

(2010) 01 CAL CK 0040
In the Calcutta High Court
Case No : C.A. No. 651 of 2009

SST Media Pvt. Ltd. and Dayal Saha and Another APPELLANT
Vs
Official Liquidator RESPONDENT

Date of Decision : 08-01-2010

Acts Referred:

Companies Act, 1956 — Section 466, 529, 529A

Citation : (2010) 01 CAL CK 0040

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Advocate : Bimal Kumar Chatterjee, P.C. Sen, Tilok Kr. Bose, Soumen Sen, D. Basak, K.C. Garg, Manju Bhuteria, D.N. Sharma and Ajay Chowdhury, for the Appellant; Ruma Sikhdar, for the Respondent

Judgement

Girish Chandra Gupta, J.—SST Media Private Limited running a news channel by the name of Kolkata TV was directed to be wound up by this Court on 21st May 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 are pending. The liability of the company is in the region of Rs. 74 Crores, a break-up whereof provided by the applicants themselves reads as follows:

Sl. No.	NAME	AMOUNT	
Current Liability			1.
Sundry	Creditors	214,463,881.57	
			2. Term Loan
167,310,693.24			3.
Unsecured	Loan	24,341,464.00	
			4. Statutory
54,316,829.16			5. Bank
OD A/C. 126,454,172.04			
6.	Dist.	Exp.	Payable
			2,251,796.00

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Broadcasting	Co.		91,154,564.00	
-----		8.	Car	Loan
2,940,282.85	-----			Total
683,233,682.86	-----			9.
Service	Tax	Payable	22,089,076.00	
-----		10.	Professional	Tax-Exp.
Share	741,923.00	-----		11.
TDS Due	30,070,451.00	-----		
Grand	Total		736,135,132.86	

2. A list of the creditors has also been furnished which is part of annexure "E" to the application being CA No. 651 of 2009. The official liquidator was prevented from taking possession of the assets of the company in liquidation. Thereafter one Shri Dayal Saha and another Shri Pradip Bandyopadhyay claiming to have been authorised by the employees of the company in liquidation moved CA No. 651 of 2009 praying for the following reliefs:

a) 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;

b) 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;

c) 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.

d) All winding up petitions and/or claims as against the Company be stayed for the time being till further order of the Court;

e) 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;

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

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

3. The resistance offered to the official liquidator in taking possession of the assets of the company in liquidation was sought to be explained by alleging in

paragraph 14 of the petition that the employees had, in fact, been sitting on dharna and in order to protect themselves that the employees did not allow the official liquidator to take over the possession of the assets of the company in liquidation.

4. The ground for the aforesaid prayers is to be found in paragraph 19 of the said application which reads as follows:

In the aforesaid facts and circumstances, we say that if the company goes into liquidation and its assets are sold no purpose will be served other than burial of a dead person whereas if the employees are allowed to run the company under the supervision, guidance/management of the said R.P. Techvision (I) Pvt. Ltd. the company may continue as a going concern and the creditors may be paid off by way of a scheme and nobody will suffer any loss and prejudice rather the same will be beneficial for everyone concern.

5. The said application was taken up for hearing on 1st September 2009, after the official liquidator had been allowed access, when the following submissions of Mr. Mukherjee, learned Senior Counsel appearing on behalf of the company in liquidation was recorded:

Mr. Mukherjee, learned Senior Counsel submitted that his clients are willing to sit with all the creditors for the purpose of formulating a scheme under which their dues can be cleared, and thereafter, he submitted a proper scheme for revival of the company may be worked out.

6. It is on this basis that Brother Bose, J. passed an order staying 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. The meeting, it appears, was held but nothing fruitful transpired therein because there was none in the said meeting prepared to make any commitment to make any investment 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.

