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In the Calcutta High Court

Case No : A.C.O. No. 25 of 2010, A.P.O.T. No. 112 of 2010, C.A. No''s. 651 and 699 of 2009 and C.P. No. 128 of 2007

R.P. Techvision (India) Pvt. Ltd. — APPELLANT

Vs

Official Liquidator and Another — RESPONDENT

Date of Decision : 16-04-2010

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

Citation : (2011) 2 BC 309 : (2010) 4 CALLT 82 : (2010) 103 SCL 38

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

Bench : Division Bench

Advocate : Hirak Mitra, Soumen Sen, Siddhartha Chatterjee, Nilendu Bhattacharya and S. Ghosh, for the Appellant;B. Dutt and Bijan Datta, K.C. Garg, Manju Bhuteria and Ravi Asopa, S.B. Mukherjee and Bimal Chatterjee, Tilak Bose, D.N. Sharma and A. Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of a third party in a proceeding 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.

2. Being dissatisfied, a third party to the proceeding who was, in the past, allowed to run the company by virtue of an interim order, 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 Private Limited, 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,

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was in the region of Rs. 74 crore.

b) The Official Liquidator, consequent to the order of winding up, when went to take 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 claiming to have been authorized by the employees of the company-in-liquidation moved C.A. No. 651 of 2009 u/s 466 of the Companies Act thereby praying for the following relief:

i) All the orders of winding up passed by this Hon''ble Court in connection with SST Media Pvt. Limited from time to time be stayed until further order of this Hon''ble Court;

ii) R.P. Techvision (India) Pvt. Ltd. of 12, Govt. Place (East), 4th Floor, Kolkata-700069 be given liberty to file scheme of Arrangement preferably through Price Water House 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 Pvt. Ltd. be run under the management/guidance of R.P. Techvision (India) Pvt. Ltd. with necessary leave to make payment in the name of the said company SST Media Pvt. 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;

iv) All parties concerned be directed to cooperate with the said R.P. Techvision (India) Pvt. Ltd. in running the said SST Media Pvt. Ltd. with specific goal of reviving the said company;

v) Official Liquidator be directed not to take any further step in terms of the orders of winding up;

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

c) In the said application, those two 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) Pvt. Ltd., the present appellant, 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 1st September, 2009 after

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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 21st September, 2009. However, it appears that the said meeting could not give any fruitful result and there was none in the said meeting who was prepared to make any commitment to invest for revival or for payment of the dues of the creditors as would appear from the order dated 22nd September, 2009. The stay already granted was, however, directed to continue on condition that a sum of Rs. 2 crore should be deposited with the Official Liquidator by 21st October, 2009 at the instance of the R.P. Techvision (India) Pvt. Limited, the present appellant.

f) On 26th October, 2009, an affidavit was affirmed by one Shri Rana Bandyopadhyay as principal officer of R.P. Techvision (India) Pvt. Limited, the present appellant, stating that it had deposited a sum of Rs. 2 crore with the Official Liquidator on 20th October, 2009 and further stated that the registration of the company-in-liquidation with the Directorate of Advertising and Visual Publicity, a Government Body authorized in that behalf, would expire on 31st October, 2009. The said R.P. Techvision (India) Pvt. Limited, the present appellant, prayed for leave as also a direction upon the Authority to have the name of the said R.P. Techvision (India) Pvt. Limited, 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) Pvt. Limited, the present appellant, had been advised that the registration in the name of company-in-liquidation would not be granted in spite of the fact that the winding up proceedings had been stayed.

g) On 28th October, 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) Pvt. 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 26th October, 2009 another application was filed by one of the two original applicants which was registered as C.A. No. 699 of 2009 u/s 457 read with Sections 433, 434, 439 and

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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 to 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 by 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) Pvt. Ltd., the applicants, TV 9 and promoters of the company-in-liquidation remained a matter of mystery requiring thorough

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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 crore 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 preferred an appeal before this Court and this Court by order dated 16th February, 2010 disposed of the said appeal by vacating 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 directed that the business of the company should immediately be stopped. We further directed that the Official Liquidator should, however, pay the dues of the landlord towards occupational charge from September 1, 2009 till that date at the rate fixed by the learned 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 law on usual investigations. This Bench did 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. It may not be out of place to mention here that in course of hearing of the said appeal the present appellant tried to intervene but we did not allow the present appellant to intervene because the appellant did not prefer any appeal.

