

(2014) 08 CAL CK 0104

In the Calcutta High Court

Case No : A.C.O. Nos. 38, 58, 62, 64, 133 and 134 of 2014, A.P.O.T. No. 122 of 2014 and C.P. No. 2 of 1987

The Baranagore Jute Factory Plc.

APPELLANT

Vs

Shreekishan Omprakash

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Companies Act, 1956 — Section 466

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 3(i)(o)

Citation : (2015) 2 CHN 64

Hon'ble Judges : J. Bhattacharya, J; Ishan Chandra Das, J

Bench : Division Bench

Advocate : Partha Sarathi Sengupta, Sr. Adv., Abhrajit Mitra, Sarvopriya Mukherjee, Rudrajit Sarkar, Reetobroto Mitra and Aniruddha Agarwal, Advocate for the Appellant; Saktinath Mukhopadhyay, Sudipto Sarkar, Jayanta Kumar Mitra, Sr. Advs., Sanjib Kr. Mal, Atanu Roy Chowdhury, Dibanath De, R. Banerjee, R.K. Mitra, S. Chowdhury, J.R. Chatterjee, A. Chatterjee, D. Chowdhury, Debasish Kundu, Majdoor Sangha, Joydeb Ghorai, S. Ganguly, S. Sarkar, R. Rakhecha, Utpol Bose, C. Chowdhury, Promit Roy, K.M. Tapuria, A. Kanodia, Deepak Kr. Singh, S. Paramanik, Ajitsaria, Manju Agarwal, Nilay Sengupta and Bajrang Manot, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Jyotirmay Bhattacharya, J.—This appeal arose out of an order passed by the Company Court on 20th February, 2014 on an application taken out by the appellant/petitioner praying for direction to make over the money deposited with the Registrar, Original Side, High Court, Calcutta in terms of the order passed on 23rd February, 2011 together with interest to the appellant/petitioner. The relief which was claimed by the appellant/petitioner was not granted by the Company Court instantly as the Company Court was informed that the competence of the appellant/petitioner to obtain an order for refund, is seriously under challenge in one of the 9 applications pending for consideration before the Company Court. Accordingly, the appellant/petitioner was directed to serve copy of the said

application upon such of the parties as may desire to have a copy thereof so that affidavits-in-opposition may be filed by those parties who intend to file such affidavit-in-opposition in the said proceeding and all the pending applications can be disposed of after exchange of affidavits between the parties.

2. The legality and/or propriety of the said order is under challenge in this appeal at the instance of the appellant who sought permission to withdraw the money deposited with the Registrar, Original Side, High Court, Calcutta in terms of the order passed on 23rd February 2011. In connection with this appeal, several applications were taken out by several applicants praying for their addition as parties to this appeal. One of such applications for addition of party was filed by the Workers Union, affiliated to INTTUC. The said application was registered as A.C.O. No. 58 of 2014. The Workers Union has also taken out another application being A.C.O. No. 133 of 2014 praying for leave to intervene in the present appeal. Prayers in both the applications are almost identical. Identical prayer for addition was made by some of the shareholders of the said company in their application which was registered as A.C.O. No. 64 of 2014. Another application for addition of party was filed by some unsecured creditors which was registered as A.C.O. No. 134 of 2014. Besides a regular appeal being A.P.O.T. No. 230 of 2014 was filed independently by a shareholder who also filed an application for addition as party in this appeal giving rise to A.C.O. No. 64 of 2014. The said appeal was filed by the said shareholder as its prayer for appointment of Administrator for managing the affairs of the said company which it claimed in its application being C.A. No. 26 of 2014 was not virtually allowed by the Learned Company Court while passing the impugned order on 20th February, 2014.

3. Marathon argument was advanced by Learned Counsels in support of the applications filed by their respective clients. Though no formal order was passed for impleading those applicants as parties to the appeal but all the applicants were heard by this Court on the merit of this appeal as in course of hearing of this appeal, we considered it fit to hear all such applicants as we found that they were vitally interested in the ultimate fate of the appeal. Thus we allowed them to intervene as pro inter se suo interveners.