7. On 26th October 2009 an affidavit was filed by one Shri Rana Bandyopadhyay as a principal officer of R.P. Tech Vision (India) Pvt. Ltd. stating, inter alia, that the said R.P. Tech Vision (India) Pvt. Ltd. had deposited a sum of Rs. 2 crores with the official liquidator on 20th October 2009 and further stating that the registration of the company in liquidation with the Directorate of Advertising and Visual Publicity, a government body, authorised to release government advertisements to the media was likely to expire on 31st October 2009. The said R.P. Tech Vision (India) Pvt. Ltd. prayed for leave as also a direction upon the

authority to have the name of the said R.P. Tech Vision (India) Pvt. Ltd. registered instead and place of the company in liquidation in order to keep the channel "Kolkata TV" viable until 31st October 2010. It was also alleged in that affidavit that the said R.P. Tech Vision (I) Pvt. Ltd. had been advised that the registration in the name of the company in liquidation would not be granted in spite of the fact that the winding up proceedings had been stayed.

8. On 28th October 2009 the official liquidator was directed to apply for renewal of the registration on behalf of the company in liquidation. The requisite fee was to be paid by the official liquidator from the funds available with him to be reimbursed by the said R.P. Tech Vision (India) Pvt. Ltd. and the employees of the company at whose instance further proceedings in connection with the winding up application had been stayed.

9. The interim order staying further proceedings in winding up 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 CA 699 of 2009 seeking winding up of the company otherwise than in accordance with law as would appear from the allegations made in paragraphs 24,25,26 of the said application which read as follows:

Before and after making the application by summons in the month of August, 2009, the applicant had approached the members and unsecured creditors to propound a scheme for revival of the said company. However, in spite of their sincere efforts the applicants were unable to get enough support from the members or creditors without which the scheme would not be passed by the requisite majority at the meeting to be held for approval of the scheme. In such circumstances, the applicant was advised to take this application.

In the aforesaid facts and circumstances, I respectfully state and submit that inasmuch as this Hon"ble Court has been pleased to pass an order directing the official liquidator to cause valuation of the assets including goodwill of the said company, the official liquidator may thereafter initiate sale of such assets of the said company as a going concern to meet the dues of its creditors out of the sale proceeds. The charge of the secured creditors, if any, be directed to shift to the sale proceeds of the assets of the company.

In the alternative, it is submitted by the applicant herein, that upon valuation of the assets of the said company by the official liquidator, such assets including the goods be sold to the present financier company free from all encumbrances and the sale proceeds thereof be utilised for settling the dues of the creditor banks, other secured creditors and unsecured creditors in such manner and such intent as permitted by law.

10. The prayers made in this application are also very significant which read as follows:

a) 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;

b) Sale of all assets including goodwill, free from all encumbrances, to the purchasers;

c) 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 reemployment of such employees not exceeding 150 of ex-employees as may be necessary;

d) 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;

e) 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;

f) 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;

g) 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;

h) The sale of the assets of the company be 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;

11. This application was heard from time to time and the interim order already passed was directed to continue. From the submission made by the learned Counsel appearing on behalf of the applicants it is abundantly clear that there is no one prepared to shoulder the liability of the company in liquidation. The so-called financier R.P. Tech Vision (India) Pvt. Ltd. is only interested in taking over the business of the popular "Kolkata TV" channel keeping the large body of the creditors at bay for all time to come. The basis of the application u/s 466 seeking stay of winding up disclosed in paragraph 19 of C.A. No. 651 of 2009 noticed above, is no longer there. The allegation that the applicants were unable to get enough support from the members and unsecured creditors of the company is

altogether untrue and incorrect. Even without ascertaining the wishes of the body of the creditors, this Court merely on the basis of an undertaking by the applicants backed by the said R.P. Tech Vision (India) Pvt. Ltd. to revive the company and to pay off the creditors passed the order staying all further proceedings in the winding up. The interim order was extended from time to time merely for asking in order to ensure that the attempts of revival of the company in liquidation and payment of the dues of the creditors might fructify. But it is more than clear to me that the undertaking to revive the company and to pay up the dues of the creditors was nothing more than a hoax which is proved by the fact that Brother Bose, J. in his order dated 22nd September 2009 passed in CA No. 651 of 2009 which originally was given TA No. 47 of 2009 recorded as follows:

As per direction of this Court, a meeting was held on 14th September 2009 in which a proposal for revival of the company was expected to be discussed. On that date, however, there was no financier with commitment to invest money into the company, which is necessary for its revival.

