

(2008) 09 P&H CK 0093

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Ashwani Kumar and Others

APPELLANT

Vs

Winsome Textiles Industries Ltd.
and Others

RESPONDENT

Date of Decision: Sept. 30, 2008

Acts Referred:

- COMPANIES ACT, 1956 - Section 19, 390, 391, 392, 393
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2009) 147 CompCas 155 : (2008) 152 PLR 470

Hon'ble Judges: Permod Kohli, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Permod Kohli, J.

Company petitions No. 416 of 2002 was presented by Winsome Textile Industries Ltd. u/s 439 read with Sections 433 and 434 of the Companies Act for winding up of M/s Mangla Context Limited, a company incorporated under the Companies Act. This Company was ordered to be wound up by order dated 16.1.2004 and official liquidator was appointed as the Liquidator of the company to take over the movable and immovable assets and properties of the Company. Subsequently, the assets and properties of the company were put to sale through the advertisement published in The Tribune in its issue dated 22.4.2006. Two applications being CA Nos. 449 and 498 of 2006 have been filed for confirmation of sale.

2. While these proceedings were pending, CA No. 387 of 2006 has been preferred by Ashwani Kumar son of Padam Kumar Jain, one of the promoters and shareholders of the Company (in liquidation) under Order 9 Rule 13 CPC for setting aside the ex parte order dated 23.3.2006 whereby this Court ordered the sale of the movable and immovable assets of the company (in liquidation) in absence of applicant. Two more

CA. Nos. 815/2007 and 682/2007 have been filed for recalling the winding up order dated 16.1.2004. Simultaneously, another CA No. 364 of 2006 was preferred seeking stay of the operation of the winding up order. In this CA, the Company Court passed order dated 18.5.2006 which reads as under:

Mr. Suri states that on receipt of Rs. 25 lakhs the petitioner has settled his claim and has no objection if the winding up order is recalled. Learned Counsel for the petitioner-creditor further states that the petitioner shall withdraw the complaints filed by him u/s 138 of the Negotiable Instruments Act and CP 418 of 2002. Mr. Malik, learned Counsel representing the former management states that the management is ready and willing to settle the claim of the official liquidator towards liquidation expenses incurred by him after the order of winding up was passed. Mr. Vajpayee may communicate the said expenses to the applicant within two days. In the meantime, notice be also issued to the secured creditors-M/s. Canara Bank, Ludhiana and IDBI, Chandigarh for 25.3.2006.

3. This order was followed by another order dated 25.5.2006 which reads as under:

Learned Counsel for the applicant has tendered a sum of Rs. 25 lakhs vide draft No. 18346 dated 16.5.2006 to the petitioner-creditor. Mr. Deepak Suri has accepted the same without prejudice to his rights. Mr. Suri states that he undertakes to withdraw CP Nos. 416 and 418 of 2002 as well as the complaints filed against the Directors of the Company u/s 138 of the Negotiable Instruments Act.

Mr. Malik has also handed over a sum of Rs. 8 lakhs by D.Ds. to the official liquidator towards the expenses incurred by him. The said amount is accepted by official liquidator subject to the order of winding up being recalled.

Mr. Ashok Jagga and Mr. Alok Jain, Advocates representing Canara Bank and IDBI Bank, respectively, seeks some time to file reply.

4. In the meantime, C.A. No. 650 of 2006 came to be filed by the Canara Bank, one of the secured creditors for its substitution as petitioner-creditor in the winding up petition or impleadment as petitioner No. 2 therein. Vide order dated 16.11.2006, the Company court directed the transposition of the Canara Bank as petitioner in winding up petition i.e. CP No. 416 of 2002 and permitted to continue with the winding up petition earlier filed by Winsome Textile Industries Ltd.

5. Official liquidator as also the secured creditors, namely, IDBI Bank through Stressed Assets Stabilisation Fund (hereinafter referred to as "the SASF") and Canara Bank filed their objections opposing the petition for recalling the order dated 23.3.2006 as also recalling of the winding up order dated 16.1.2004.