4. In fact the competence of the appellant to obtain an order for refund is seriously under challenge in one of the applications filed by one of such interveners, which is pending before the Learned Company Court.

5. Before entering into the merit of this Appeal, let us give the short background of the case leading to filing of this appeal. Baranagore Jute Factory PLC (hereinafter referred to the company) went into liquidation in 1987. However, subsequently in 1988 the winding up order was stayed until further orders. Taking over possession of the assets of the company by the official liquidator was stayed and the company was allowed to run its business under the Committee of management constituted by the Company Court, to revive the said company in term of the revival scheme accepted by the Court. Subsequently, a B.I.F.R. proceeding was set into motion for declaring the said company as "Sick

Company". In the said proceeding a question cropped up as to applicability of the Sick Industrial Companies (Special Provisions) Act, (hereinafter referred to as the said Act) to the said company as the said company was incorporated in a foreign country. The Writ Court answered the said question in the negative. Appeal Court reversed the decision of the Writ Court. The BIFR proceeding wherein the Baranagore Jute Factory PLC was sought to be declared as a "sick company" went upto the Hon"ble Supreme Court wherein the Hon"ble Supreme Court after taking note of the fact that the said company received a sum of Rs. 170 crores approximately by way of acquisition compensation and a sum of Rs. 95 crores was paid by National Highway Authority of India to the said company which is presently lying with the Registrar, Original Side, High Court, Calcutta and the company would be left with a surplus of about Rs. 50 crores after meeting all its losses and liabilities, held that the said company can no longer fall within the ambit of the expression "sick industrial company" as defined in Section 3(i)(o) of the SICA. Considering the improved financial health of the said company, the Hon"ble Supreme Court held that the question as to whether the company, which was incorporated and registered in England having its business and assets in India can maintain any application for reference before the Board of Industrial and Financial Reconstruction (in short BIFR) under the provision of Sick Industrial Companies (Special Provision) Act has practically become academic and redundant. Hence without deciding the said question finally, the SLP arising out of the said BIFR proceeding was disposed of by the Hon"ble Supreme Court without making any observation therein as to the entitlement of any particular group of shareholders to run and manage the affairs of the said company, and the said issue was left open to be decided by any forum competent in law. Even the issue as to whether the winding up proceeding against the said company was permanently stayed or not, remained unanswered in the said Special Leave Petition. The Hon"ble Supreme Court declined to make any observation on the said issues as the parties made conflicting contentions on the issue regarding rights of particular group of shareholders viz. the Appellant herein to control the management of the company and further due to the reason that the interveners did not concur with the appellant on the issue regarding permanent stay of the winding up proceeding against the said company, which according to them, is yet to be decided by the High Court.

6. It is worth mentioning here that though an application was filed by the appellant before the Hon"ble Supreme Court praying for permission to withdraw the amount deposited with the Registrar (Original Side), High Court, Calcutta but neither the said application was placed before the Hon"ble Supreme Court nor any order was passed by the Hon"ble Supreme Court on the said application of the appellant. After disposal of the said Special Leave Petition, the appellant herein, claiming to be the present Directors of the said company filed an application before the Company Court praying for leave to withdraw the money deposited with the Registrar (Original Side), High Court, Calcutta. Some other reliefs were also claimed by the appellants in the said application before the

Learned Company Court.

7. After taking note of the rival contentions of the parties regarding the scope of enquiry in several pending applications including one, wherein the competence of the appellant herein to obtain an order for refund of the said deposited money is seriously under challenge, the Learned Company Court thought it fit to decide all those pending applications including the applications made by Judges' Summons taken out by M/s. L.P. Agarwalla & Co. supported by an affidavit affirmed by one Sri Vijay Pugalia on 10th December, 2013, registered as TA No. 125 of 2013, praying for direction to make over the money deposited in terms of the order dated 23rd February, 2011 together with interest to the applicants, at a time. Accordingly, direction was given to the appellant/petitioner to serve copy of the said application upon such of the parties who may desire to have a copy thereof so that the affidavits may be exchanged between the parties who are interested to file such affidavits in the said proceeding and all those applications can be decided simultaneously after exchange of affidavits between the parties.

