

(1992) 07 KAR CK 0020

In the Karnataka High Court

Case No : Company Application No. 644 of 1992 in Company Petition No. 16 of 1992

Smt. Usha R. Shetty and others

APPELLANT

Vs

Radeesh Rubber Pvt. Ltd. and another

RESPONDENT

Date of Decision : 31-07-1992

Acts Referred:

Companies Act, 1956 — Section 433, 433 (1), 536 (2)

Citation : (1995) 84 CompCas 602 : (1992) ILR (Kar) 2782 : (1992) 3 KarLJ 604

Hon'ble Judges : Kedambadi Jagannatha Shetty, J

Bench : Single Bench

Advocate : Udaya Holla, for the Appellant; Jayaram, for the Respondent

Judgement

Kedambady Jagannatha Shetty, J.—The applicants have filed the above referred company petition for the winding up of the company on the ground that there is a deadlock in the affairs of the company and also on the ground that the total liability of the company far exceeds the assets.

2. The conspectus of the facts given in the petition are that the respondent-company is incorporated under the Companies Act known as Radeesh Rubber Pvt. Ltd. It is stated in the petition that there is a deadlock in the company and that the total liability of the company far exceeds its assets. Respondent No. 2, one of the shareholders and a director of the company, filed an objection statement and contended, inter alia, therein that the allegations contained in the petition are not true, but nevertheless the fact that the company is not doing any business and that there are heavy bank liabilities, and the company suffered heavy loss have been admitted. Apart from that respondent No. 2 also filed a company petition for the winding up of the company.

3. This court, after hearing the parties, prima facie found that, as there was no business transacted over the years and the company has already suffered heavy loss and its liability far exceeds its assets and the petitioner and respondent No. 2 do not see eye to eye and there is deadlock, and the respondent has not

seriously objected to the winding up of the company, has, by its order dated July 3, 1992, admitted the petition which reads as follows :

"I find that a prima facie case has been made out by the petitioner for winding up u/s 433(e) of the Companies Act. The respondent has not seriously objected. However, he has filed his objections."

4. but, postponed the consideration to take out publication and posted the hearing of Company Application No. 644 of 1992 filed by the petitioner-applicant.

5. The petitioner who is an applicant in the company application has sought an order directing the sale of the assets of the company to one Sri Jamal or to any other willing buyer who is willing to pay the highest price for the assets of the company. It is averred in the application that the applicants have borrowed money from the State Bank of India. The said loans have been guaranteed by the first applicant as well as her husband, the late Sri Ratnakar Shetty, and in fact, it is also guaranteed by the second respondent. The company has sustained accumulated losses of over Rs. 55 lakhs. It is also averred that the second respondent took over the reins of administration of the company, and the company started sustaining heavy losses as a result of which the second respondent had thought of selling the assets of the company in order to pay off the liabilities. In this regard, an advertisement was released in the daily newspaper Deccan Herald, a copy of which is produced as exhibits A. 5-6 enquiries were received and, subsequent thereto, one Mr. Jamal came forward to purchase the factory and take over the entire bank liabilities of the company, thereby saving the applicants as well as the second respondent from certain ruination. As regards the sale of the factory, it is further stated that the second respondent took into confidence the applicants, there were discussions with the State Bank of India which also agreed orally to the proposal of sale of the factory to Mr. Jamal. In fact, Mr. Jamal met the second respondent, and he also expressed his happiness for the proposed sale of the factory to Sri Jamal and even went to the extent of agreeing with the manager of State Bank of India for the proposed sale of the factory of the second respondent-company in favour of Mr. Jamal. But, for reasons best known, the second respondent went back and has taken a totally unreasonable attitude and has refused to accede to the proposal of sale of the factory as a going concern in favour of Sri Jamal. It is further averred that it is not possible for the company to carry on its affairs profitably. Every day's delay results in further accumulation of a huge amount by way of interest which is in excess of Rs. 4,600 per day. As against this, the machinery and equipment keep on depreciating in value.

6. The second respondent filed his objections and resisted the application and stated that firstly there is no deadlock in the affairs of the company. The petitioner cannot take advantage of her own wrong and illegal action, but admitted that the company has borrowed from the State Bank of India and that these have been guaranteed by the first petitioner as well as the second respondent. The losses suffered by the company are not a new feature, as the

