

(1960) 04 CAL CK 0004
In the Calcutta High Court
Case No : A.F.O.O. No. 99 of 1959

Ram Kumar Agarwala and Another

APPELLANT

Vs

Buxar Oil and Rice Mills Ltd. and Another

RESPONDENT

Date of Decision : 12-04-1960

Acts Referred:

Companies Act, 1956 — Section 439(1), 439(2)

Citation : AIR 1960 Cal 764

Hon'ble Judges : S.C. Lahiri, C.J; R.S. Bachawat, J

Bench : Division Bench

Advocate : S. Chowdhury, B.C. Mitra and H.N. Ghosh, for the Appellant; Samiran Sen and Subrata Roy Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—This is an appeal from an order refusing to wind up the respondent company, Buxar Oil and Rice Mills Ltd.

2. The case of the appellants is that the company issued 300 debentures of Rs. 1,000/- each and executed a debenture trust deed dated 1-3-1954, by which valuable lands, factory buildings, machinery plant and tools appertaining to its factory at Buxar were mortgaged to secure the repayment of the debentures. The appellants are the trustees for the debenture holders appointed by the trust deed. Their further case is that interest since June 1955 payable to the debenture-holders is in arrears that the security constituted by the trust deed became enforceable, that on 7-8-1958 they served upon the company the requisite statutory notice u/s 434 of the Indian Companies Act and that in spite of the notice the company failed and neglected to pay the dues of the debenture-holders. The appellants presented this winding up petition on 15-9-1958. They contend that the company is unable to pay its debts and also that it is just and equitable to wind up the company.

3. The company has its registered office in Calcutta. It has an oil and rice mill

and factory at Buxar. In this appeal we shall have to notice three sets of transactions entered into by the company viz. (a) the debentures and the debenture trust deed, (b) a lease of lands and machineries in Buxar executed by the company in favour of one Shahabad Industries (Private) Limited, (c) a transaction of loan of Rs. 65,000/- obtained by the company from the respondent Sitaram Bhartia.

4. The respondent Sitaram Bhartia, who is an unsecured creditor of the company, opposed the winding up order. No other creditor appeared at the hearing of the application. Apparently, the company also opposed the winding up order. On 17-2-1959, P.B. Mukharji, J., refused to make the winding up order.

The case of Sitaram Bhartia is that the debentures were issued without consideration and that the debentures and the debenture trust deed are fictitious and void documents and were brought into existence by the company fraudulently in order to defeat the claim of its creditors.

5. It appears that Sitaram Bhartia lent and advanced a sum of Rs. 65,000/- to the company on 1-6-1949. He instituted a suit for the recovery of his dues in this High Court on 29-5-1952. He obtained a decree against the company for the sum of Rs. 76,600/- with interest and costs on 15-2-1956. The company preferred an appeal from the decree. On 9-4-1956 the Appellate Court passed an order staying execution of the decree, conditionally, on the company depositing Rs. 35,000/- with the Registrar and furnishing security for Rs. 45,000/- within one month from the date of the order. The company could not make the deposit or furnish the security. On 25-6-1956, the decree-holder obtained an order for transmission, of the decree to the District Court at Arrah. In September 1956 the decree was transmitted to the Arrah Court. On 7-11-1956, the decree-holder applied in the Arrah Court for execution of his decree. On 15-11-1956, the Arrah Court passed an order of attachment of the immovables and machinery belonging to the company. On June 27 and again on 7-8-1958 the Arrah Court passed orders for sale of the attached properties.

