(2012) 10 DEL CK 0292

In the Delhi High Court

Case No : CO. A. No''s. 616-619 of 2012 in CO. Petition No. 161 of 1997

M/s Rocksmelt Company (India) APPELLANT

Vs

M/s Ganga Automobiles Ltd. RESPONDENT

Date of Decision : 08-10-2012

Acts Referred:

Citation : (2012) 10 DEL CK 0292

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : P.V. Kapur, with Ms. Niti Dixit, Ms. Samiksha Godiyal and Mr. Arjun Narayan, in Co. A. Nos. 616-619/2012 and Mr. Manish Bishnoi, for OL, for the Appellant;

Final Decision : Dismissed

Judgement

P.K. Bhasin, J.—In this winding up petition filed by the petitioner above-named for the winding up of the respondent Company M/s Ganga Automobiles Ltd.(to be referred hereinafter as ''the Company in liquidation'' since it stands already wound up) because of its failure to repay the money due to the petitioner Company this Court was informed at the initial stages of the petition that the Company in liquidation had to pay money not only to the petitioner, M/s Rocksmelt Company(India), but also to many more persons and its liability was running into crores of rupees and those other persons had also filed winding up petitions. However, before any formal order for the appointment of provisional liquidator of this Company could be passed one of its directors Mr. Mukhinder Singh(who died during the pendency of these proceedings and the four applications which are being disposed of by this common order had been moved his legal heirs) and Mr. G. Sagar Suri, of its sister concern M/s Delhi Automobiles Limited came forward to settle the claims of the creditors who had approached this Court in a phased manner and their proposal(which now appears, was never intended to be honoured by them) was recorded in the court proceedings of 2nd February, 1998 which are re-produced below:

... It is submitted by the learned counsel for the respondent that M/s Delhi Automobiles Limited have immovable property, namely, 1, Sikandara Road, New Delhi. According to the learned counsel for the respondent the property is extremely valuable. He further states that efforts are being made to sell the property and in case the property is sold, the money will first be utilized for meeting the amount due to the creditors who have filed petitions in this Court. He further states that the Chairman of M/s Delhi Automobiles Limited and Mr. Mukhinder Singh, the Director of M/s Ganga Automobiles Limited are present in Court and their statements may be recorded. Let their statements be recorded.

Sd/-

Judge

February 2, 1998.

The statement of Mr. G.Sagar Suri, Chairman, M/s Delhi Automobiles Limited, and Mr. Mukhinder Singh, Director of M/s Ganga Automobiles Limited, have been recorded. The undertakings given by them are accepted. In case the property No. 1, Sikandara Road, New Delhi is not sold within a period of three-and-half months and the amounts which are due to the creditors who are before this Court are not paid off or any other favourable arrangement securing the monies of the creditors is not reached within the above said period from today, the property No. 1, Sikandara Road, New Delhi will be deemed to have been attached and will be sold under the supervision of the Court....

Then on 20th February, 1998 the following order was passed:

Learned counsel for the respondent states that he is conscious of the fact that the respondent had given an undertaking in certain cases to make the payment to the petitioners within a particular period of time and the same could not be carried into effect because of financial difficulties which are being faced by the respondent. He further states that he is also conscious of the fact that the chairman of M/s. Delhi automobiles on 2nd February, 1998 had made a statement in this Court that he had authority to state on behalf of M/s. Delhi automobiles Limited that efforts were being made to sell the property of M/s. Delhi Automobiles located at 1, Sikandara Road, New Delhi so that the liability of M/s. Ganga Automobiles Limited towards its creditors could be liquidated but on 3rd February, 1998 the Chairman of M/s. Delhi Automobiles Limited had stated that he did not have the authority of the Board to make any statement with regard to 1, Sikandara Road, New Delhi. Learned counsel further states that despite the circumstances which are against the respondent, he would pray that the respondent be given an opportunity till 21st of May, 1998 to make the payment to all the creditors who are before this Court and in the event of the payments not being made by the said date, the company be deemed to have been wound-up and the Official Liquidator attached to this Court be deemed to have been appointed as the Liquidator of the Company. Learned counsel for the petitioners have no objection to the passing of the order of deemed winding-up in the light of the submission of leaned counsel for the respondent.

