(2010) 02 CAL CK 0082

In the Calcutta High Court

Case No : A.C.O. No''s. 4, 16 and 17 of 2010 and A.P.O. No. 11 of 2010, arising out of C.A. No''s. 651 and 699 of 2009, connected with C.P. No. 128 of 2007

Pradip Bandyopadhyay APPELLANT

Vs

Official Liquidator RESPONDENT

Date of Decision : 16-02-2010

Acts Referred:
Companies Act, 1956 — Section 433, 434, 439, 457, 466

Citation : (2010) 154 CompCas 219

Hon'ble Judges : Prasenjit Mandal, J;Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Hirak Mitra, Amitesh Banerjee, Tilak Kumar Bose, D. Basak and Manju Bhuteria, Satyabrata Mukherjee, Bimal Chatterjee, Somen Sen, Sakya Sen and M.K. Seal, for the Appellant; A. Sarkar and Rutna Sikdar, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of one of the two unsuccessful applicants for stay of winding up of a company in liquidation and is directed against the order dated January 8, 2010, by which the learned company court has dismissed two applications, one u/s 466 and the other u/s 457 of the Companies Act, 1956.

2. Being dissatisfied, one of the original applicants has come up with the present appeal.

3. The facts giving rise to filing of this appeal may be summed up thus:

(a) One SST Media P. Ltd., running a news channel by the name of Kolkata TV, was directed to be wound up by the learned company court on May 21, 2009, in C. P. No. 39 of 2009 at the instance of one of the creditors thereof. Several other winding up petitions filed by the creditors were pending and the liability of the company, as it appears from the break-up given in the application, was in the region of Rs. 74 crores.

(b) The official liquidator, consequent to the order of winding up, when went to take the possession, was prevented from taking possession of the assets of the company in liquidation and thereafter, one Shri Dayal Saha and another Shri Pradip Bandyopadhyay (appellant before us), claiming to have been authorised by the employees of the company in liquidation moved C.A. No. 651 of 2009 u/s 466 of the Companies Act, 1956, thereby praying for the following relief:

(i) All the orders of winding up passed by this hon''ble court in connection with SST Media P. Ltd., from time to time be stayed until further order of this hon''ble court;

(ii) R. P. Techvision (India) P. Ltd., of 12, Govt. Place (East), 4th Floor, Kolkata-700 069 be given liberty to file scheme of arrangement preferably through Price Waterhouse within such time as this hon''ble court may deem fit and proper;

(iii) Till such scheme is filed and/or till order is passed thereon the applicants be given liberty to have the company, i.e., SST Media P. Ltd., be run under the management/guidance of R. P. Techvision (India) P. Ltd., with necessary leave to make the payment in the name of the said company SST Media P. Ltd., and to have necessary receipt in the name of the said company itself.

(iv) All winding up petitions and/or claims as against the company be stayed for the time being till further order of the court;

(v) All parties concerned be directed to co-operate with the said R. P. Techvision (India) P. Ltd., in running the said SST Media P. Ltd., with specific goal of reviving the said company;

(vi) The official liquidator be directed not to take any further step in terms of the orders of winding up;

(vii) R. P. Techvision (India) P. Ltd., be given liberty to maintain a separate account as regards the expenses being incurred.

(c) In the said application, the applicants sought to give explanation for the resistance offered to the official liquidator in taking possession by contending that they had been sitting on "dharna" and in order to protect themselves, the employees did not allow the official liquidator to take possession of the assets of the company in liquidation. It was further contended that if the company went into liquidation and its assets were sold, no purpose would be served other than that of the burial of a dead person whereas if the employees were allowed to run the company under the supervision, guidance and management of one R. P. Techvision (India) P. Ltd., the company might continue as a going concern and the creditors might be paid off by way of a scheme and nobody would suffer any loss and prejudice.

(d) The said application was taken up for hearing on September 1, 2009, after the official liquidator had been allowed access, when the learned advocate appearing on behalf the company in liquidation submitted that his clients were willing to sit with all the creditors for the purpose of formulating a scheme under which their dues could be cleared, and thereafter, he would submit a proper scheme for the revival of the company.

(e) On the basis of the aforesaid submission, a learned single judge of this Court passed an order staying all further proceedings of the winding up of the company and appointing two learned advocates of this Court for the purpose of presiding over a meeting between the promoters/financiers on the one hand and the creditors on the other. The company was allowed to continue its business and a separate account as regards income and expenditure was directed to be maintained. The matter was made returnable on September 21, 2009. However, it appears that the said meeting could not give any fruitful result and there was none in the said meeting prepared to make any commitment to make any investment for revival or for payment of the dues of the creditors as would appear from the order dated September 22, 2009. The stay already granted was, however, directed to continue on condition that a sum of Rs. 2 crores should be deposited with the official liquidator by October 21, 2009, at the instance of the R.P. Techvision (India) P. Ltd.