6. During the pendency of the suit of Sitaram Bhartia, the company executed the lease dated 9-8-1956 in favour of Shahabad Industries (Private) Ltd. By that lease the company demised to Shahabad Industries (Private) Limited its lands, factory buildings, machinery plant and tools appertaining to the factory at Buxar for a term of 5 years with an option of renewal for a further period of 5 years at a monthly rent of Rs. 1,500. The case of Sitaram Bhartia is that this lease was fraudulently brought into existence by the company with a view to obstruct the execution of his decree and that in reality the lease is a paper device and a colourable and collusive transaction. There is force in this contention. It is the case of the appellants also that this lease is a collusive transaction brought about by the company in collusion with Shahabad Industries (Private) Limited. It is to be noticed that the order for transmission of the decree in favour of Sitaram Bhartia was made on June 25, 1956. Shortly thereafter, Shahabad Industries (Private) Limited was incorporated on 14-7-1956 and the lease in their favour

was executed on 9-8-1956. The directors of the lessee company are Badridas Jain, father's sister's son of Bhagwandas Bajoria, Chairman of the Board of Directors of the lessor company and Chandrama Roy and Parasram Roy employees of the lessor company. The decree in favour of Sitaram Bhartia was actually transferred to the Arrah Court in September 1956 and at about the same time by a letter dated 15-9-1956 the lessor company requested the lessee company to pay rent to the appellants. It is again to be noticed that Sitaram Bhartia applied in the Court of the second Subordinate Judge, Arrah on 7-11-1956 for execution of his decree by attachment of the movable and immovable properties of the judgment debtor and on 13-11-1956 Shahabad Industries (Private) Limited obtained a katcha receipt from G. G. Debey, one of the attorneys for the appellants for Rs. 9000/- representing six months' rent payable under the lease and on the same day filed a petition under Order XXI, Rule 58 read with Section 151 of the CPC in the executing court objecting to the attachment. The petition of Shahabad Industries (Private) Limited was dismissed by the Arrah Court on 27-6-1957. It is the case of Sitaram Bhartia that the appellants were aiding and abetting Shahabad Industries (Private) Limited in its false claim. It is interesting to notice that while the appellants now challenge the lease as a collusive transaction, at one point of time they recognised the lease by accepting rent and actively helped the lessee in its objection before the Arrah Court. They or their attorneys handed over the original debenture trust deed to the lessees who produced the same in the Arrah Court on 15-11-1956 in support of their objections.

7. The debenture trust deed also was executed on 1-3-1954 during the pendency of the suit instituted by Sitaram Bhartia against the company. The appellants were appointed trustees under the debenture trust deed. It is the case of Sitaram Bhartia that the appellants did not make any serious attempt to enforce the security and that their activities were directed towards thwarting and obstructing the various steps taken from time to time by Sitaram Bhartia for the execution of his decree. Sitaram Bhartia obtained an order for transmission of his decree on 25-6-1956 and on August 9, 1956 we find a demand made by the appellants on the company for payment of interest said to be due since 30-6-1955. The decree of Sitaram Bhartia was transmitted to the Arrah Court for execution in September 1956 and at about the same time on 12-9-1956 we find a demand by the appellants on the company for delivery of possession of the mortgaged properties in accordance with the terms of the debenture trust deed and on 15-9-1956 we find a letter from the company to the appellants recording that the appellants had taken possession of the mortgaged properties. On 7-11-1956 Sitaram Bhartia applied in the Arrah Court for execution of his decree and on 8-11-1956 we find that the company executed a power of attorney authorising Ramani Mohan Banerjee, Baijnath Garg and Girdharilal Gayadin Debe to manage the properties covered by the debenture trust deed and recording that the appellants were in actual possession of the factory premises situated at Buxar together with all machinery, equipment, utensils and other assets