company has been suffering losses right from its inception, even from the period when the first petitioner's husband was alive and actively managing the company. It is further stated that the respondent is aware that discussions took place with one Mr. Jamal for the purchase of the factory. The prospective purchaser wanted the concurrence of respondent No. 2 also, while it was the intention of the first petitioner to exclude him altogether and negotiate a private deal from which she would personally benefit. In view of this disagreement between the parties the first petitioner launched upon a series of actions attempting to oust the second respondent from his position as director which made it necessary for him to file a suit for injunction in the City Civil Court, Bangalore. It is averred that the second respondent was willing to negotiate a sale on clear and open terms to which the first petitioner was not willing. It is on account of this problem that the parties fell out, as the first petitioner wanted to make a selfish and secret benefit from the transaction to the detriment of the interest of the second respondent. Further, it is stated that, even on this day, the second respondent is willing for a fair and open negotiation with Mr. Jamal and to negotiate the terms of the transaction beneficial to the company and all concerned. So far as the liability is concerned, it is stated that the interest is mounting at the rate of Rs. 4,600 per day which is to be paid in respect of the State Bank of India's loans. It is also admitted that the petitioner as well as the second respondent stood as guarantors and gave a personal guarantee in respect of the loans borrowed from the State Bank of India. However, it is contended that this is an unusual procedure having regard to the provisions of the Companies Act and the decisions of courts settling the position of law. The relief is incapable of being granted having regard to the jurisdiction of this court and the consequence of a winding up order, if eventually made.

7. It is an undisputed fact that the company has not been carrying on the business over the years. Both the petitioner and the second respondent have given personal guarantees for obtaining heavy loans from the State Bank of India to the respondent-company. The liability of the company far exceeds its assets. Both the petitioner and the second respondent are at loggerheads and no meeting either of the board or the general body has been held since 1990, and the liability of the respondent-company is mounting every day. Every day's delay results in accumulation of the huge amount by way of interest payable to the State Bank which is in excess of Rs. 4,600 per day. It is not in dispute that there was negotiation with one Jamal to sell the assets of the company who was willing to purchase the assets of the company at a fair price. Even now, the second respondent is willing for fair and open negotiations with Mr. Jamal and to negotiate the terms so as to be beneficial to the company and to all concerned. The second respondent has not seriously objected to the winding up of the company and the company petition has been admitted, awaiting a further order for advertisement. The second respondent has also filed a company petition for the winding up of the respondent-company. But the second respondent has seriously contended that no relief by way of sale of the assets of the company

before the order of advertisement and winding up could be granted, having regard to the jurisdiction of this court under the Companies Act and the consequences of a winding up order, if eventually made.

8. Mr. Udaya Holla, learned counsel for the petitioners-applicants, has submitted that this court has power u/s 443(1)(c) of the Companies Act to pass such interim order to secure the ends of justice, even before the winding up order much less, advertisement is ordered by the court. If the winding up petition is admitted before the order for the insertion of advertisement, the petitioner can move an application in the company petition for an interim order. The power to entertain such application is inherent in the court and rule 9 of the Companies (Court) Rules, 1959, reads as follows :

"Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the courts to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

9. In support of his submission, he has relied on the decisions in Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi, Ramakrishna Industries (P.) Ltd. and Others Vs. P.R. Ramakrishnan and Others, and National Conduits (P) Ltd. Vs. S.S. Arora,

10. In National Conduits (P.) Ltd.'s case [1967] 37 Comp Cas 786, the Supreme Court has observed thus (at page 788) :

"A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised; that is clear from the terms of rule 24(2). But that is not to say that as soon as the petition is admitted, it must be advertised. In answer to a notice to show cause why a petition for winding up be not admitted, the company may show cause and contend that the filing of the petition amounts to an abuse of the process of the court. If the petition is admitted, it is still open to the company to move the court that in the interest of justice or to prevent abuse of the process of the court, the petition be not advertised. Such an application may be made where the court has issued notice under the last clause of rule 96, and even when there is an unconditional admission of the petition for winding up. The power to entertain such an application of the company is inherent in the court."

11. The Supreme Court in The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, has held thus (headnote) :

"Though there are limitations on the powers of the court it cannot abandon its inherent powers. The inherent power has its roots in necessity and its breadth is co-extensive with the necessity."

12. The Division Bench of the Madras High Court in Ramakrishna Industries (P.) Ltd. and Others Vs. P.R. Ramakrishnan and Others, had held (at page 430) :

"... the hearing of the winding up petition starts even on the day when the

winding up petition is admitted and entertained and the order of notice for the hearing to the respondents after deciding to entertain would amount to a hearing of the winding up petition itself. The words "on hearing a winding up petition" would cover the entire period from the date of entertainment and issuing of notice till an actual order of winding up is made or the winding up petition is dismissed. "Hearing" does not mean hearing the respondent to the company petition. Hearing of the petitioner for the purpose of admitting the petition and issuing notice is also part of the hearing of the winding up petition."