6. The applicant seeks setting aside of the order dated 23.3.2006 and recalling of the order dated 16.1.2004 with the following averments:

It is stated that the applicant-company was established with the investment of Rs. 60 lacs in the share capital contributed by the promoter and shareholder. The Company established an export oriented unit under EPCG Scheme for manufacture and export of fabrics and garments. It is one of the scheduled industries specified in the first schedule at Sr. No. 23 sub-heading (1) under the heading of Textiles under the IDR Act, 1951. The company has been established in Joint Sector with PSIDC as a co-promoter. The private promoters are qualified and experienced in international marketing and manufacturing. The company has established the most advanced and high tech plant to manufacture and produce the world class fabrics. The renowned buyers of the world like Gap Inc., USA, Timberland, USA, Champion, USA Hartstring, USA and Dockers, USA are some of the buyers who have assured to purchase the products of the Company. In sum and substance, the contention of the applicant is that the company in liquidation is a potentially viable, but sick unit. The Company has secured loan from IDBI as also the working capital credit from Canara Bank. It is alleged that the petitioner Company M/s. Winsome Textile Industries Limited has filed the petition for winding up on the basis of the disputed claim, but due to ex parte order, the winding up of the company has been ordered. It is the case of the applicant that the applicant has paid the entire claims of the petitioner, namely, M/s Winsome Textile Industries Limited i.e. Rs. 25 lacs and also Rs. 8 lacs as liquidation expenses as is evident from the order dated 25.5.2006 passed in C.A. No. 364 of 2006. Regarding the claim of the secured creditors i.e. IDBI and the Canara Bank, it is stated that both the secured creditors have filed original applications for recovery before the DRT. The Canara Bank has filed O.A. No. 315 of 2004 and IDBI has filed O.A. No. 325 of 2002. It is also alleged that the promoters have filed counter claim for damages and compensation to the tune of Rs. 1965 crores against the IDBI, Canara Bank and PSIDC. The applicant has also invoked the provisions of Sick Industrial Companies (Special Provisions Act) 1985 (hereinafter referred to as "the SICA") to claim that the company cannot be ordered to be wound up being a potentially viable unit governed by the provisions of the SICA.

7. Prayer of the applicant is resisted by both the secured creditors-IDBI through the SASF as also the Canara Bank in their disclaimers filed. Secured creditors have stated that the Company in liquidation has to pay huge debts amounting to more than Rs. 20 crores to the SASF and huge amount to Canara Bank for which proceedings for recovery are pending before the DRT. It is further pleaded that the present applications are not maintainable. The remedy of the promoters is to seek the revival scheme under Sections 391 to 394 of the Companies Act that too by paying the claims of the secured creditors. It is further the case of the secured creditors that the attempt of the applicant is to delay the payment of claims of the secured creditors by stalling the liquidation proceedings. It is further stated that the assets of the Company have already been sold for Rs. 6.70 crores and the applications for confirmation of the sale are pending before this Court.

8. I have heard the learned Counsel for the parties. From the record, it is evident that the Company was ordered to be wound up vide order dated 16.1.2004. Before passing of this order when the petition was admitted to hearing. Company was put to notice and one Mr. A.K. Rampal, Advocate, appeared on 13.3.2003. He sought time to file reply which was granted to him and the case was adjourned to 22.5.2003. The case was again adjourned to 11.7.2003 and then to 5.9.2003 and thereafter to 12.9.2003. The Company remained unrepresented and the petition was admitted on 31.10.2003. The order of admission was duly published in the Indian Express (Chandigarh Edition) and Dainik Tribune as also in the Government Gazette.

9. In CA No. 387 of 2006, the only ground for setting aside the ex parte order dated 23.3.2006 is that the applicant came to know about the proceedings in the company petition No. 416 of 2002 on 22.4.2006 when the sale notice was published in the Tribune, Chandigarh and prior to that the applicant had no knowledge of the winding up proceedings. In the application itself, the applicant has referred to the winding up order dated 16.1.2004. No prayer has been made for setting aside the admission order dated 31.10.2003 and the winding up order dated 16.1.2004. However, two more applications have been presented being CA. No. 682 of 2007 and 815 of 2007 seeking recalling of the winding up order dated 16.1.2004. In CA. No. 815 of 2007 and 682 of 2007, it is averred that the applicant settled their debt with the original petitioner-M/s Winsome Textile Industries Ltd. and paid an amount of Rs. 25 lacs as full and final payment of all dues as also Rs. 8 lacs, as liquidation expenses incurred by the Official Liquidator and M/s Winsome Textile has filed application dated 3.7.2006 withdrawing the winding up petition. Hence the order of the winding up passed at the instance of the M/s Winsome Textile Industries Limited is required to be re-called. It is further alleged that the secured creditors have no locus standi to seek winding up of the Company, particularly, when they have already availed the remedy of recovery before the DRT. To the contrary, the contention of the learned Counsel for the secured creditors is that the winding up order has been passed on failure of the promoters to respond to the notices and failure of the company to pay the debts of all the creditors. Even presently, the company is unable to pay all its debts and thus the winding up order cannot be recalled. It is further contended on behalf of the respondents that the Canara Bank has already been transposed as petitioner in winding up petition being C.P. No. 416 of 2002 and its claims having not been paid, the winding up order cannot be set at naught. It is further argued that the applicant has not challenged the order dated 16.11.2006 transposing the Canara Bank as the petitioner substituting Winsome Textile Industries Limited and thus, without settlement with the Canara Bank, no relief can be granted to the applicant. It has also been urged on behalf of the respondent-secured creditors that the remedy of the applicant is not by way of recall of the winding up order, but to proceed under Sections 391 and 394 of the Companies Act with a viable scheme of revival and unless such claim of revival is approved by the Court and the company in liquidation is revived, winding up order

cannot be recalled or set aside.