Having regard to the statement of learned counsel for the respondent and learned counsel for the petitioners, I am of the view that the submission of Mr. Sethi, learned counsel for the respondent, with regard to the deemed winding-up of the company should be accepted. Accordingly, it is directed that in case the admitted liability of the creditors who have filed petitions in this Court is not discharged by the respondent before 21st May, 1998, the Company will be deemed to have been wound-up and the Official Liquidator attached to this Court will act as the Liquidator of the Company....

2. On 22nd May, 1998 when the matter was taken up again the following proceedings were recorded:

Mr. Kapil Sibal, learned senior counsel appearing for the respondent, states that at this stage without insisting for the variation of the order dated February 20, 1998, his client will deposit a sum of Rs. 610 lakhs for being disbursed to the petitioners in the following manner...

Mr. Sibal also states that in case of default in the payment of any of the above instalments, it will be open to the court to appoint the Official Liquidator as the Provisional Liquidator of the company.

Besides the above statement, learned counsel for the respondent submits that the dispute between M/s. Gujarat Lease Financing Ltd. and the respondent company with regard to the question of liability could be resolved by appointing a Chartered Accountant to go into the question as to whether liability of the respondent towards the petitioner is Rs. 4.60 crores or is Rs. 17 lakhs. He further submits that the dispute between M/s Goyal MG Gases Limited and the respondent stands referred to an arbitrator. Learned counsel also submits that the dispute between M/s. Poysha Oxygen Pvt. Ltd. and the respondent has also been referred for arbitration. Learned counsel for the respondent says that the liability of the respondent towards M/s. Rajeev Goel Architects Pvt. Ltd. will be notified to the petitioner. He states that the respondent will calculate the interest payable to each of the petitioners on the admitted rate of interest and will file a schedule of payment. Learned counsel for the respondent submits that Mr. Mukhinder Singh, a director of the respondent company, will give a statement that he will abide by the statements and undertakings given on behalf of the respondent, and in the event of the breach of the payment schedule he will be personally liable for the consequences arising from such a breach.

Mr. Sibal states that Mr. Mukhinder Singh is present and is willing to make a statement to the above effect. Let the statement of Mr. Mukhinder Singh be recorded.

Statement of Mr. Mukhinder Singh has been recorded...Mr. Sibal, learned counsel for the respondent states that Mr. Mukhinder Singh owns twenty seven acres of land at Dabla Kalan, Fazilka, District Ferozpur. He submits that Mr. Mukhinder

Singh is a non-functional Director and his personal properties cannot be a subject matter of a restraint order in these proceedings...However, till the next date Mr. Mukhinder Singh is restrained from selling the above said property.

4. However, the creditors were not paid off their money as had been assured to the Court on behalf of the Company in liquidation and so the following order was passed by this Court on 18th August, 1998:

The petitioners are the creditors. The respondent company failed to pay its debt to the petitioners, in spite of the statutory notice having been served on it, therefore, petitioners approached this Court for winding up of the respondent company. After receipt of notice the respondent company was represented by a counsel, on 2nd February, 1998 counsel for the respondent made a statement that M/s. Delhi Automobiles Limited has immovable property, namely, 1, Sikandara Road, New Delhi. According to him this property was extremely valuable. He further stated that efforts were being made to sell this property and in case the property was sold, the money would first be utilized for meeting the amounts due to the creditors who filed petitions in this Court. Accordingly this Court recorded the statement of Mr. G. Sagar Suri, Chairman of M/s. Delhi Automobiles Limited and of Mr. Mukhinder Singh, Director of M/s. Ganga Automobiles Limited. It was ordered by this Court that in case the property bearing No. 1, Sikandara Road, New Delhi was not sold within a period of three-and-half months and the amounts due to the creditors (before this Court) were not paid or any other favourable arrangement securing the monies of the creditors not reached within the above said period, the property No. 1 Sikandara Road, New Delhi would be deemed to have been attached and would be sold under the supervision of this Court. The Directors of the respondent company gave personal guarantees in the loan transactions. They were directed to disclose their personal properties, movable as well as immovable. Subsequent thereto on behalf of Mr. G. Sagar Suri, application for review was filed. It was taken up on 3rd February, 1998 and thereafter the case was adjourned to 20th February, 1998.

