

(1955) 05 CAL CK 0021

Calcutta High Court

Case No: Matter No. 98 of 1955

In Re: Chandbali Steamer
service Co., Ltd.

APPELLANT

Vs

RESPONDENT

Date of Decision: May 23, 1955

Citation: 60 CWN 278

Hon'ble Judges: Baghawat, J

Bench: Single Bench

Advocate: S.M. Base, A.G. of West. Bengal and S. Roy Union of India., T. Banerji of M/s T. Banerji and Co., Attorney for the Official Liquidator Mr. R.N. Banerjee, A.K. Sen for Associated Investment Industrial Finance Ltd., R. Chaudhuri for Messrs P.C. Dutt and Co., S.K. Chatterjee of M/s Mukherjee and Biswas, Attorney for Amrita Lall Ojha and Co., B.K. Chakraverty, for Concord of India Insurance Co., Ltd., R.C. Sen, Attorney for S.K. Neogy and J.P. Mukherji for East Bengal Engineering Company, for the Appellant;

Final Decision: Dismissed

Judgement

Bachawat, J.

This is an application by the Union of India for extension of time of the registration of the mortgages dated the 5th January, 1953, and the 2nd March, 1953, and the collateral instruments dated the 9th January, 1953, and the 5th June, 1953. Messrs,. Chandbali Steamer Service Co. Ltd., hereafter referred to as the "company" owns two ships named S.S. Dhamra and S.S. Ramkrishna.

2. By an instrument in writing dated the 5th January, 1953, the Company executed a mortgage of S.S Dhamra in favour of the petitioner to secure the repayment of a sum of Rs. 5,51,000. By an instrument in writing dated the 9th January, 1953, the Company executed a collateral agreement relating to the mortgage. By an instrument in writing, dated the 2nd March, 1953, the Company executed a further mortgage of S.S. Ramkrishna then known as S.S. Orsa in favour of the petitioner to secure the repayment of the said sum. By an instrument in writing dated the 5th

June, 1953, the Company executed a collateral agreement in respect of the said mortgages.

3. The mortgages dated the 9th January, 1953, and the 2nd March, 1953. were duly registered under the provisions of the Merchant Shipping-Act.

4. The several mortgages and instruments were not registered in accordance with section 109 of the Indian Companies Act and have not been entered in the register of mortgages and charges kept by the Registrar, Joint Stock Companies. Neither the original mortgages and instruments nor attested copies thereof made out in the prescribed manner were filed with the Registrar for registration in accordance with the section.

5. Non-compliance with the statutory provisions was due to ignorance of law and the inexperience of the officers of the petitioner. I am satisfied that the omission to register was due to the negligence and carelessness of such officers. I am also satisfied that such negligence and carelessness were not actuated by bad faith or by any fraudulent and improper motive.

6. On the 30th November, 1952, a petition for winding up of the Company was presented. On the 7th January, 1953, an application for sanction of a scheme of arrangement was presented. On the 31st January, 1955, this Court appointed a provisional liquidator of the Company. On the 2nd March, 1955, the present Notice of Motion, returnable on the 7th March, 1955, was taken out. On the 9th March, 1955, the Company was ordered to be wound up, and Mr. R.N. Banerji is now the official liquidator of the company. The records of the above proceedings show that the Company is insolvent and is unable to pay its unsecured debts in full. This application is opposed by the liquidator and several unsecured creditors of the Company.

7. The relevant portion of section 109 of the Indian Companies Act is as follows:-

(1) Every mortgage or charge created after the commencement of this Act by a company and being either-

(a) a mortgage or charge for the purpose of securing any issue of debentures; or

(b) a mortgage or charge on un called share capital of the company; or

(c) a mortgage or charge on any immovable property wherever situate, or any interest therein; or

(d) a mortgage or charge on any book debts of the company; or

(e) a mortgage or a charge, not being a pledge on any movable property of the company except stock-in-trade; or

(f) a floating charge on the undertaking or property of the company;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the Registrar for registration in manner required by this Act within twenty one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable:

The section makes void a security comprised in certain unregistered mortgages and charges against certain persons. This section makes the security void "not as against everybody, not as against the company grantor, but as against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the Company".-Per Phillimore, L.J. In re. Monolithic Building Company-Tacon v. The Company (1) [(1915) 1 Ch. 643, 6671. In spite of the generality of the expression "any creditor", an ordinary unsecured creditor of the Company cannot avoid the mortgage, for he has no enforceable right either against the mortgagee or against the property comprised in the mortgage. Only a creditor of the Company who has acquired a right against the property may intervene and avoid the mortgage, e.g., where he has a charge over the property or where the Company is in liquidation and he has acquired a right to the rateable distribution of the assets of the Company; Re. Eshamann Brothers Ltd., (2) [(1906) 2. Ch. 697, 708-9].