8. The legality and/or validity of the said order passed by the Learned Company Court on 28th February, 2014 in TA No. 125 of 2013 heard alongwith the other pending applications, is under challenge before us in this Letters Patent appeal.

9. Let us now consider the legality of the said order in the facts of the instant case. On overall consideration of the facts before us, we are of the view that the entitlement of the appellant/applicant to receive the money deposited with the Registrar (Original Side), High Court, Calcutta largely depends upon the fate of a pending application filed by one of such interveners, wherein entitlement of the appellant/applicant to receive the said deposited money, was disputed. The said application is still under consideration before the Company Court.

10. In this regard Mr. Sengupta, Learned Senior Counsel, appearing for the appellant tried to impress upon us that the said issue is no longer res integra as the said issue had already been decided by the Hon'ble Supreme Court on 24th May, 2006 while disposing of Civil Appeal No. 4101-4103 of 2004. Drawing our attention to the said judgment, where the company was described as a going concern and a reference was made about the permanent stay of the winding up proceeding granted u/s 466 of the Companies Act, 1956, Mr. Sengupta, Learned Senior Counsel contended that the dispute which some interveners are now trying to raise by contending that the winding up proceeding against the said company is still alive, is contrary to the aforesaid finding of the Hon'ble Supreme Court made in Civil Appeal No. 4101-4103 of 2004. Mr. Sengupta, thus, contended that since the Hon'ble Supreme Court has already declared that the winding up proceeding has been permanently stayed, the said issue cannot be reagitated before the Company Court, as according to him, it is now a closed chapter. He thus submitted that since his client being the Directors of the said company are now in control and management of the affairs of the said company, they have the right to receive the money deposited to the credit of the said company with the Registrar (Original Side) of this High Court.

11. Such contentions of Mr. Sengupta, was refuted by the Learned Counsels appearing for different groups of interveners, i.e., the shareholder, the workers union and the unsecured creditors, as according to them the issue as to whether the winding up proceeding has been permanently stayed or not is still an alive issue which is required to be resolved by the Company Court.

12. Contradictory stand, taken by the parties against each other on the issue of permanent stay of the winding up proceeding, leads us to investigate deep into the matter to find out the present stage of the said winding up proceeding. In this regard, it is worth mentioning here that apart from mentioning that the Company is a going concern and the winding up proceeding against the said company has been permanently stayed u/s 466 of the Companies Act, 1956, by the Hon"ble Supreme Court in the said judgment dated 24th May, 2006 passed in the Civil Appeals No. 4101-4103 of 2004, the order passed by the Company Court and/or any other competent Court staying the winding up proceeding against the said company permanently u/s 466 of the Companies Act, 1956, could not be produced before this Court by the appellant/petitioner in spite of repeated insistence of this Court. An order of permanent stay of the winding up proceeding is a judicial order to be passed by the Company Court u/s 466 of the Companies Act, 1956, which the appellant/petitioner has failed to produce before this Court.

13. In this regard, our attention was drawn by the Learned Counsels appearing for the different groups of interveners, such as the shareholders, the Workers Union and the unsecured creditors, to several orders passed by the Company Court and/or the Appeal Court in connection with the winding up proceeding, and/or the appeal arising therefrom as well as the orders passed by the Writ Court and/or the Appeal Court in connection with the BIFR proceeding and/or the appeal arising therefrom which clearly indicate that sometimes Committee of Management was constituted by the Company Court and/or the Appeal Court to run the management of the said company and sometimes Special Officers were appointed by this Court either in the winding up proceeding or in the said BIFR proceeding to discharge certain specified duties and sometimes Board of Management was constituted for running the business of the said company by the Court in the BIFR proceeding and some of such orders were passed long after the order was passed by the Hon"ble Supreme Court on 24th May, 2006 in the aforesaid Civil Appeal Nos. 4101-4103 of 2004. If the winding up proceeding was permanently stayed, then how the affairs and the management of the said company were directed to be managed by the Committee of Management and/or the Board of Management and/or under the supervision of the Special Officer. Was the Official Liquidator who was directed to take charge of the assets of the company was ultimately discharged by the Company Court? When and in which opportune moment the appellants took control over the management of the said company? Whether exclusion of Chaitan Chowdhury and Ridh Karan Rakecha from the Board of Directors was justified or not? Whether the Committee of Management and/or the Board of Management was ultimately dissolved by the

Court or not? Whether the Special Officer appointed by the Court was discharged or not? Whether the company is still running its business as per the revival scheme or not? Thus the ultimate question is: Is the company still under liquidation? We do not find any answer to these questions from the materials on record and without resolving these issues, we cannot come to a definite conclusion as to whether the winding up proceeding against the said company was permanently stayed or not.

