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(2007) 06 BOM CK 0102

In the Bombay High Court

Case No : Company Petition No. 599 of 1990

Rajendra R. Chhapwale — APPELLANT

Vs

Akshaya Hospital and Research Centre (P.) Ltd. — RESPONDENT

Date of Decision : 21-06-2007

Acts Referred:
Companies Act, 1956 — Section 397, 398, 402, 439(1)

Citation : (2007) 79 SCL 419

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Vishal Kanade and N.N. Tated, for the Appellant; Manoj Mhambray, for the Respondent

Judgement

D.Y. Chandrachud, J.—The Company Petition was originally instituted for reliefs under Sections 397 and 398 of the Companies Act, 1956. In pursuance of an amendment that was allowed during the pendency of the Petition the Petition has been amended to seek an order of winding up on the ground that (i) the company is unable to pay its debts and (ii) that it is just and equitable that the company be wound up.

2. The first respondent was incorporated on 14-4-1988 with an authorized capital of Rs. 20 lakhs. The second and third respondents were the first directors of the Company. On 29-6-1988 the first, second, third and fourth petitioners were appointed as additional directors. The first respondent purchased a Lithotripter Machine in March 1989 which was acquired overseas. The Bank of India which is the fifth respondent sanctioned a loan of Rs. 1.84 crores to the Company on 7-4-1989 as a demand bridge loan. An additional working capital facility in the amount of Rs. 20 lakhs and an import L/C facility in the amount of Rs. 1.70 crores were also extended inter alia, in order to acquire the machine. Petitioners 1 to 4 furnished guarantees to the first respondent for the repayment of the loan.

3. The case of the petitioners is that since August 1989 irregularities were committed by the second and third respondents in carrying on the day-today

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business of the company including misappropriation of funds. Petitioners 1 to 4 who represent the interest of all the petitioners alleged that they were excluded from the management of the company. The poor financial status of the Company according to the petitioners was revealed to them for the first time in a meeting held on 28-12-1989. On 17-5-1990 the petitioners were informed that they ceased to be the additional directors of the Company. The Company Petition was instituted before this Court on 28-9-1990 initially under the provisions of Sections 397, 398 and 402 of the Companies Act, 1956 for relief against oppression and mismanagement. In a Company Application (CA 332 of 1990) taken out by the petitioners for interim reliefs an interim order was passed by a Learned Single Judge of this Court on 6-10-1990 restraining the company and its directors from creating third party rights in respect of the assets and properties of the Company including in respect of certain flats. The order of the Court contained a direction that the dues of the Bank of India shall be repaid at least in a sum of Rs. 50,000 each month. The Company Petition was admitted on 6-10-1990. Some time in March 1992 the Petition was amended so as to seek reliefs of winding up. The application for amendment was allowed on 27-10-1993. On 10-7-1995 the Official Liquidator came to be appointed as Provisional Liquidator. The order dated 10-7-1995 was carried in appeal. The appeal was dismissed in default on 18-7-2005 and the Petition was thereafter advertised.

4. At this stage, it would be necessary to advert to certain grants which have taken place in a suit instituted by the Bank of India, inasmuch as they are germane to the present proceedings. The Bank instituted a suit before this Court on 15-1-1992 against the Company, the second and third respondents and petitioners 1 to 4 for the recovery of its dues. On 24-1-1992 an ad interim order was passed by which the Court Receiver was appointed as Receiver in respect of the residential flats and all the movable plant and machinery of the first respondent excluding the Lithotripter Machine in respect of which certain directions were given. On 14-11-1994 this Court inter alia directed the Court Receiver to take forcible possession of the flats and directed that the machine be sold within a period of three months. The proceedings in the suit were transferred to the Debts Recovery Tribunal on 23-1-2002. On 15-6-2005 the Debts Recovery Tribunal allowed the application filed by the fifth respondent and decreed the claim in the amount of Rs. 2,67,04,206 with interest at the rate of 16 per cent per annum. Accordingly a recovery certificate was issued on 14-7-2005. The Bank has instituted recovery proceedings against respondents 1 to 3 and petitioners 1 to 4. Petitioners 1 to 4 who are guarantors filed an appeal against the order before the D.R.A.T. and on 8-6-2006 the Appellate Tribunal called upon them to deposit an amount of Rs. 15 lakhs within eight weeks to establish their bona fides. Petitioners 1 to 4 are stated to have deposited the amount on 4-8-2006. The order of the Tribunal has not been challenged by respondents 1 to 3 until date.