13. Relying on the ratio of the decision rendered in Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, it is further observed (at page 433 of 64 Comp Cas) :

"Thus, it is settled law that even at the stage of admitting the winding up petition, or entertaining the winding up petition, the court has also an inherent power to do that which is necessary to prevent the abuse of the process of the court or to advance the cause of justice or make such orders which are necessary to meet the ends of justice, that inherent power of the court is not taken away or in any way restricted by section 443(1) of the Companies Act."

14. The decision referred to above is apposite to the facts of the case. In the instant case, the winding up petition was admitted and the matter was posted by the order of this court, for further hearing regarding advertisement and for winding up of the company. The company application is one for selling the assets of the company, to save the company from further loss and put an end to further liability. The second respondent has, in fact, taken steps to sell the assets of the company and he has admitted that the company has already suffered heavy loss and the liability of the company is mounting every day inasmuch as the interest payable on the loan taken from the State Bank of India on the personal guarantee of both the petitioner and the second respondent apart from the loan is in the region of Rs. 4,600 per day. The liability of the company has already far exceeded its assets. The second respondent, in his objection statement, has clearly stated that even now he is willing for the sale of the assets of the company, obviously for the reason that any delay in the matter of winding up of the company, both the petitioner and the second respondent who had given their personal guarantee to the loan obtained from the State Bank of India would suffer the heavy liability of paying huge arrears of loans with increased liability of payment of interest. The only objection of the second respondent is that no order for sale or transfer of the assets of the company could be made in an interlocutory application before the winding up order or at any stage of the winding up order of the company.

15. Mr. Jayaram, learned counsel appearing for the second respondent, has relied on the decisions in National Conduits (P) Ltd. Vs. S.S. Arora, and Ramakrishna Industries (P.) Ltd. and Others Vs. P.R. Ramakrishnan and Others, These two decisions are relied upon by Mr. Udaya Holla also in support of his submission.

16. In my opinion, the contentions of Mr. Jayaram, learned counsel for the respondent, are unacceptable.

17. Learned counsel, referring to section 536(2) of the Companies Act, has submitted that no transfer of the assets during the pendency of the winding up petition should be effected. As per section 536(2) in the case of winding up by or subject to the supervision of the court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void. Thus, it clearly indicates that the court has power to order transfer or to sell the assets of the company when the winding up petition is pending. There is no inherent indication in the section so as to warrant the conclusion that this power can be exercised only after the winding up order is made. It is difficult to spell out the limits on the jurisdiction of the courts from the opening words in the section, viz., "in the case of winding up" so as to mean "only if the company is ordered to be wound up." It would be reading more than what the Legislature intended in the said wording. I am of the view that the court can exercise jurisdiction u/s 536(2) of the Act even before the winding up order is made. The fact that the order becomes otiose, if the application for winding up is ultimately rejected, does not take away the jurisdiction. Therefore, even before the winding up order is made, the jurisdiction of the court can be invoked u/s 536(2) of the Act for permission for the disposal of the assets of the company. The contention of Mr. Jayaram, learned counsel appearing for the second respondent, in view of the decision of the Supreme Court as well as the decision of the High Court referred to above, is unsustainable.

18. I am also of the view that, at the stage of entertaining the winding up petition or admitting the winding up petition and on further hearing of the respondent after deciding to entertain the winding up petition, the court has inherent power to do that which is necessary to advance the cause of justice or make such orders which are necessary to meet the ends of justice. This inherent power of the court is not taken away or in any way restricted by section 443(1) of the Companies Act.

19. One other submission which has been made by learned counsel for the second respondent is that, in this company petition, the respondent-company is not represented. Learned counsel, Mr. Holla, appearing for the petitioner, has submitted that the shareholders are also parties in this company petition. The objection raised by Mr. Jayaram is a technical one and it is rejected. It is pointed out by Mr. Holla that the company is actually served with notice and all the directors are represented.

20. When the substratum of the company has gone and there was heavy loss already suffered and it is incapable of carrying on any business and the liability of the company is mounting every day, it is just and proper to treat that there is a "notional liquidation" and pass such order to save the respondent-company and

all concerned from further loss and mitigate the liability, by ordering the sale of the assets of the company to any willing purchaser. Thus, considering the facts and circumstances of the case, I am of the opinion that the company application deserves to be allowed and the same is, therefore, allowed. It is ordered that the petitioner shall take steps to sell the assets of the company by calling for tenders from the public and the same be placed before the court to decide to accept the tender with regard to the sale of assets of the company, both movable and immovable. The petitioner shall give proper advertisement calling for tenders for the purchase of the assets of the company in any one of the leading local newspapers. The amount realised will be deposited in the court for the purpose of making payment to the State Bank of India. The expenses incurred by the petitioner towards advertisement in the paper and other expenses to effect the sale shall be charged on the respondent-company. The petitioner shall seek orders, from time to time, of this court, in taking further steps for the sale of the assets of the company.