12. The law on the subject was elaborately discussed by this Court in the case of Mahavir Prasad Agarwalla v. Ashkaran Chattar Singh reported in 1985 CWS 557 wherein after considering the English and Indian authorities the following view was expressed:

Therefore, from the above principles which has been summarised in different authorities and the decision referred to hereinabove it appears that the discretion for stay u/s 466 can only be exercised by the Court (1) if the Court is satisfied on the materials before it that the application is bonafide, (2) the Court would be guided by the principles and definitely come to the finding that the principles are applicable to the facts of a particular case, (3) mere consent of all the creditors for stay of winding up is not enough, (4) that offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough, (5) Court will consider the interest of commercial morality and not merely the wishes of the creditors and contributories, (6) Court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation, (7) a firm and accepted proposal for satisfying all the creditors must be before the Court with material particulars, (8) the jurisdiction for stay can be used only to allow in proper circumstances a resumption of the business of the company, (9) the Court is to consider whether the proposal for revival of the company is for benefit of the creditor but also whether the stay will be conducive or detrimental to commercial morality and to the interest of the public at large, (10) before making any order Court must see whether Ex-directors have complied with their statutory duties as to giving information to the Official Liquidator by furnishing the statement of affairs, (11) and any other relevant fact which the court thinks fit to be considered for granting or not granting the stay having regard to the peculiar facts of a particular case.

13. As already indicated by the application registered as CA No. 699 of 2009 the

prayer of stay of the winding up proceedings u/s 466 of the Companies Act has been jettisoned. Now the prayer is that winding up should be made in such a fashion that the fruits of the winding up are reaped by R.P. Tech Vision (India) Pvt. Ltd. and the employees. I am pretty sure that the employees have also been used, if at all, merely as the front men for the purpose of grabbing the fruits of the winding up by the said R.P. Tech Vision (India) Pvt. Ltd. The authority allegedly given to Shri Dayal Saha and Shri Pradip Bandyopadhyay by 117 employees of the company in liquidation is for revival of the company and not for sale of the assets thereof in favour of the said R.P. TechVision (India) Pvt. Ltd. The authority letter dated 18th August 2009 provides, inter alia, as follows:

The said representatives are hereby duly authorised to take stand as they think fit and proper for revival of the said Company through R.P. Techvision (India) Pvt. Ltd. inasmuch as in terms of our request the said Company has come up for protection of our interest with a view to revive the said Company in Liquidation.

14. Even assuming that the applicant Pradip Bandyopadhyay had the backing of 117 employees of the company in liquidation it cannot be said that the said applicant has been authorised to apply for sale of the assets of the company in liquidation to the said R.P. Tech Vision (India) Pvt. Ltd. I am pretty sure that the interest of the employees shall soon be jettisoned by R.P. Tech Vision (India) Pvt. Ltd. in the same manner as the interest of the creditors and the company in liquidation sought to be protected in CA No. 651 of 2009 has been jettisoned within a matter of 2/3 months. In any event Court has no jurisdiction to short-circuit the due process of law. The winding up has to continue in accordance with law.