10. Ms. Munisha Gandhi, learned Counsel for the applicant representing the Ex-Management has referred to and relied upon various judgments in support of her contention for recalling of the impugned order. In the case of *G.T. Swamy and Anr. v. Goodluck Agency and Anr.* 1990 (69) CC 819, Karnataka High Court while considering the jurisdiction and power of the company court, held that the Company Court has inherent powers under Rules 6 and 9 of the Companies (Court) Rules, 1959 framed by the Supreme Court to recall the winding up order. In the case of *R. Ganesha v. H.R. Engineering Works and Anr.* 1995 (82) CC 251, it has been observed that where the Company is in a position to pay its debts and no other creditors have come up in support of winding up, it is appropriate that the order of winding up be recalled. In the case of [Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K. Samiti and Others](#), the Hon"ble Supreme Court made following observations:

16....The argument that Section 391 would not apply to company, which has already been ordered to be wound up cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive....

11. In the case of *Canara Bank v. Arihant Industries Ltd.* (2002) 110 Comp. Case 70 (P&H), this Court declined to order the winding up of the company on the ground that where there are prospects of revival Company and mere fact that Company is unable to pay its debts, it is the duty of the Court to welcome revival rather than affirming the death of the Company. It has further been observed that mere fact that if at a given time, the Company is unable to pay its debts, the creditors cannot insist upon winding up in the event the Company being unable to pay the debts. Under the said circumstances, if there are still prospects of the Company's coming back to life, the Court should be inclined to give a chance to the Company resurrect. Based upon aforesaid judgments, it is contended that the Company has liquidated the claims of the petitioner who initiated the winding up proceedings and also the liquidation expenses and thus, there is no impediment in recalling the winding up order as also the order of sale of the property of the Company to enable promoters (Ex-Management) to revive the Company.

12. In so far as the contention of the respondents that the Company has to pay huge amounts to the secured creditors, namely, IDBI through the SASF and Canara Bank, Ms. Manisha Gandhi, learned Counsel for the applicant has argued that these two secured creditors have already approached the DRT where the Ex-Management of the Company has also lodged counter claims. The issues involved as to whether any

amount is payable by the Company or whether counter claims are to be awarded have to be decided by the DRT and thus the Company Court cannot go into this aspect of the matter and thus the prayer for winding up of the company be declined. She has relied upon Allahabad Bank v. Canara Bank and Anr. AIR 2000 SC 1535 wherein the Hon"ble Supreme Court made following observations regarding the exclusive jurisdiction of the Tribunal constituted under the Recovery of Debts Due to Banks and Financial Institutions Act for adjudication of liability of debtor:

25. Thus, the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other Court or authority much less the Civil Court or the Company Court can go into the said questions relating to the liability and the recovery except as provided in the Act....

13. It is further argued that it is also within the exclusive domain of the Tribunal to adjudicate upon the counter claim and set off. Reliance is placed upon the case of [Mudit Entertainment Industries \(P.\) Ltd., Allahabad and others Vs. Banaras State Bank Ltd. and others](#), wherein following observations have been made:

12. The Tribunal is not merely an Executing Authority to recover debts as claimed by the Bank or Financial Institutions. The Tribunal is enjoined with the duty to decide the debts due to the Bank. Taking into account the entire Scheme and modalities, the Tribunal, while adjudicating the claim of the Banks or the Financial Institutions, has to take into account the cause shown by the debtor as required under Sub-section (3) of Section 19. Such cause could include the counter claim and set off of the debtor as put forth against the claim of the Bank. The Tribunal, having regard to the cause as shown, has to decide the liability of the debtor and if the debtor succeeds, the Tribunal has to make necessary adjustment of such claim against the debts claimed by the bank. The grievance as such is untenable.

14. In the aforesaid judgment, the contention raised is that the liability of the Company in liquidation towards the secured creditors is yet to be determined and thus it cannot be said that it is a debt due. At this stage, according to the learned Counsel, the Ex-Management should be allowed to revive the Company by recalling the winding up order.

15. It is further contended that when the debt is bona fide disputed, the court should decline to make winding up order. Again reliance is placed upon [Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.](#), . In this judgment, the Hon"ble Supreme Court made following observations:

21. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company.

