In Re: P.P. De and Co.

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Court : Kolkata

Decided On : Dec-14-1950

Reported in : AIR1953Cal309,[1951]21CompCas215(Cal),55CWN271

Judge : Bachawat, J.

Acts : Companies Act, 1913 - Sections 211 and 216

Appeal No. : Civil Matter No. 576 of 1950

Appellant : In Re: P.P. De and Co.

Advocate for Pet/Ap. : R. Chowdhuri, Adv.;A.K. Sen, Adv.;S.C. Sen, Adv.

Judgement :

Bachawat, J.

1. This is an application on the part of Messrs. M. L. Mallick and D.N. Das who are the liquidators of Messrs. P. P. De & Co. Ltd. for an order that all attachment and certificate proceedings initiated for realisation of income-tax and sales tax be stayed and for an order setting aside the attachment and execution put in force against the estate and effects of the company for realisation of income-tax and sales tax and for other reliefs. The company went into voluntary liquidation by a special resolution of the members on 7-3-1949.

2. It appears that the Union of India and the State of West Bengal are claiming large sums on account of income-tax and sales tax respectively and they seek to realise their claim by execution and attachment of the properties of the company. The notice of motion was served upon the Union of India, the Income-tax Officer, Companies District I and the Commercial Tax Officer, Central Section, West Bengal. The notice of this application was not served upon the State of West Bengal, but Mr. Samaren Sen who is instructed by the solicitor to the State of West Bengal appeared on behalf of the State and waived service of the notice of motion and I have proceeded upon the footing that the State of West Bengal is adequately represented in these proceedings.

3. The question whether and under what circumstances the petitioners are entitled to restrain the respondents from realizing their claims by execution and attachment has been very much debated before me.

4. The relevant sections of the Indian Companies Act are as follows: --

Section 211 -- Subject to the provisions of this Act as to preferential payment the property of the company shall, on its winding up be applied in satisfaction of its liabilities 'pari passu' and subject to such application shall, unless the Articles otherwise provide, be distributed among the members according to their rights and interests in the company.

Section 216(1)-- The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects by the company after the commencement of the winding up.

(3) The Court, if satisfied, that the determination of the question or the regular exercise of power or the order applied for will be just and beneficial, may accede

wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks fit.

5. Mr. Chowdhury appearing on behalf of the applicant contended that in case of a voluntary liquidation if an execution is put in force against the estate of the company after the commencement of the winding up, such execution should be set aside as a matter of course in the absence of special circumstances. On the other hand, Mr. A.K. Sen and Mr. Samaren Sen appearing on behalf of the respondents contended that in the case of a voluntary liquidation unless a special case is made out such stay ought not to be granted.

6. The practice as to stay of execution proceedings prevailing in England is stated in the following words by Scrutton L. J. in --'Anglo Baltic and Medeterranean Bank v. Barber & Co.', (1924) 2 KB 410 at pp. 417 and 418: --

'While that action was proceeding, on 8-3-1921, Barber & Co went into voluntary liquidation. The effect of that was that by Section 186 of the Companies Act, the assets of the company became divisible equally among the creditors 'Pari passu' and the result of that statutory provision has been that the powers of the Court to stay the actions against a company in compulsory liquidation have been extended in practice to companies in voluntary liquidation, and 'it is now the almost invariable practice' when a company is in voluntary liquidation to stay proceedings in an action against it, because the result of allowing a judgment creditor to proceed to execution might be that, instead of the assets being divided among the creditors 'pari passu', the judgment creditor, by enforcing his judgment, would obtain an advantage over the other creditors. * * * But it is only in very special circumstances such as these that the Court will depart from its general practice of staying execution when the company is in voluntary liquidation for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets 'pari passu'.'

In that case the Appeal Court stayed execution proceedings against the company in voluntary liquidation and discharged garnishee order 'nisi'.

7. The latest case on this point is --'In re Margot Bywaters Ltd.', (1942) 1 Ch D 121, at p. 123, where Simonds J. observed as follows: --

'Where the liquidation is voluntary it is necessary for the liquidator to come to the Court to have the distress proceeding stayed, and the Court will stay them unless there be extraordinary reasons or exceptional circumstances which justify their continuance. * * * It is contended on behalf of the Crown that this is an assessed tax with regard to which preference is given by Section 264, Companies Act, 1929, and, therefore, this case does not differ from any other case in which the creditor who is not entitled to any preference is seeking in a liquidation to enforce otherwise than by proof his claim against a debtor.'

The result of these authorities seem to be that except in the case of preferential creditors, the Court will as a matter of course and in the absence of special circumstances stay execution proceedings against a company in voluntary liquidation because the result of allowing a judgment creditor to levy execution would inevitably interfere with the scheme of distribution of the assets 'pari passu' amongst the creditors in accordance with Section 211, Indian Companies Act.