whatsoever therein contained and belonging to the company and mortgaged by the debenture trust deed. The appellants and their attorneys were very active at this stage. Besides giving the receipt for Rs. 9000/- on 13-11-1956 and producing the original debenture trust deed in the Arrah Court on 15-11-1956 G. G. Dubey wrote to the Nazir, Civil Court, Arrah, on 18-11-1956 stating that the properties sought to be attached were in possession of the appellants and were not in possession of the judgment debtor. It seems that the appellants and the company had fallen out by December 1956 and during December 1956 and January 1957 we find a set of correspondence between them in which the appellants, for the first time, contradicted the statement in the letter dated 15-9-1956 and stated that they had not taken possession of mortgaged properties. The appellants also stated that the lease dated 9-8-1950 was a bogus lease and denied that they had collected any moneys from the lessee. The case of Sitaram Bhartia is that the appellants were watching the proceedings in the Arrah Court and that because the Arrah Court on June 27, 1957 dismissed the objection of the Shahabad Industries (Private) Limited and made an order for sale of the attached properties, the appellants filed a petition of objection in the Arrah Court on January 30, 1958 with the object again of delaying the execution of his decree. This petition of objection was headed as "under Section 151 and order XXI, Rule 66 of the Code of Civil Procedure". The petition set up the debenture trust deed and stated that the charge created by that deed had not been mentioned in the sale proclamation and prayed for suitable directions safeguarding the interests of the appellants and of the auction purchaser before proceeding with the sale. In his rejoinder Sitaram Bhartia challenged the debentures and the debenture trust deed and asked for a declaration that the debentures were benami transactions. The Miscellaneous Case was adjourned from time to time and eventually on June 21, 1958 was dismissed for default of appearance on the part of the appellants. On August 7, 1958, the Arrah Court passed a fresh order for sale of the properties and on the same date the appellants gave the statutory notice u/s 434 of the Indian Companies Act to the company. Before the properties were sold on September 15, 1958 the appellants presented the petition for winding up. During the pendency of the petition the appellants again applied to the Arrah Court on October 1, 1958 for postponing the sale of the attached properties. That application was dismissed on January 10, 1959.

8. If the debenture-holders are the creditors of the company and if the debenture trust deed was executed to secure the due repayment of the debentures, there can be no doubt that the appellants as trustees for the debenture holders are creditors of the company, having regard to the provisions of Sub-section (2) of Section 439 of the Indian Companies Act. Now, there is a very serious dispute between Sitaram Bhartia and the appellants on the question whether the debentures were issued without any consideration and whether the debentures and the debenture trust deed are fictitious documents and were brought into existence by the company with a view to defeat and delay the claim of its

creditors. I am unable to resolve this dispute on these affidavits. I do not consider it safe to act on the affidavit of the appellants. Their testimony is not reliable. The appellants' case is that they never took possession of the mortgaged properties; yet they deliberately recorded in a formal instrument, namely, the power of attorney dated November 8, 1956, that they had taken possession of the mortgaged properties and were in actual possession thereof and G. G. Debey, their attorney, in a letter written to the Nizir of a Court of Justice stated on November 18, 1956, that the appellants were in possession of these properties. Either the case now made by the appellants is untrue or they and their attorney were parties to documents containing materially false statements. The case of the appellants now is that the lease in favour of Shahabad Industries (Private) Limited is a fictitious and bogus lease; but at one point of time their attorney recognised the lease and helped the lessees in their objections filed before the Arrah Court. The appellants are not credible witnesses. I am not prepared to find merely on the strength of their affidavit that there are valid debentures and a valid and operative debenture trust deed. But it is said that there are admissions made by the company in the debentures and in the debenture trust deed and in the affidavit filed on its behalf. Here again comes the question whether we should act upon the affidavit of Bhagwandas Bajoria or upon the admissions made by the company. The conduct of the company and its directors do not at all inspire confidence. The company has tried its best to defeat the claim of Sitaram Bhartia. If, as is said now by the appellants as also Sitaram Bhartia, the lease is a fictitious and bogus document, the company and its directors have deliberately bolstered up a false document in the shape of a lease with a view to defeat and delay the claim of Sitaram Bhartia. The matter is now being tried on affidavits and, having regard to the circumstances of the case I am not at all prepared to find on the affidavits and the admission of the company "and of its directors that the appellants are creditors of the company.