The proceeding of 20th February, 1998 show that the counsel, appearing for the respondent company, Mr. Ravinder Sethi, Senior Advocate made a statement that despite the circumstances against the respondent company an opportunity till 21st May, 1998 for making the payment of all the creditors (who are before this Court) be given and in the event of the payment not being made by the said date, the company be deemed to have been wound up and the Official Liquidator attached to this Court be deemed to have been appointed as the Liquidator of the Company. To this statement of counsel for the respondent, petitioners expressed no objection for passing of the order of deemed winding up. Accordingly, having regard to the statement of counsel for the respondent company and of the petitioners, this Court passed the order that if the liability or the debts of the creditors who filed petition before this Court was not discharged by the respondent company before 21st May, 1998, the company would be deemed to have been wound up and the Official Liquidator attached to this Court would act as the Liquidator of the company. It was in this background that the order of attachment and sale of the property bearing No. 1, Sikandara Road, New Delhi was kept in abeyance till 21st May, 1998. Mr. Kapil Sibal, Senior Advocate appearing for the respondent company without insisting on the variation of the order dated 20th February, 1998 made a statement that his client would deposit a sum of Rs. 610/- lakhs for being disbursed to the petitioners. The respondent company was to pay Rs. 40 lakhs on or before 15th July, 1998 and another sum of Rs. 40 lakhs on or before 14th August, 1998 and another sum of Rs. 40 lakhs on or before 30th September, 1998. Thereafter the respondent company was to pay Rs. 100 lakhs on or before 31st October, 1998 and Rs. 140 lakhs on or before 30th November, 1998 and finally the respondent company was to pay Rs. 250 lakhs on or before 31st December, 1998. Mr. Kapil Sibal, Senior Advocate also stated that in case of default in the payment of any of the above instalments, it would be open to this Court to appoint the Official Liquidator as the Provisional Liquidator of the company. He also made a statement that the respondent would calculate the interest payable to each of the petitioner on the admitted rate of interest and would file a schedule of payment. Mr. Mukhinder Singh, Director of the respondent company also gave undertaking/statement that he would abide by the statement of the counsel and further undertook on behalf of the respondent company, that in the event of the breach of the payment schedule, he would also be personally liable for the consequences arising from such a breach......

The respondent company failed to adhere to the schedule of payment given to this Court on 22nd May, 1998. Thus the breach has been committed by the respondent was well as by its Director in adhering to the schedule of payment....... Thus as against two instalments which have become due amounting to Rupees eighty lakhs, the respondent company has been able to pay only twenty lakhs. There is thus a breach in the undertaking given by the respondent company through its counsel as well as of its Director, Mr. Mukhinder Singh. This Court vide order dated 22nd May, 1998 made it absolutely clear that in case there would be a breach of the payment schedule the deemed winding up order would come into operation and the Official Liquidator appointed as Liquidator of the company would take over the assets of the company as well as of the Director, Mr. Mukhinder Singh who had by his undertaking made himself personally liable for the consequence arising from such a breach.