8. Mr. A.K. Sen relied upon the case of --'Liquidators Marwar Bank Ltd. v. Pannalal', 27 Ind Cas 685 (Lah) where the question arose as to whether an action against a company in voluntary liquidation should be stayed. In that case the claim of the plaintiff was disputed by the company and the question arose as to whether the proceedings to establish the claim by ordinary action should be restrained. Shadilal J. refused to restrain the plaintiff from proceeding with the suit. He relied upon the judgment of --'Currie v. Consolidated Kent Collieries Corporation Ltd.', (1906) 1 K.B. 134. In the latter judgment it is pointed out that where the existence of a debt or liability is substantially admitted but the exact amount of liability was disputed the ordinary practice is to restrain the plaintiff from proceeding with his suit but where there was a real dispute as to the existence of liability the suit ought not to be restrained. It is to be noticed that 'Curry's case' and the case reported in 27 Ind Cas 685 (Lah), deal with the question of the stay of a suit. None of those cases relate to stay of execution proceedings. It is to be observed that there is an essential distinction between these two types of cases. In the case of execution

proceedings the distribution of assets is necessarily interfered with if the execution is allowed to proceed whereas in the case of an action to establish a claim there is no question of interference with the distribution of assets and it is preferable, when the company is in voluntary liquidation, to have a disputed claim established in Court rather than to have it established before the liquidators. This distinction is pointed out in the judgment of Tekchand J. in --'Buta Singh & Sons Ltd. v. People's Bank of Northern India Ltd.', AIR 1931 Lah 589, where the learned Judge distinguished the earlier case reported in 27 Ind Cas 685 (Lah), and restrained the execution proceedings.

9. The company was assessed for the sum of Rs. 11658/9/- in respect of income-tax for the year 1943. It is alleged by the petitioner that in fact no income-tax is payable for the year. An appeal has been filed in respect of that assessment and the Appeal is still pending but it is admitted by the petitioner that if any moneys are due to the Union of India in respect of the 1943 income-tax the Union would be entitled to rank as a preferential creditor inasmuch as the demand notice in respect of such tax was served on the company before it went into voluntary liquidation. There have also been assessments of income-tax in respect of periods subsequent to 1943 and large sums of money are claimed by the Union of India to be due to it in respect of such assessments. The demand notices in respect of such assessments were served on the company after it went into voluntary liquidation and the petitioners claim that the Union of India is not entitled to the preferential payment of income-tax subsequent to 1943. There is no doubt about the bona fides of this contention of the petitioners having regard to Section 230, Indian Companies Act.

10. It is alleged on behalf of the petitioners that a sum of over Rs. 7000/- has been realised by and/or paid to the Union of India. It is also alleged that besides this sum other sums have also been realised by the Union of India but the petitioners are unable to give particulars of such realisation. This statement is not categorically denied in the affidavit-in-opposition and I am unable to ascertain at present what sum precisely have been recovered by the Union of India. It is to be observed that the contention of the applicant is that on a proper assessment no tax would be payable to the Union of India in respect of the year 1943. I have no

doubt that there is a serious dispute pending between the Union of India and the petitioners as to the amount of income-tax payable to the Union of India in respect of the year 1943 & the subsequent periods. It is impossible to say at the present moment what sum of money is due to the Union of India on account of income-tax, and to what extent, if at all, the Union of India is entitled to any preferential payment. The result is that so far as the Union of India is concerned, I must deal with this case on the footing that the Union of India has not established its claim to rank as preferential creditor in respect of any definite sum of money. On that footing it does not appear to me that there are any exceptional circumstances in this case which ought to entitle the Union of India to proceed with the execution proceedings.

11. I have no doubt that the Union of India and the State of West Bengal are bound by the provisions of the Indian Companies Act and by the scheme of administration of companies in liquidation laid down by that Act and are not entitled to any preferential rights or treatment or to any prerogative save and to the extent expressly provided for in that Act. This proposition as not and cannot be disputed having regard to the judgment of the --'Federal Court in Governor General in Council v. Shiromani Sugar Mills Ltd.', 50 Cal WN (F.R.) 10.

12. It is contended by counsel for the respondents that the declaration of solvency is not an honest statement and that the company is really insolvent. On the other hand, it is contended by the petitioner that there has been arbitrary assessment in respect of income-tax and that the real amount of income-tax payable to the Union of India is much less than what is demanded by the Union of India. It is too early to say what would be the result of the pending appeals in the income-tax proceedings and, I am not satisfied at present that there has been any false statement in the declaration of solvency.

13. It is also urged by counsel for the respondents that there has been a long delay in the liquidation proceedings and for the last one year and a half practically nothing has been done, but on the other hand, it is pointed out by Mr. Chowdhury that there are large number of outstandings to be realised and a number of jobs have to be completed and such completions have been undertaken and the jobs

are being completed. I do not think that there has been any extraordinary delay in the liquidation proceedings or that there are any exceptional facts in so far as the Union of India is concerned which ought to entitle them to continue the execution proceedings.

