

(1998) 07 CAL CK 0017

In the Calcutta High Court

Case No : Original Jurisdiction C.A. No. 81 of 1998 C.P. No 245 of 1996

Ruby General Hospital Ltd.

APPELLANT

Vs

Chandmaku Construction Private Ltd.

RESPONDENT

Date of Decision : 22-07-1998

Acts Referred:

Companies Act, 1956 — Section 536(2)
English Companies Act, 1948 — Section 227

Citation : (1999) 1 CALLT 49

Hon'ble Judges : Sujit Kumar Sinha, J

Bench : Single Bench

Judgement

1. It appears that the winding-up petition was admitted by the learned Company Judge by his order dated 4th November, 1997. The learned Company Judge has also directed payment of the amount claimed by the petitioning creditor in the sum of Rs. 10.23,316.06/- within a fortnight from the date of his order and in default advertisement of the winding-up petition. The Company has preferred an appeal from the said order and obtained a conditional order of stay from the appellate court dated 3rd December, 1997, By its said order the appellate court has directed the Company to furnish bank guarantee to the extent of Rs. 6,00,000/- and this order has been complied with. It appears that the said bank guarantee is still subsisting. The stay application before the application court is pending.

2. My attention has been drawn by the learned counsel for the Company to the averments made in the winding-up petition which read as follows :-

"...the Contractor shall be entitled to the payment of the final balance in accordance with the final Certificate to be issued in writing by the Architect at the expiration of the period referred to as Defects Liability Period..."

3. It is submitted by him that unless a Certificate is given by the Architects it cannot be said what amount if any is payable by the company to the petitioning creditor. I find great force in this submission.

4. However, I am not called upon to decide as to the maintainability of the winding-up petition on which the order was passed by the then learned Company Judge.

5. The only point that has arisen in the present application made by the Company u/s 536(2) of the Companies Act, 1956 is/as to what further amount should be directed to be secured by the said Company having regard to the fact that by this application the Company seeks leave of this court to mortgage its immovable property situated at premises No. Kasba Goalpark Eastern Metropolitan Bypass, Calcutta in favour of the Industrial Development Bank of India (IDBI) to secure the repayment of the sum of Rs. 4,60,00,000/- already lent and advanced by the said IDBI to the Company besides Interest.

6. In view of the aforesaid averments in the winding-up petition I am unable to do so.

7. Section 536(2) of the Companies Act, 1956 in so far as it is material for the present application provides as follows: -

"In the case of a winding up by.....the court, any disposition of the property of the Company.....made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

8. It will be recalled that no winding up order has been passed and it cannot be said that the first limb of the aforesaid section, that is to say, "winding up by the court" has come into operation. Nevertheless, in my opinion the present application by the Company which is in the nature of a quia timet action is maintainable. Indeed, in construing the corresponding provisions of section 227 of the English Companies Act, 1948 which in so far as they are material provide as follows :-

"In a winding up by the court, any disposition of the property of the company.....made after the commencement of the winding up, shall, unless the court otherwise orders, be void.";

Slade J. in "R. Burton & Deakin Ltd" 1977) 1 All England law Reports 651 held as follows :--

"An order under the section is thought necessary by the company because, if a compulsory order were made, it would date back to the presentation of the petition. The decision of Buckley J. in Re A I Levy (Holdings) Ltd. makes it clear that the court would have jurisdiction to authorise the relevant dispositions although no winding up order has yet been made. The company also wishes to obtain protection from any possible operation or section 227 in respect of any payments made in the ordinary course of business and in respect of any other disposals of its assets which it might make in such ordinary course."

9. It appears from this application that the said IDBI has already advanced to the Company the sum of Rs. 4,55,00,000/- and that such loan was given before the

presentation of the winding up petition by the petitioning creditor who is the respondent in this application. The said loan has been utilised by the Company for setting up of a multi-storied and multi-disciplinary hospital at the aforesaid premises.

10. It also appears from the relevant entry in the Register of Charges maintained by the Registrar of Companies that the only charge-holder in respect of the assets of the Company is the said IDBI. The certified copy of the said entry which is produced by the Company pursuant to the direction of this court has been directed to be filed with the records.

11. The object of this application as stated hereinabove is for mortgage of the aforesaid premises including the said Hospital building in favour of the said IDBI to secure the due repayment of the aforesaid sum of Rs. 4.55.00.000/- together with Interest.

12. It does not appear that there is any creditor other than the said IDBI. The alleged dues of the petitioning creditor cannot be said to be a debt of the said Company in the absence of the architect's certificate.

13. I am satisfied that the mortgage sought to be created by the said Company is bona fide.

14. Having regard to the aforesaid and after considering the submissions made on behalf of the parties, I allow this application.

15. I accordingly direct as follows :

16. Leave is given to the Ruby General Hospital Limited to mortgage its aforesaid premises at Kasba Goal park Eastern Metropolitan By pass, Calcutta Including the Hospital building in favour of the Industrial Development Bank of India to secure the due repayment of the aforesaid sum of Rs. 4,55,00,000/- together with Interest as agreed upon by and between the said Industrial Development Bank of India and the Ruby General Hospital Limited.

17. The application is, accordingly, disposed of.

18. There will, however, be no order as to costs.

19. It will be open to the petitioning creditor, the Chandmaku Construction Private Limited, If so advised to apply before the appellate court for furnishing of such further security as to it may deem fit and proper in the facts and circumstances of this case and having regard to the present order passed by this court.

20. All parties concerned are to act on a signed xerox copy of this dictated order on the usual undertaking.

21. Appeal disposed of.