22. Where the debt is undisputed the Court will not act upon a defence that the Company has the liability to pay the debt but the Company chooses not to pay that

particular debt (See Re: A Company 94 S.J. 369). Where, however, there is no doubt that the Company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the Court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Re: Tweeds Garages Ltd (1962) Ch. 406. The principles on which the Court acts are first that the defence of the company is in good faith and one of substances, secondly, the defence is likely to succeed in point of law and thirdly and company adduces prima facie proof of the facts on which the defence depends.

16. From the ratio of the aforesaid judgments, following principles emerge:

(1) The Company Court has the jurisdiction to recall the winding up order at any stage.

(2) Where the debt is bona fide disputed, winding up should not be ordered.

(3) Where the liability is established and the defence of the Company to dispute the liability is not based upon substantial material, winding up cannot be refused.

(4) Despite liability of company to pay its debts, if there are still apparent prospects of the company back to life, the death of the Company should not be affirmed and Anr. chance be given to the Company to survive.

17. Applying the aforesaid principles emerging, the case of the applicant, Ex-Management is to be examined. Admittedly, the claim of the M/s Winsome Textile Industries Ltd., the original petitioner in the winding up petition, CP No. 416 of 2002 has been paid. Liquidation expenses of the Official Liquidator also stand paid. However, there is huge liability towards the two secured creditors i.e. IDBI through the SASF and the Canara Bank, although both the secured creditors have initiated recovery proceedings before the Debt Recovery Tribunal. Nevertheless, the liability is that of the Company in liquidation. One of the secured creditors, namely, Canara Bank has assumed the role of the petitioner in the winding up petition on its transposition as the petitioner therein meaning thereby that now the present liquidation proceedings are deemed to be at the instance of the Canara Bank, in view of the order dated 16.11.2006 passed in CA No. 650 of 2006. The debt of the Canara Bank is unpaid as on date. Although the Ex-Management has raised counter claim before the DRT and the counter claim as also the liability of the Company in liquidation is yet to be finally adjudicated upon by the Tribunal, but fact remains that there are huge claims against the company. All the claims of the Company in liquidation against the secured creditors are in the nature of damages/compensation for non-disbursement of the loan. To what extent, the Company will succeed cannot and should not be commented upon in these proceedings lest it may prejudice the cause of any of the parties before the Tribunal. Suffice it to say that the claims against the Company in liquidation are on account of loan advanced by the IDBI and Canara Bank and the assets and properties of the Company are subject to the charge for such loans. The loans having secured, charge

has been registered in the record of Registrar of Companies. This Court cannot ignore that there are recovery" proceedings against the Company in liquidation and its assets and properties are subject to the charge for the liabilities towards secured creditors, if they ultimately succeed. One of the secured creditors, namely, Canara Bank is already petitioner in the winding up petition. No material has been placed on record to even suggest how the company in liquidation or the Ex-Management intends to liquidate huge liability in the event recovery is ordered by the DRT. In the two judgments of the Karnataka High Court relied upon by Ms. Munisha Gandhi, including the judgment of the Apex Court, it is clear that the winding up order cannot be passed by this Court, if the Court is of the opinion that the company is in a position to pay off its debts and no other creditor has come up in support of the winding up. In the present case, both the secured creditors have supported the winding up and have vehemently opposed the revival of the Company in absence of any revival proposal. There is also no proposal by the Ex-Management of the company or the applicant promoter as to how the Company will be revived, the source of finance, the method and mode of resurrection or resuscitative measures initiated for survival of company. In absence of any such proposal or step, mere desire does not inspire confidence to stay or stall winding up and jeopardize the interest of secured creditors (public sector banks) and eventually the public interest.

18. C.A. No. 387 of 2006 is for setting aside the ex parte order dated 23.3.2006, whereby sale of the assets of the Company in liquidation was ordered which is only a consequential order of winding up. The winding up order is dated 16.1.2004 and two applications, being C.A. No. 815 and 682 of 2007 are filed for recalling the order of winding up. From the perusal of these applications, it is apparent that no valid grounds are shown for setting aside or recalling of the winding up order.

19. It has been observed above that when the petition was initially filed by M/s Winsome/Textile Industries Ltd., a notice was issued to the Company. The company initially appeared through an advocate and later absented and the court had no option, but to admit the petition. Even after admission, notice was published in two newspapers and the Punjab Government Gazette, but the Company choose not to appear and contest. Applicant has failed to establish any valid ground for recalling winding up order. Since prima facie he has failed to establish the other question raised that the Company can only be revived under Sections 391 and 394 of the Companies Act, need not be gone into.

20. These applications are accordingly dismissed.