14. With regard to the state of West Bengal large sums of money are due to it on account of sales tax. In respect of sales tax for the period subsequent to December 1945 the demand notices in respect of such tax was served upon the company after it went into voluntary liquidation and consequently it is disputed that the State is entitled to rank as preferential creditor in respect of such tax. I will not decide this dispute but there is no doubt that this dispute is fairly raised by the petitioners. With regard to sales tax for the period April 1944 up to December 1945 the company was assessed at a sum of Rs. 7779/11/6. The State of West Bengal has received certain sums of money in respect of such tax and on behalf of the petitioners it is contended that no more than Rs. 4141/9/6 is due to the State in respect of the tax for the period April 1944 to December 1945.

For the purpose of this application I cannot safely assume that a sum of more than Rs. 4141/9/6 is due to the State in respect of sales tax for such period. Demand notice in respect of this tax was served on the company before it went into voluntary liquidation and consequently it is admitted by the petitioners that the State of West Bengal is a preferential creditor for the sum of Rs. 4141/9/6. With regard to the rest of the claim of the State of West Bengal I cannot safely assume that it is a preferential creditor at all. I have, therefore, no doubt that the State of West Bengal should in the absence of any special circumstances be restrained as a matter of course from realising by execution any portion of its claim over and above Rs. 4141/9/6. Mr. Chowdhury contends on the authority of an unreported judgment of Sinha J. in the matter of Suburban Bank Ltd.' that the State of West Bengal ought to be restrained from realising even its preferential claim pending liquidation proceedings. In the case before Sinha J. there was a serious dispute between the parties as to whether Union of India was entitled to be a preferential creditor in respect of this income-tax dues. Sinha J. after noting the respective contentions of the parties observed as follows:

'I do not think that I should decide the question now. That question has to be decided at the time when the time for distribution arrives. Even if the Income-tax authorities are entitled to preferential payment, they would have to take rateably with preferential creditors in case of insufficiency of assets. The question of priority should be considered in the presence of the creditors who are entitled to a share in the distribution of assets. Till that time arrives, no payment should be made on account of income-tax assessed.'

15. It is to be observed that in the case before me the claim of the State of West Bengal to a preferential treatment in respect of Rs. 4141/9/6 is admitted by petitioners. It is not alleged that there are any preferential creditors other than the Union of India. The Union of India, however, does not desire that the State of West Bengal should be restrained from realising its claim. In fact Mr. A.K. Sen on behalf of the Union of India expressly requested me to allow the State of West Bengal to realise its claim by execution. I am not prepared to hold that in the case of admitted preferential claims as a matter of course the preferential creditor ought to be restrained from executing this decree. It seems to me that ordinarily he ought not to be restrained unless there are special circumstances justifying that course. It does not appear that there are any special circumstances in this case justifying the State of West Bengal from realising by execution its admitted preferential claim for Rs. 4141/9/6.

16. I will not determine finally the rights of the parties nor will I determine to what extent, if any, either the State of West Bengal or the Union of India is entitled to preferential payment. That question may be determined at a later stage but to the extent the claim of the State of West Bengal to a preferential payment is admitted, I will not restrain execution proceedings unless the amount of such claim is paid into the hands of Mr. N.C. Mitra, attorney to the State of west Bengal.

17. Mr. Chowdhury's client through him has, however, given an undertaking to pay Rs. 4141/9/6 to Mr. N.C. Mitra, attorney for the State of West Bengal by Monday next. In the circumstances, I am satisfied that it is just and beneficial that the respondent should be restrained from realising by execution the amounts payable by the petitioners on account of income-tax and sales tax. Under Section 216,

Indian Companies Act I am entitled to impose on the petitioners suitable terms and conditions to safeguard the interest of the respondents and Mr. Chowdhury does not object to such terms being imposed upon the petitioners.

18. There will be, therefore, an order in terms of prayers A and C of the petition. The order against the State of West Bengal is made on the footing of the above undertaking. The respondents are entitled to the costs of and incidental to the attachment and execution proceedings. The respondents are also entitled to the costs of this application. Certified for counsel. The costs of this application and of the attachment and execution proceedings will be paid out of the assets in the hands of the Liquidator. The point whether such costs ought to be paid out of the assets has not been fully argued and this order should not be treated as a precedent.

The Liquidators have also given an undertakingthat they will make an inventory of the assetsof the Company as best as they can by the 7thJanuary and will supply the respondents withcopies of such inventory. They have also givenan undertaking that they will forthwith allow therespondents or their duly authorised agents toinitial all the books of account of the companyand they also will allow the respondents to inspect and take copies of such books of account,during reasonable hours. Such inspections andtaking of copies must be completed by 3-1-1951.The Liquidators have also given an undertakingnot to distribute any of the assets amongst thecreditors without a fortnight's notice to the respondents. Liberty is also given to the respondentsto inspect and take copies of the books of accountof the company periodically every month uponthree days notice to the attorney of the petitioner.Such inspection may be made and copies may betaken by the attorneys or the duly authorisedagents of the respondents but the inspection andthe copies must be completed in course of oneday. The sum of Rs. 4141/9/6 to be paid to Mr.N.C. Mitra attorney for the West Bengal will beheld by him free from all lien subject to furtherorders of the Court.