The chief aim of every system of Bankrupt Law should be to combine and regulate two great objects: 1st, The distribution of the effects of the debtor in the most expeditious, the most equal, and the most economical mode; and secondly, the liberation of his person from the demands of his creditors when he has made a full surrender of his property (See Henley's Bankrupt Law, 3rd Edn., p.1)

He [bankrupt] was formerly considered merely in the light of a criminal or offender; ...but at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors (see Blackstone's Commentaries, vol. 2 pp.471-472)

15. Before any scheme or proposal for revival of the company can be acceded to the court has necessarily to see whether the scheme contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529A of the Act. Of course, the court has to see to the bona fides of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the company in liquidation. See

16. There can be no reason why the assets of the company in liquidation should be sold at a price to be valued by the valuer. Sight cannot be lost of the fact that the company in liquidation is a prestigious and popular TV channel known as "Kolkata TV" which has tremendous goodwill and reputation in the market which is many times more valuable than the value of the tangible assets of the company in liquidation.

17. I am also inclined to think that there is a competition between the intending buyers of the business of this company. A significant hint in that regard has been given in the application being CA No. 651 of 2009 in paragraph 18 which reads as follows:

Subsequent thereto, the representative of the said T.V.-9 met with our representatives and started showing interest in the company for obvious reason but what has happened in the recent past we say that the said T.V.-9 is also responsible for the downfall of the company and cannot be trusted by the employees afresh.

18. In paragraph 12 of that application there is an allegation that the said TV 9 has misappropriated more than Rs. 12 crores of the company in liquidation. Therefore this aspect of the matter needs investigation by the official liquidator.

19. What is further significant is the fact that in paragraph 16 of the application being CA No. 651 of 2009 and paragraph 14 of the CA No. 699 of 2009 there is reference to a director of R.P. Tech Vision (India) Pvt. Ltd. but nowhere has his name been disclosed. In paragraph 14 of CA No. 699 of 2009 there is also an allegation that the promoters of the company in liquidation had also requested the said unidentified director of R.P. Tech Vision (India) Pvt. Ltd. to take over the management of the company in liquidation and for revival thereof. Therefore the nexus between the R.P. Tech Vision (India) Pvt. Ltd., TV 9 and the promoters of the company in liquidation remains a matter of great mystery requiring thorough investigation by the official liquidator. Mismanagement on the part of the promoters of the company in liquidation has been alleged in paragraph 1 of the CA No. 651 of 2009.

20. By the order dated 1st September 2009 Brother Bose, J. directed that "Account shall be maintained for expenditure incurred during this period as also of earnings from advertisements or other sources " but strangely there is no information made available to the Court as regards the revenue generated by the company in liquidation after the order dated 1st September 2009 was passed. There is indeed a suggestion that more than Rs. 9 crores were injected by R.P. Tech Vision (India) Pvt. Ltd. which were spent in meeting the operating expenses and paying the creditors as would appear from annexure "E" to the CA No. 699 of 2009. But there is nothing to show the income which was or should have been generated out of the operation. This read with the prayers made in the CA No. 699 of 2009 noticed above leaves no manner of doubt that this application has

been made with an ulterior object seeking to take away the assets of the company in liquidation without paying any consideration therefore.

21. It is already clear that both the applications have to be dismissed but the question remains whether any consequential order has to be passed particularly with regard to the sum of Rs. 2 crores deposited with the official liquidator pursuant to an order of Court. The question of refunding the sum of Rs. 2 crore, in my view, cannot arise at this stage. The official liquidator has to make an enquiry into the dealing and transactions subsequent to and pursuant to the order dated 1st September 2009. The question of refund of the said sum of Rs. 2 crores may only arise after the Court is fully satisfied that the company in liquidation when the official liquidator resumed possession was not poorer than what it was on the day when the order of winding up had been passed.

22. For the aforesaid reasons both the applications being CA 651 of 2009 and CA 699 of 2009 are dismissed with costs assessed at 600 G.Ms. payable to the official liquidator by an account payee cheque. All interim orders are vacated. The official liquidator is directed to resume possession forthwith and to start investigation in accordance with law.

23. Urgent xerox certified copy of this judgment, be delivered to the learned Advocate for the parties, if applied for, upon compliance of all formalities.