14. That apart we find that when acquisition compensation money was payable to the company by the National Highway Authority, one of the interveners filed an application praying for injunction for restraining the National Highway Authority from paying the acquisition compensation money to the Appellants and the Company Court ultimately passed an order on 23rd February, 2011 restraining the National Highway Authority of India from making any payment on account of compensation to the company in liquidation, except by way of an Account Payee cheque to the Registrar, Original Side, High Court, Calcutta. The Registrar, Original Side, High Court, Calcutta upon receipt of such payment shall keep the same in a short term fixed deposit, subject to further order of the Court with the SBI Main Branch. While passing the said order, it was recorded by the Company Court that the said company was described as a company in liquidation as already winding up order was passed by this Court and the fuller effect of that order was yet to be examined. The parties accepted the said order. However, we feel that there is a grey area on the issue as to whether the winding up proceeding against the said company has been permanently stayed or not and we feel that some further research is yet to be made to resolve the said dispute. Such research is necessary to ascertain the right of the appellant to manage the affairs of the said company as the Directors of the company inasmuch as the management of the company cannot be controlled by the Board of Directors of the company when the company is in liquidation. Thus we hold that the appellants' right to withdraw the deposited money depends upon the fate of such research. However, such research cannot be completed without affidavits being exchanged between the parties. We do not want to do the exercise as the Company Court has not yet decided these applications finally, and if we do this exercise at this stage, the aggrieved party will lose a forum of appeal for challenging our order on this issue.

15. Considering the amount of deposit which the appellants want to withdraw, and the company's indebtedness to its various creditors and the quantum of its liability, coupled with the facts that even the workers have not been paid their dues, we do not feel it safe to allow a particular group of shareholders, who are described as interloper by the creditors, to withdraw the money deposited with the Registrar, Original Side of this Court without deciding the said issue finally, particularly when we find that the appellant/applicant themselves have filed an application being C.A. No. 957 of 2010 praying for permanent stay of the company petition No. 2 of 1987 which is yet to be decided finally. In the aforesaid context, we do not find any illegality in the impugned order passed by

the Learned Company Court proposing to dispose of all the pending applications simultaneously.

16. Before parting with we also feel it necessary to mention the contention of Mr. Jayanta Mitra, Learned Counsel appearing for some of the unsecured creditors that the appeal does not lie against the impugned order as the impugned order cannot be said to be a "judgment" attracting the provision contained in the Clause 15 of the Letters Patent for challenging such an order passed by the Company Court in appeal, as no right of the parties and/or any controversy in question in any ancillary proceeding and/or any part of the proceeding was decided by the Company Court in passing the impugned order. In support of his submission, he relied upon a decision of the Hon'ble Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, We have considered the said judgment with great anxiety and we find much substance in such contention of Mr. Mitra as we find that the rights of the parties and/or any controversy between the parties has not been finally decided by the Company Court by the impugned order. As such the appealability of the impugned order is also doubted by this Court.

17. Accordingly, we do not find any merit of this appeal. The appeal, thus, stand dismissed.

18. The order impugned is affirmed.

19. The appellants are, thus, directed to serve copy of the application upon all the parties including the interveners who desire to have a copy thereof, so that the affidavit-in-opposition may be filed by them in connection with the pending application. Such service should be effected within a week from date. Affidavit-in-opposition to be filed by those parties who desire to contest the said proceeding within two weeks from the date of service of the copy of this application, reply, if any be filed within a week thereafter. Liberty to mention before the appropriate Bench for earlier hearing of the pending applications.

20. The appeal and all connected applications are, thus, disposed of.

21. The urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

Ishan Chandra Das, J.

22. I agree