9. There are other circumstances bearing on the question which require investigation. The debenture trust deed was executed on 1-3-1954 during the pendency of the suit of Sitaram Bhartia. From paragraph 5(b) of Ram Kumar Agarwalla's affidavit affirmed on 4-2-1959, it would appear that Bhagwandas Bajoria, Chairman of the Board of Directors of the company, and his sons were on very friendly terms with the appellants for several years past prior to 15-9-1956.

10. The application filed by the appellants in the Arrah Court and headed as u/s 151 and Order XXI, Rule 66 of the Code of Civil Procedure, was dismissed for default of appearance. It is curious that the appellants made no attempt to establish the debentures and the debenture trust deed in the Arrah Court. It is also worth noticing that in spite of the fact that their objection in the Arrah Court had been dismissed, in the winding up proceeding they made no attempt to bring independent evidence of the payment of consideration by the debenture-holders.

11. As I have said already, the petition of objection by the appellants were

headed u/s 151 and Order XXI, Rule 66 of the Code of Civil Procedure. There is some question that in spite of the heading of the petition, the petition was substantially a petition under Order XXI, Rule 62 read with Order XXI, Rule 58 of the Code of Civil Procedure, and that the order dismissing the objection of the appellants is conclusive since no suit has been tiled to establish the claim of the appellants within one year from the date of the order dismissing the objections.

12. As between the company and a creditor, a creditor who is unable to obtain payment of his debts is entitled *ex debito justitiae* to an order for winding up of the company on proof that the company is unable to pay its debts. But before an order for winding up is made on the petition of an alleged creditor, it must be made out that the petitioner is in fact a creditor of the company.

13. In *Bowes v. Hope Life Insurance and Guarantee Co.* (1865) 11 HLC 389 at p. 401, Lord Cranworth observed:

"The real question here is, whether the Master of the Rolls, before whom the matter originally came had before him a case in which there was such a clear proof of a valid debt, both at law and in equity, that he had no other course to take but immediately to direct the winding up; because I agree with what has been said, that it is not a discretionary matter with the Court when a debt is established, and not satisfied, to say whether the company shall be wound, up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the Court to direct the winding up. But here I must confess I cannot say that this debt is so clearly made out to my mind as being a valid debt at law and in equity that think the Court was bound to direct the winding up, if there was any mode by which the validity of the debt could be better established before that order was made *
* Therefore this is, in fact, a single creditor claiming under a judgment of a rather suspicious character, to put the machinery of the Joint Stock Companies Act in motion for the purpose of winding up this company, in order that he may have this debt paid."

In the case just cited the petitioner for winding up claimed to be a judgment creditor of the company. The petition was opposed by the company. In the circumstances of the case the House of Lords directed that the petition for winding up should, stand over until a certain date, the company undertaking in the meantime to take proceedings for impeaching the judgment. In a case where the debt said to be due to the petitioning creditor is disputed and the dispute cannot be resolved on the affidavit the court has the discretionary power either to adjourn the further hearing of the petition until the debt is established in other proceedings or to dismiss the petition without prejudice to the right of the petitioner to establish and enforce his claim in other proceedings. In this case P. B. Mukharji, J., in the exercise of his discretion has dismissed the application. I am of the opinion that he has adopted the right course. In the circumstances of the case the best course is to leave the appellants to enforce their rights in other

proceedings.

13-A. Mr. Chaudhuri contended that the petitioners are entitled to a winding up order if they make out a prima facie case that they are creditors, of the company and that before making the winding; up order the court need not be satisfied positively that they are in fact creditors, I am unable to accept this contention.

14. Section 439 of the Indian Companies Act 1956 enumerates the classes of persons who are entitled to present a petition for winding up of the company. The appellants claim to present winding up petition on the ground that they are creditors or the company. In order to obtain the winding up order they must affirmatively prove to the satisfaction of the Court that they are creditors and as such entitled to set in motion the machinery for winding up.

