RobIn Paul and anr. Vs.

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Court : Kolkata

Decided On : Mar-15-2011

Judge : Patherya, J.

Acts : Companies Act - Section 466; Contract Act - Sections 140, 141

Appeal No. : CA NO. 293 OF 2004; CP No. 324 of 2001; CA No.419 of 2006.

Appellant : RobIn Paul and anr.

Respondent : The Official Liquidator

Advocate for Def. : Mr. M. C. Ghosh; Mrs. M. Sen; Mr. Amar Mitra; Mr. Abhrajit Mitra, Mr. S. K. Kundu; Mr.S.Ghosh, Advs.

Advocate for Pet/Ap. : Mr.P.C Sen;Mr. Reetobroto Mitra; Mr.A. Mitra; Mr. Debdutta Sen; Mr.M. K. Seal, Advs.

Judgement :

1. This application has been filed under Section 466 of the Companies Act, 1956 for stay of the winding up order dated 8th July, 2003. The case of the petitioner is that it is a contributory having more than 60% of the total issued and paid up share capital. In view of the winding up petition filed by an unsecured creditor and the inability of the company to make payment an order of winding up was passed on 8th July, 2003. A direction for payment was also passed but no payment could be made and advertisements were published. Although best efforts were made to make payment of the bona fide dues of the creditors and to run the garden, the

same could not be made. Subsequently some of the claims of the unsecured creditors were settled and the applicant is ready and willing to make payment to the other unsecured creditors too. The applicant is desirous of running the tea estate by liquidating the dues of its creditors provided instalment is granted.

2. A settlement has been reached between the workers and the applicant and the workers are willing to support the applicant if the mode of payment and disbursement is decided before the District Collector or Labour Directorate. As the claim of the unsecured creditors before and after advertisements is approximately Rs.82,81,022.27p a sum of Rs.50 lakhs will be deposited within the time specified by Court. A settlement has also been reached between the United Bank of India, the only secured creditor and a core has already been deposited in a no lien account. As the settled amount is Rs.3.50 crores, the balance sum will be paid as agreed between the applicant and the secured creditor. As the applicant is willing to deposit sums and upon such deposit and disbursement thereof the order of winding up be permanently stayed.

3. Counsel for the Official Liquidator submits that pursuant to the order of winding up and advertisement, Rs.1,36,84,309.72p was payable to the unsecured creditors whose claims have been admitted. Subsequent to advertisement claims have also been received which aggregates approximately to Rs.11,05,64,196.99p. The said amount is inclusive of the workers claim and even if the said claims were excluded huge sums would be payable by the company to the unsecured creditors who have lodged their claim pursuant to the advertisement. After the advertisement on 18 th February, 2011 time was sought by the bank for lodging its claim but the said request could not be acceded to as the Official Liquidator has no power to extend the time to make payment. If sums sufficient to the said claim is deposited by the applicant or by any other party the Official Liquidator can have no objection in this regard.

4. Counsel for the plaintiff in EOS No.1 of 1985 appears to oppose the application on the ground that it is a secured creditor having deposited a sum of Rs.10 lakhs with the United Bank of India being the sole secured creditor as proceedings have been initiated against it before the Debts Recovery Tribunal as a guarantor.

Therefore, in view of 145 Company Cases 298 it has stepped into the shoes of the bank. G. A. 116 of 2011 was filed by the plaintiffs in EOS No.1 of 1985 for a direction on the United Bank of India to consider its proposal to settle the amount owing to it and an order was passed directing the bank to inform the plaintiff therein as and when the matter would be reported before the appropriate Bench. This notice has not been served by the bank on the plaintiffs in 1985 suit. In view of Sections 140 and 141 of the Contract Act as the plaintiffs in the 1985 suit have stepped into the shoes of the secured creditor it is ready and willing to deposit a sum of Rs.1 core in order to run the said tea estate.

5. Counsel for the secured creditor United Bank of India, on instruction, submits that no such payment has been received by the bank till 11.35 a.m. This is disputed by Counsel for the plaintiffs in the suit of 1985 and reliance is placed on the letter dated 14 th March, 2011 whereunder a cheque for Rs.10 lakhs was forwarded without prejudice to its rights and contentions. Having considered the submissions of the parties an order for winding up was passed on 8 th July, 2003. Although by the said order payment was directed and efforts were made to make payment in respect of some creditors, the balance creditors could not be paid. This application has been filed in 2004 for stay of the winding up order on the ground that the applicant is ready and willing to make payment to the creditors. During the pendency of this application a settlement has been reached between the applicant and the only secured creditor of the company, namely, the United Bank of India for Rs.3.50 crores. A sum of Rs.100 lakhs has already been deposited by the applicant and is lying in a no lien account.

6. The applicant has expressed its readiness and willingness to deposit the balance sum of Rs.2.50 crores within two months from the date of stay of the winding up order. Advertisements were issued inviting claims by the Official Liquidator. Some claims were received by it even prior thereto and the claims received earlier have been adjudicated. On calculation of the admitted amount a sum of Rs.1,36,84,309.72p is due and payable to not only the unsecured creditor but also to the provident fund authorities. In respect of the claims which have been received after advertisements there has been no adjudication and on a rough calculation a sum of Rs.82,81,022/- will be due and payable to all the unsecured

creditors. It is true that only the claim of the provident fund authorities is before this Court. No claim of the ESI authority has been lodged. After advertisements the Sales Tax authorities have also lodged a claim. Although the correctness of the claim has been disputed by the applicant and as regards the provident fund dues it has been submitted that Rs.20 lakhs has been paid. To ascertain the exact amount which is due to the statutory authorities it is desired that the applicant negotiates a settlement with the aforementioned statutory authorities and the result of such negotiation be placed before the Court when the matter appears next.