...Thereafter, in these circumstances there is no alternative but to hold that respondent company stood would up and the Official Liquidator attached to this court who was appointed as Liquidator of the company to take into custody and possession the assets, effects and records of the respondent company as well as the assets movable and immovable of Mr. Mukhinder Singh, Director of the respondent company, who made himself personally liable for the consequences arising from such a breach.........

xxx xxx xxx

Notice of contempt may also be issued to Mr. Mukhinder Singh, Ex-Director of the respondent company, returnable on 10th September, 1998.

xxx xxx xxx

5. Against the direction given by this Court to the official liquidator vide order dated 18th August, 1998 to take the custody of the property of Mr. Mukhinder Singh also because of his having made himself personally also liable for the consequences of non-payment of the debts of the Company in liquidation late Mr. Mukhinder Singh filed an appeal on 25th August, 1998 before a Division Bench of this Court(being Co. A. No. 18/1998) in which he had claimed that his personal properties could not be attached and sold for clearing the debts of the Company in liquidation.

6. However, after filing the appeal late Mr. Mukhinder Singh instead of pursuing the same before the Division Bench filed a review application also(being C.A. No. 1372/1998) on 27th August, 1998 in C.P. No. 161/1997 seeking a review of the order dated 18th August, 1998 almost on the same grounds on which it had already been challenged in his appeal against that order.

7. After filing the review application late Mr. Mukhinder Singh had been getting his appeal adjourned from time and on the ground of pendency of his review application no. 1372/1998 and finally the Division Bench adjourned that appeal sine die on 6th November, 2000 with liberty to the review petitioner to have the same revived after the disposal of the review application. In the meanwhile late Mr. Mukhinder Singh, had also moved an application(C.A. No. 1520/1998) on 9th September, 1998 in the main winding up petition itself for stay of the operation of the order dated 18th August, 1998 till the disposal of his review application. However, thereafter Mr. Mukhinder Singh had stopped following up his review application as also the said stay application and that is evident from the fact whenever the same were listed no prayer was made on his behalf for the same being heard and disposed of. In fact, none had even been appearing in the matter on his behalf. Last time C.A. No. 1372 and 1520 were listed together on 25.01.2002. Thereafter, it appears that the Registry stopped listing these two applications of late Mr. Mukhinder Singh and none made any request also on his behalf for listing the same even though his counsel, who has been representing the Company in liquidation also throughout in these proceedings, had been appearing for the Company. However, C.A. 1520/1998 came to be listed before the Court on 13.08.2009 and on that day it was dismissed for non prosecution.

8. It appears that in the meanwhile on 16th April, 2009 the Registry listed the appeal of late Mr. Mukhinder Singh before the Division Bench with a note that his Review Application had been disposed of on 18.10.2001. The Division Bench ordered issuance of notice to the counsel for the parties for 11th May, 2009. On that date none appeared on behalf of late Mr. Mukhinder Singh despite service of notice upon his counsel. However, counsel for the official liquidator appeared and

informed the Court that the appellant Mr. Mukhinder Singh had died long time back(he died in April, 2004). Accepting that statement of the counsel for the official liquidator the Division Bench disposed of the appeal as having abated.

9. Then the Official Liquidator moved an application (being CA No. 311/2012) on 14.02.2012 seeking a direction to the legal heirs of late Shri Mukhinder Singh, who had meanwhile expired in the year 2004, for handing over the possession of his land which he had placed at the disposal of this Court on 22nd February, 1998 and which land this Court vide order dated 18th August, 1998 had ordered to be taken over by the official liquidator. Notice of that application was ordered to be issued to three legal heirs impleaded in that application. Out of those three legal heirs respondent no. 1, who was the son of late Shri Mukhinder Singh, was being represented in Court and he accepted notice of that application on 27th February, 2012. Subsequently, a joint reply to that application was filed on behalf of all the three legal heirs of the late Shri Mukhinder Singh. On 27th February, 2012 this Court had also directed the official liquidator to take over the possession of the land of late Shri Mukhinder Singh which he had placed at the disposal of this Court.