15. Mr. Chaudhuri contended that the Court can make the winding up order without deciding that the appellants are creditors of the company because even if the order is made they will get nothing unless they prove in the winding up and unless the winding up Court is satisfied that there is a debt due to them. In support of his contention he relied upon the dictum of Jessel, M.R., in *Moor v. Anglo-Italian Bank* (1879) 10 Ch. D. 681 at p. 690 that "The petitioning creditor gets nothing unless he proves." He also relied upon the following observations of Sanderson, C.J. in *Keotokey Churn Banerjee v. Sarat Kumari Dabee* 20 CWN 995 at p. 996: AIR 1917 Cal 39 at p. 39 (FB)) (a decision under the Presidency Towns Insolvency Act);

"In my opinion, it must be open to the Official Assignee after the insolvency to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor, he surely must say so and strike out his or her name from the list of creditors."

16. The decisions relied upon do not establish that the Court will make a winding up order on the petition of a person who claims to be a creditor of the company without satisfying itself that the petitioner is in fact such a creditor. The Court has the power and the duty to see that the machinery of winding up is set in motion only by a person who is entitled to present a winding up petition. The Court will dismiss a winding up petition by a person claiming to be creditor of the company if the petitioner does not affirmatively establish that he is in fact such, a creditor. The authorities relied upon show that the bankruptcy and the winding up courts have large powers at the stage of proof of debts. Assuming that the winding up court has the power to disallow the proof of the petitioning creditor wholly if it is satisfied that in fact there is no debt due to him, it does not follow that the court will make a winding up order at the instance of a person claiming to be creditor of the company if he fails to satisfy the court that he is such a creditor.

17. The appellants claim to present the winding up petition on the ground that they are trustees for holders of debentures appointed by the debenture trust deed and as such creditors within the meaning of Sub-section (1)(b) read with

Sub-section (2) of Section 439. There is a serious dispute as to the validity of the debentures and the debenture trust deed and as to whether the appellants are creditors of the company as alleged. That dispute cannot be resolved on the affidavits. In the circumstances the winding up order ought not to be made. The appellants will be at liberty to enforce their rights by other means. The opinion expressed in this judgment and in the judgment of the learned Trial Judge must not be taken to prejudge the issues in any way.

18. Mr. Chaudhuri contended that the objection that the petitioners are not creditors cannot be taken by an opposing unsecured creditor. He contended that the objection was open only to the company and not to an unsecured creditor. I am unable to accept this contention. On admission of the petition for winding up directions for the issue of advertisements were given and creditors and contributories were invited to appear at the hearing of the application. Every creditor of the company is entitled to appear at the hearing and oppose the order for winding up. If the petition is liable to be dismissed on the ground that the petitioners are not creditors of the company or on the ground that there is a serious dispute on that question and that dispute cannot be resolved on the affidavits, that contention is open to all those who are entitled to oppose the petition.

19. It was also contended that the winding up order ought not to be made, because (a) the appellants have an ample security and as such they will not obtain any practical advantage by the winding up order; (b) before presenting the winding up petition they should exhaust all their remedies under the debenture trust deed; (c) there are no assets other than those covered by the debenture trust deed and the general body of creditors will not benefit by the winding up order; (d) the petition suppressed the proceedings in the Arrah Court and material facts regarding possession of the mortgaged properties and (e) the statutory notice is dated August 7, 1957 and called upon the company to pay the debt within three weeks from the date of the notice, but the notice was in fact served on August 7, 1958 and in the circumstances it was impossible to comply with the notice and consequently the notice was not a valid notice u/s 434 of the Indian Companies Act and as such the inability to pay the debts has not been proved by recourse to Section 434(a) of the Indian Companies Act that there is no other proof of such inability. Having regard to our conclusions on the main question, we do not consider it necessary to express any opinion on these further contentions.

20. I propose that the following order be passed:

21. The appeal is dismissed with costs,

22. The appellants will pay one set of costs to the respondent Sitaram Bhartia and another set of costs to Buxar Oil and Rice Mills Ltd.

23. Certified for two counsel.

Lahiri, C.J.

24. I agree.