7. As regards the dues of the unsecured creditors the applicant is directed to deposit a sum of Rs.1 crore in two instalments of Rs.50 lakhs each with Mr. Sondwip Mukherjee, Advocate appointed Special Officer for such purposes. The first of such instalments be paid by 17 th March, 2011. A draft of Rs.50 lakhs be drawn in the name of the Special Officer who will be entitled to open an account earmarked to the said company for purposes of depositing and disbursement of sums. The Special Officer will be entitled to an initial remuneration of 1000 GMs. It is made clear that the initial sum deposited be invested by the Special Officer in a short term deposit with any nationalised bank and payments be made out of the said sum to the unsecured creditors whose claims have been adjudicated by the Official Liquidator. In the event the applicant disputes the correctness of such claim, the applicant will be entitled to take appropriate proceedings in accordance with law.

8. Such payments be made on a prorata basis. Initially 20% of the admitted claim be paid by 20 th April, 2011 and thereafter 10% per month on the 20 th day of each succeeding month. The second instalment of Rs.50 lakhs be deposited by the applicant by 1 st April, 2011. Payment to the secured creditor will be made as per the terms agreed between the parties with the secured creditor. Upon deposit of the initial payment of Rs.50 lakhs the tea estate of the company in liquidation be handed over to the applicant who will run the same under the abovementioned Special Officer. At the time of handing over possession an inventory be made by the Special Officer in presence of the representative of the Official Liquidator and the representative of the bank. In this order no payment is directed to be made to

the workers in view of the affidavit affirmed by their representative and placed before this Court. This will, however, not prevent the workers from approaching the District Collector, Jalpaiguri or the Labour Directorate, Government of West Bengal for settlement of their dues so also mode of disbursement.

9. Although one Reba Bhowmik has appeared through Counsel and offered to deposit Rs.1 crore this day on the ground of being a secured creditor, the said offer of Reba Bhowmik cannot be accepted as no scheme has been propounded by her to show how the payment is going to be made. There is no settlement reached between her and the bank with whom a sum of Rs.100 lakhs has already been deposited by the applicant herein. Although Reba Bhowmik has alleged payment of Rs.10 lakhs to the secured creditor and thereby has stepped into the shoes of the secured creditor. An attempt to make such payment has only been made on 14 th March, 2011. Such cheque though handed to the secured creditor has not as yet been enchased. Therefore, admittedly Reba Bhowmik has not stepped into the shoes of the secured creditor nor has made any payment. All that she did was to express her intent to deposit such sum of Rs.10 lakhs which is a miniscule amount in a settlement of Rs.3.50 crores.

10. Therefore, the proposal of Reba Bhowmik cannot be accepted. It is made clear that on and from the day of deposit of Rs.50 lakhs and the tea estates being handed over to the applicant herein the order of winding up will be stayed for a period of three months. The bank will be at liberty to adjust the sums deposited in a no lien account towards its settlement dues. Another reason for passing this order this day is that by order dated 23 rd December, 2010 Joint Special Officers were appointed to file a report regarding the status of the tea garden. Such report has been filed on 7 th March, 2011 and from a reading of such report it appears that an Operating Management Committee comprising of the Workmen was formed in 2003 at the behest of the District Magistrate, Jalpaiguri and it is this Management Committee which is running the tea garden.

11. On an average 2500 kgs. per day green leaves are plucked and sold between May to October from the Red Bank Tea Garden while from Dharanipore Tea Estate 5000 to 6000 kgs of tea is plucked and sold per day on an average

between May and November. It is not known how such Management Committee could have been formed or allowed to run the tea estate when the company is in liquidation and the assets is in control of the Official Liquidator. How the tea leaves are being sold, when the assets are in the possession of the Official Liquidator raises various questions in ones mind. The only conclusion that one can reach is that the green leaves are being plucked and sold by the workers or by the Committee formed and the monies are being used by them to the deprivation of the company in liquidation.

12. Needless to mention that the applicant will not dispose of, alienate, encumber or create third party interest in respect of the assets and properties of the company in liquidation. This order is passed on the prayer made by Counsel for Reba Bhowmik, the plaintiff in the suit of 1985. As upon handing over possession the security agency appointed by the Official Liquidator will no longer be required, the applicant will be at liberty to engage its own security agency and the secured creditor who has borne the expenses of the security agency will be entitled to lodge its claim in this regard with the Official Liquidator within seven days from the date of receipt of this order. Matter to appear in the list three months hence to assess the steps taken by the applicant in running the said tea garden and the progress made therein. On the prayer of Counsel for the applicant the second instalment of Rs.50 lakhs directed to be deposited by 1st April, 2011 is extended till 15th April, 2011.

13. In default of any payment the order of winding up will revive and the Official Liquidator will take possession of the assets forthwith. Affidavit filed by the workers be kept on record. Special Officer, Official Liquidator, United Bank of India and all parties concerned to act on a Photostat signed copy of this order on the usual undertakings.