10. It appears that on receipt of the notice of CA No. 311/2012 the legal heirs of late Shri Mukhinder Singh became active and first they approached the Division Bench for revival of the appeal which late Shri Mukhinder Singh had filed (being Co. Appl. 18/1998) by making an application for setting aside of the abatement of that appeal on the ground that they had come to know about the present proceedings only on receipt of notice of CA No. 311/2012. However, after filing applications for setting aside of the abatement of that appeal which stood disposed of as abated vide order dated 11th May, 2009 of the Division Bench, the legal heirs of late Shri Mukhinder Singh did not press their prayer before the Division Bench for the setting aside of abatement of the appeal and disposal on merits. Accordingly the Division Bench vide order dated 20th March, 2012 dismissed the applications filed by the legal heirs of late Shri Mukhinder Singh after recording the statement made on their behalf by their senior counsel that the legal heirs were in the process of filing appropriate applications for setting aside of the abatement of CA No. 1372/1998 which late Shri Mukhinder Singh had filed seeking review of the order dated 18th August, 1998, which was under challenge in that appeal also.

11. Thereafter on 29th March, 2012 CA Nos. 616-619/2012, which are being disposed of by this common order were filed by the legal heirs of late Shri Mukhinder Singh for setting aside of the abatement of the review application no. 1372/1998 after condoning the delay in filing of the said application and for substituting them in place of the deceased Shri Mukhinder Singh and hearing and disposal of the review application on merits.

12. Shri P.V. Kapur, learned senior counsel for the legal heirs of the deceased Shri Mukhinder Singh submitted that since review application had not been disposed of during the lifetime of deceased-review petitioner the same needs to be taken

up for hearing and disposal on merits but before that is done the legal heirs of the deceased-review petitioner need to be substituted in his place after setting aside the abatement of the review petition. It was also contended that the applicants were not at all aware of the present proceedings during the lifetime of late Shri Mukhinder Singh and even thereafter also they had come to know about these proceedings only after they were served with a notice of CA No. 311/2012 filed by the Official Liquidator for permitting it to take over the possession of the land in question. Therefore, learned senior counsel submitted, there were good reasons for condonation of the delay in moving the application for setting aside of the abatement and for bringing on record the legal heirs of the deceased Shri Mukhinder Singh for the prosecution of CA No. 1372/1998.

13. However, after giving my anxious consideration to the entire matter I find no reason whatsoever to revive the review application no. 1372/1998 as the review petitioner himself during his lifetime had never pursued that application and the reason for that appears to be that he had also filed an appeal before the filing of the review application to challenge the correctness of the order dated 18th August, 1998 whereby the Official Liquidator had been directed to take the custody of the land in question belonging to him. There is another reason also for not entertaining the present four applications for setting aside the abatement of the review application. As noticed already, before filing the review application late Shri Mukhinder Singh had filed an appeal against the order dated 18th August, 1998, of which review was also being sought, on the ground that his personal properties could not be attached and sold to pay off the debts of the Company in liquidation since he was a non-functional Director. That appeal was disposed of as having abated and when the legal heirs of late Shri Mukhinder Singh moved similar applications before the Division Bench for setting aside of the abatement of the appeal the same were not pressed and the Division Bench had accordingly dismissed the same. With the dismissal of the applications moved by the present applicants for setting aside of the abatement of the appeal the order dated 18th August, 1998, of which review was being sought by late Shri Mukhinder Singh, attained finality and so there is now no justification for entertaining the present applications for setting aside of the abatement of review application and its being taken up for hearing on merits.

14. From the afore-said narration of the background of this case it also appears that late Shri Mukhinder Singh''s attempt was only to wriggle out of his undertaking which he had given to this Court that he shall be personally liable to clear the dues of the Company in liquidation in case the Company itself failed to do that and now after his death his legal heirs also want that somehow or the other this Court does not proceed further to have his undertaking and assurance given to this Court enforced by selling the land which he had placed at the disposal of the Court. For the afore-said reasons, all the four applications filed by the legal heirs of late Shri Mukhinder Singh are dismissed.