(f) On October 26, 2009, an affidavit was affirmed by one Shri Rana Bandyopadhyay as principal officer of R. P. Techvision (India) P. Ltd., stating that it had deposited a sum of Rs. 2 crores with the official liquidator on October 20, 2009 and further stated that the registration of the company in liquidation with the Directorate of Advertising and Visual Publicity, a Government Body authorised in that behalf, would expire on October 31, 2009. The said R. P. Techvision (India) P. Ltd., prayed for leave as also a direction upon the authority to have the name of the said R. P. Techvision (India) P. Ltd., registered instead and place of the company in liquidation in order to keep the channel "Kolkata TV" active till October 31, 2009. It was also stated in the affidavit that the said R. P. Techvision (India) P. Ltd., had been advised that the registration in the name of the company in liquidation would not be granted in spite of the fact that the winding up proceedings had been stayed.

(g) On October 28, 2009, the official liquidator was directed by the learned single judge to apply for renewal of the registration on behalf of the company in liquidation and pay the requisite fees from the funds available with him to be reimbursed by the said R. P. Techvision (India) P. Ltd., and the employees of the company at whose instance all further proceeding in connection with the winding up application had been stayed.

(h) The interim order staying further proceedings in winding up, as mentioned above, was extended from time to time and ultimately, on October 26, 2009, another application was filed by one of the two original applicants (the appellant before us) which was registered as C. A. No. 699 of 2009 u/s 457 read with Sections 433, 434, 439 and 466 of the Companies Act thereby praying for the following relief as quoted below:

(i) Sale of the equipments and machinery held by the company under hire purchase agreements or lease agreements with different financiers/owners upon payment of the balance price and transfer/sale of such goods free from all encumbrances to the purchasers of the assets of the company as prayed for herein;

(ii) Sale of all assets including goodwill, free from all encumbrances, to the purchasers;

(iii) Sale of the above assets and all saleable assets of the company (in liquidation) free from all encumbrances as a going concern subject to payment of all dues of the employees up to the date of winding up and also post liquidation dues including current dues to the employees and re-employment of such employees not exceeding 150 of ex-employees as may be necessary;

(iv) Charges, if any, of the secured creditors be shifted upon the sale of the assets as above to sale proceeds of the assets but the transfer to the purchaser will be free from all encumbrances;

(v) Until valuation of assets, advertisements and actual sale of the assets by the official liquidator the company be run as at present on the conditions imposed by court, i.e., payment of hire purchase, instalments, rent/occupation charges, license fees, auditors fees, salaries and wages and all outgoing as at present;

(vi) Stay of the winding up order and/or all proceedings in winding up till the disposal of this application or such time as this hon''ble court may deem fit and proper;

(vii) In the event of the sale of the assets as mentioned above being held in favour of the present financiers, viz., R. P. Techvision (India) P. Ltd., or their nominee, credit be given to them for all payments made and/or funds provided for payment of salaries, license fees, rents/occupation charges, deposit, audit fees, etc., by them as costs charges and expenses of liquidation towards the sale proceeds or repayment out of the sale proceeds to them on a preferential basis;

(viii) The sale of the assets of the company held by private treaty to the aforesaid financiers, viz., R. P. Techvision (India) P. Ltd., or their nominee at a price not less than the price fixed on valuation caused to be made by the official liquidator or at such price as this hon''ble court may fix.

(i) The aforesaid application was heard from time to time and the interim order already passed was directed to continue.

(j) Ultimately the learned single judge by the order impugned in this appeal has dismissed both the aforesaid applications on the ground that the nexus between R. P. Techvision (India) P. Ltd., TV 9 and promoters of the company in liquidation remained a matter of mystery requiring thorough investigation, It was further held that the question whether consequential order is required to be passed particularly with regard to the question as to whether the amount of Rs. 2 crores deposited with the official liquidator pursuant to the order of the court should be refunded or not, should be decided after the official liquidator made enquiry into the dealings and transactions subsequent to and pursuant to the order dated September 1, 2009. According to the learned single judge, the question of refund of the said amount would arise only after the court was fully satisfied that the company in liquidation, when the official liquidator resumed possession, was not poorer than what it was on the date of the order of winding up had been passed.

4. Being dissatisfied, the applicant of the second application mentioned above and one of the two applicants of the former one has come up with the present appeal.

5. Before us, two separate applications being A. C. O. No. 16 of 2010 and A. C. O. No. 17 of 2010 were moved by third parties thereby praying for intervention and being made parties to this appeal. We, however, after hearing learned Counsel for those parties and after going through the averments made therein, find no reason to add them as parties to this appeal as for the effective disposal of the appeal before us filed by the appellant against the order of the learned single judge while disposing of the two applications mentioned above, those applicants are neither necessary nor proper parties. Within the narrow scope of this appeal, for the purpose of deciding whether the learned single judge was justified in disposing of the two applications filed before the company court in the way mentioned in the order impugned, there is no justification of entering into the allegations made by those persons and as such, we dismiss the two applications of interventions as those are beyond the scope of this appeal.