5. Against our order dated 16th February, 2010 Shri Pradip Bandopadhyay who preferred the previous appeal moved the Hon''ble Supreme Court of India by filing a Special Leave Application but ultimately the same was withdrawn.

6. Subsequently, the present appellant has preferred this appeal with an application for leave to prefer appeal as according to the appellant it will be prejudicially affected by the order passed by the learned Single Judge along with an application for condonation of delay of 18 days in preferring this appeal.

7. We condoned the delay in filing the appeal and granted leave to prefer the present appeal only to enable the appellant to challenge that part of the order passed by the learned Single Judge, if any, which has really prejudicially affected its right.

8. Mr. Mitra, the learned senior advocate appearing on behalf of the appellant, laboriously contended before us that his client from the month of September, 2009 having invested huge money and industry to run the business should be

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given preferential right to purchase the assets instead of competing with the other intended purchasers. According to Mr. Mitra, this Bench in the earlier appeal preferred by the representative of the employees having directed sale of assets of the company as a going concern, we should, in the alternative, at least permit his client to continue with the business so that the assets are sold, in essence, as a going concern. Mr. Mitra also placed strong reliance upon the decision of a learned Single Judge of this Court in the case of "In re: Elvocp Ltd. reported in 52 Company Cases 308 which was also relied upon by the employees in the former appeal filed by them which has since been disposed of. Mr. Mitra further prays for at least a direction of refund of the amount spent by his client in the event we refuse the other two prayers indicated above.

9. Mr. Mukherjee, the learned Counsel appearing on behalf of the representative of the employees, at whose instance the appellant was brought in the field, supported the contention of Mr. Mitra while the other counsel appearing on behalf of the creditors and the landlord of the premises opposed the aforesaid prayers.

10. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the appellant is supported by a section of the employees at whose instance the learned Company Court permitted the appellant to run the business. Simply because by virtue of an interim order, the appellant run the company for four months, such fact cannot enable it have a right to purchase the business by way of private treaty without competing with the other intended purchasers in a public auction.

11. The case of In re: Elvoc (P) Ltd. (supra) was decided by a learned Single Judge by passing an order of private sale instead of Public auction in the following peculiar facts of the said case:

An application of the sale by private treaty of the assets of the 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 a 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 the 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 exerted by them in revival of the company. The Court after the 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 increasing 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

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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, therefore, find that in the special facts of the said case, the learned Single Judge passed an order of sale in favour of the applicant after taking into consideration their past devotion and industry in reviving the company. In the case before us, the appellant has not made out any such case to deviate from the well-settled practice of selling the assets by public auction. We have already pointed out that by virtue of an interim order at the instance of a section of the employees, the appellant entered in the field and continued for just four months when the learned Trial Judge passed the order vacating the earlier interim order.

13. In our opinion, the interest of the creditors and the employees as well will be best protected if the sale is held as a going concern in public auction and this Bench in the earlier appeal preferred by the representative of the section of the employees passed such direction. The appellant in their separate appeal could not place any better materials for passing a different order which would be beneficial for all concerned.

14. Similarly, we do not find any reason to pass any order for refund of the money deposited by the appellant as condition of continuation of the business pursuant to the interim order passed in the proceedings and the learned Single Judge most judiciously observed that the question of return of such money will be considered only after the Court was fully satisfied that the company-in-liquidation was not poorer than what it was on the date of order of the winding up had been passed.

15. We also do not find any reason to vary the order passed by us in the previous appeal disposed of by us making some specific order regarding payment to the landlord and we re-affirm that order as regards the payment to the landlord.

16. On consideration of the entire materials on record we, thus, find no merit in this appeal and the same is dismissed.

17. In the facts and circumstances, there will be, however, no order as to costs.

Prasenjit Mandal, J.

18. I agree.

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