5. The winding up of the first respondent has been sought in these proceedings

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both on the ground that the first respondent is unable to pay its debts and on the ground that the Company has lost its substratum. The facts before the Court reveal an undisputed position that the second and third respondents are holders of 56 per cent of the total issued and paid-up share capital and have been responsible for the management of the Company. The petitioners who hold 43 per cent of the equity capital have instituted the Petition in their capacity as contributories u/s 439(1)(c) of the Companies Act, 1956. Though appointed as additional directors in June 1988 petitioners 1 to 4 are stated to have been ousted from the management since 1990. Now insofar as the financial position of the Company is concerned, it is undisputed that the Bank which had sanctioned a loan of Rs. 1.84 crores as a demand bridge loan together with a working capital limit of Rs. 20 lakhs and L/C facility of Rs. 1.70 crores instituted proceedings for the recovery of its dues. In the Company Application filed by the petitioners in these proceedings respondents 1 to 3 were injuncted from alienating the assets and were in the meantime directed to deposit an amount of Rs. 50,000 per month at the least towards dues of the Bank. After compliance for a period of approximately four months, there was a default on the part of the Company in complying with the order. Admittedly, the Company was unable to pay its dues to the Bank. The Application by the Bank has been allowed by the Debts Recovery Tribunal and there is a decree in the amount of Rs. 2.67 crores or thereabout together with interest at the rate of 16 per cent per annum. The case of the petitioners is that prior to 1988 M/s. Akashaya Hospital was a partnership firm with the second and third respondents as partners. The second and third respondents are alleged to have proposed to the petitioners in 1988 that a Lithotripter Machine could be purchased if an investment of Rs. 1.70 crores was made and the object of the partnership could be expanded by the constitution of a limited company in which the petitioners could be inducted as shareholders. Undoubtedly, the object of the Company when incorporated was not merely to acquire the Machine, but was to take over the running business of Akshaya Hospital and to carry on the business of running hospital, clinics, dispensaries and to establish polyclinics. For the purpose of these proceedings, it is not necessary for the Court to enter a finding on the contention of the petitioners that the acquisition and use of the Lithotripter Machine formed the substratum of the business of the Company. Even if it did not, the fact remains that on 14-11 -1994 this Court ordered the Court Receiver to forcibly take possession of the flats and the machine for the purposes of the sale. The Court has been informed that the machine could not eventually be sold since it has been reduced to scrap. The fact that the company has been continuously running into losses since inception has not been denied. According to the petitioners a search report dated 6-3-2007 has revealed that the Company has not filed any report after 1995. This position has not been disputed on behalf of the first respondent, nor was it disputed that for the accounting year ending 31-3-1989 the accumulated loss of the first respondent was Rs. 42.15 lakhs which increased to Rs. 96.06 lakhs for the year ending 31-3-1990. As on 31 -3-1995 the accumulated losses were to the extent of Rs. 1.58 crores while the debts due and outstanding were in the

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amount of Rs. 2.41 crores. The fact that the company has not been in a position to challenge the order of the Debts Recovery Tribunal clearly shows that the substratum of the Company has completely collapsed. Though an adjournment was sought on the last occasion by counsel appearing on behalf of the Company to place on the record the financial position of the Company no such affidavit has been forthcoming. The facts therefore contained in the written submissions filed before this Court have not been controverted nor is the factual position that the first respondent is in a position of financial distress and that it was unable to pay its debts. In the circumstances, the submissions urged on behalf of counsel appearing for the petitioner are worthy of acceptance and the Company Petition will have to be allowed.

6. The Company Petition is accordingly made absolute in terms of prayer Clause (a). Insofar as prayer Clause (b) is concerned, the Official Liquidator is appointed as Liquidator of the first respondent together with all the assets, business properties, books of account, bank accounts, machinery, furniture and fixtures etc. of the first respondent. Prayer Clause (b) also seeks a direction that the Liquidator shall stand appointed in respect of four flats bearing Nos. 201 to 204 in Palm Spring Co-operative Housing Society Limited, Lokhandwala Complex, Andheri (West), Mumbai 400 058. At the present stage, it would not be appropriate for this Court to pass any direction in regard to the flats since it would be open to respondents 1 to 3 to produce necessary documents of title in respect of the flats in question. Respondents 1 to 3 shall do so within a period of three weeks from today. The Liquidator shall after duly scrutinizing such documents as may be produced by the first, second and third respondents take necessary action in accordance with law if it is found that the ownership of the said flats is of the first respondent herein. The Company Petition is disposed of in the aforesaid terms since the other prayers have not been pressed.

7. In Company Application 332 of 1990 respondents 1 to 3 were by an order dated 6-10-1990 inter alia restrained from alienating the aforesaid flats amongst other properties. The order dated 6-10-1990 shall continue to remain in force until the Official Liquidator makes his determination.

Stay refused.

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