6. Therefore, the only question that arises for determination in this appeal is whether the learned single judge was justified in passing the order impugned by refusing the prayer of the applicants.

7. So far as the first application u/s 466 of the Act is concerned, we find that the learned single judge has rightly followed the principles which are required to be followed in deciding the question of revival and no fruitful suggestion for revival of the company in liquidation had been placed before the company court. It appears that the appellant himself came with a second application in which he prayed for sale of the assets of the company in liquidation as a going concern with further prayer that the property should be sold to the present financiers, viz., R. P. Techvision (India) P. Ltd., or their nominee, after credit being given to them for all payments made and/or funds provided for payment of salaries, licence fees, rents/occupation charges, deposit, audit fees, etc., by them as costs, charges and expenses of liquidation towards the sale proceeds or repayment out of the sale proceeds to them on a preferential basis.

8. From the conduct of the appellant it was apparent that the object of the second application was to confer on the present financier a preferential right over others knowing well that it was not possible to revive the company in liquidation by any fresh scheme.

9. Therefore, we are of the opinion that the learned trial judge rightly dismissed the application being C. A. No. 651 of 2009 u/s 466 of the Companies Act in the absence of any constructive scheme offered.

10. As regards the other application being C. A. No. 699 of 2009 is concerned, we are of the opinion that the prayer for framing the scheme of revival having failed and having regard to the dues of the company in liquidation and the interest of the creditors including its employees, the assets of the company in liquidation should be sold in public auction as a going concern. The official liquidator should take immediate steps for continuing and/or reviving the required licences for running of the TV channel in its name so that in the public sale as a going concern, the maximum amount is fetched. It is needless to mention that R. P. Techvision (India) P. Ltd., will be entitled to participate in the process of auction after complying with all the formalities which will be fixed for participation in the process of auction.

11. Mr. Mukherjee, learned senior counsel appearing on behalf of the appellant, in this connection, placed strong reliance upon the decision of a learned single judge of this Court in the case of Elvoc P. Ltd., In re [1982] 52 Comp Cas 308, where the learned single judge passed an order of private sale instead of public auction in the following peculiar facts of the said case:

An application of sale by private treaty of the assets of a company in liquidation was filed by the employees to a registered co-operative society formed by the employees of the company who within a short period of the grant of licence by the court to run the company had revived the sick company with the resources of finance and expertise from the Government, financial institution, banks and also Government concerns and multinational concerns and in such a case, all the objectors were interested parties. The only question that had fallen for determination in that case was whether the discretion should be exercised in favour of the applicants having regard to the special facts of the said case indicating the efforts put by them in revival of the company. The court after a careful consideration of the pleadings, annexures, supplementary affidavits and counter-affidavits was satisfied that there was paramount public interest including the prospect of employment and increase in production of various types of electrical equipments and products which the company was producing and which appeared to have immense prospect and profitability and taking into consideration the industry, commerce and commercial morality and also the fact that the ex-management with a view to frustrate the achievement of the applicant society was opposing the application and that the objection was not bona fide and purely motivated to get back the assets of the company and frustrate the achievement of the applicant, granted the application in a modified form to sell the assets of the company in liquidation to the applicant society by private treaty at the best reasonable price as the court thought fit. While making such order, the learned judge hastened to add that the said order was made in the peculiar facts of the said case and should not be taken to be a precedent.

12. We are, therefore, unable to accept the said decision as a precedent and moreover, no such special case on equity in favour of the R. P. Techvision (India) P. Ltd., has been made out to deviate from the well-settled practice of a sale by public auction and at the same time, R. P. Techvision (India) P. Ltd., has not even preferred any appeal against the order of the learned single judge regarding return of amount of Rs. 2 crores paid by them.

13. We, accordingly, vacate the interim order passed by the appellate court earlier permitting the running of the business under the order of the court passed earlier by the trial court and continued by virtue of the order of the appellate court and the business of the company should be immediately stopped. The official liquidator should, however, pay the dues of the landlord towards occupational charges from September 1, 2009, till date at the rate fixed by the single judge of this Court in the pending proceedings, i.e., Rs. 6,14,000 a month from the money lying in his hand and no further amount should be paid except in accordance with the law on usual investigations. We pass this order in favour of the landlord only because after the order of winding up when the company was permitted to run by virtue of the interim order, there is no just reason why the dues of the landlord for using his property for the sake of business for the period in question even after the order of winding up should be withheld.

14. We do not interfere with the order of the learned single judge directing the official liquidator to take immediate possession and make necessary investigations pursuant to the order of winding up. The order awarding costs is, however, set aside in the facts and circumstances of this case and the parties are directed to bear their own costs.

Prasenjit Mandal, J.

15. I agree.

