 1932 up to the present time large sums varying from Rs. 11,000 to Rs. 14,000 have been maintained in this account. The liquidators contend that they are bound to keep large sums in this account pending adjustment and they give various instances where large sums have been claimed and have been partially adjusted by payments which have been entered in the Suspense Account.

19. Objection is also taken to the fact that one of the liquidators has executed a power of attorney in favour of the other liquidator and that he spends the greater part of his time in Calcutta without attending to the affairs of the Company.

20. Monmotho Nath Banerji, the liquidator against whom those charges have been levelled, has sworn an affidavit in which he says that he generally resides in Calcutta and that he has been ill for some considerable time and does not consider it necessary to incur the cost of going to Pabna. He somewhat naively remarks in his final paragraph in his affidavit, " That the affairs of this Company are better managed than the affairs of various other loan Companies which are in liquidation." His appointment was supported by the largest creditor and it is urged that the presence of one liquidator in Calcutta is desirable as much of the litigation is now in this Court.

21. Finally, it is charged that the liquidators have charged travelling allowance and halting charges although such charges have not been sanctioned under any order of this Court. The liquidators rely on a judgment of this Court where travelling expenses, so they say, were allowed in the matter of the Pabna Model Co., Ltd. No copy of that judgment has been produced before me and it is contended by the Petitioner that that order was only made some two years ago, and that it only decided the scale on which such expenses should be charged, and that these liquidators have been charging these expenses from a time

previous to that order.

22. I am informed by the Court''s Officer that these charges are always allowed unless they are called in question, but so far as I am aware they are not justified by any rule and they should not be charged unless sanction has first been obtained.

23. Those are the charges which have been levelled against the liquidators and I have been referred to the case In re Adam Eyton, Ltd.: Ex parte Charlesworth [1887] 36 Ch. D. 299 for the principles by which the Court should be guided in deciding whether or not the liquidators should be removed from their office. Cotton, L. J., in his judgment reported at page 304, sets out the matter thus:--

If the Court is satisfied on the evidence before them that it is against the interest of the liquidation by which I mean all those who are interested in the Company being liquidated, that a particular person should be made liquidator, then the Court has power to remove the present liquidator, and of course then to appoint some other person in his place.

24. Bowen, L. J., [The passage is at p. 306.--Reporter] referring to the language of Sir George Jessel in In re Sir John Moore Gold Mining Co., [1877] 37 L. T. 242 says:--

To my mind the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation, [and to the purpose for which the liquidator is appointed. Of course, fairplay to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation.

25. The words " due cause" to which the learned Lord Justice was referring are the same words which are used in sec. 176 of the Indian Companies Act which provides that any official liquidator may be removed by the Court on due cause shown.

26. In resisting this application Mr. Roy has urged that these liquidators have been in charge of this Company''s affairs for the past six years, they have managed during a very difficult time to get in a large quantity of assets. Almost all the assets are zamindary properties which at the present moment and for some years past have been very difficult of realisation. Intricate questions of title are involved and during this time during which the liquidators have been in charge they must. have acquired a vast experience and knowledge of the Company''s assets of this peculiar nature which it would be difficult for any other liquidator to acquire for some time.

27. Taking all those matters into consideration it seems to me that it is not in the "real, substantial, honest interest of the liquidation " that these persons should be removed from their posts. It is quite clear, however, that they have been negligent in carrying out the specific orders of the Court and the specific rules which have been laid down in the Companies Rules. The present Petitioners were

abundantly right in bringing this application and the various charges which they have established must be put right. There must be a banking account opened immediately with the Imperial Bank of India as ordered by this Court. [His Lordship then proceeded to give certain directions.]