8. On the assumption that section 109 requires registration of the instruments dated the 5th January, 1953, 9th January, 1953, 2nd March, 1953, and the 5th June, 1953, the security comprised therein has now become void against the liquidator and the creditors of the Company in liquidation as the instruments have not been registered within the time prescribed by the section.

9. This application seeks extension of the time u/s 120 of the Indian Companies Act which is as follows :-

120 (1) The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or misstatement of any particular with respect to any such mortgage or charge, or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified, and may make such order as to the

costs of the application as it thinks fit.

(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.

10. Sub-section 2 of section 120 of the Indian Companies Act was introduced by the amending Act of 1936.

11. The section specifies five alternative conditions of relief. The Court may grant relief if the omission to register the mortgage is either (a) accidental or (b) due to inadvertence or (c) due to some other sufficient cause or (d) is not of a nature to prejudice the rights of creditors or shareholders of the company or any person interested or (e) if, on other grounds, it is just and equitable to grant the relief. The Court may grant relief if any one of the alternative conditions is satisfied.

12. Pausing here, I think that the words "due to inadvertence" are satisfied if there is "negligence or carelessness, where the circumstances show an absence of bad faith."-Per Huddleston B. in *ex-parte Lenanton* (8) [(1889) 53 J.P. 263]. The section gives a right to the mortgagee to come to the Court to be relieved of the consequences of his own negligence which is not actuated by any fraudulent or improper motive,-*Re Kris Cruisers Ltd.* (4) [(1949) 1 Chan. 138, 142,].

13. The section confers a wide judicial discretion. In exercising this discretion it is not material to consider (a) the solvency or insolvency of the company (b) the presence or absence of any judgment against the company and (c) the pendency of a winding up petition;-*Re. M.I.G. Trust Ltd.* (5) [(1933) 1 Ch. 542]; *Re. Kris Cruisers Ltd* (4) [(1949) 1 Chan. 138, 142].

14. Even if the petitioner makes out a condition of relief the Court is not bound to extend the time and may decline to do so in appropriate circumstances, e. g., where the order for extension will be useless.

15. The effect of extension of the time of registration and of actual registration within the extended time is that the mortgage is constituted a valid charge ab initio, from the date of its execution subject to the conditions, if any, imposed by the order for extension-Per. Sir Lancelot Sanderson in *Ram Narain v. Radha Kissen Motilal Chamarla* (6) (L.R. 57 Indian Appeals, 76, 83-84); Per Romer, L. J., in *Re Ehrmann Bros. Limited*, (2) [(1906) 2 Chan. 696, p. 707].

16. Prior to the enactment of sub-section (2) of Section 120 an unconditional order for extension of the time of registration and of actual registration within the extended time had the effect of displacing rights acquired against the property in the meantime. Accordingly, the practice of the Court was to make the order subject to suitable conditions protecting such rights.

17. Usually an order for extension was made subject to the following condition:

But this order is to be without prejudice to the rights of the parties acquired prior to the time when the mortgage shall be actually registered."

18. See *Re. Joplin Brewery Ltd.* (7) [(1902) 1 Ch. 79]. *Gore Browne-Handbook of Joint Stock Companies* 41st Edition p. 327.

19. In *Re. I.C. Johnson & Co. Ltd.*, (8) [(1902) 2 Chan. 109] the order was modified to give effect to rights inter se of debenture-holders who were contractually entitled to rank *pari passu*, but the order made in that case had otherwise the same effect as the usual order: See *Re. Anglo Oriental Carpet Manufacturing Co.* (9) [(1903) 1 Ch. 914, 919-920].

20. The condition protected rights acquired between the end of 21 days within which a registration was required by section 109 and the date of actual registration, *Re. Eframann Bros. Ltd.*, (2) [(1906) 2 Chan. 696, 704, 709], but it did not enlarge the ambit of the right protected, *Ram Narain v. Radha Kissen Motilal Chamaria*, (6) (L.R. 57 I.A. 76).

21. The condition protected only rights acquired against and affecting the property charged, rights which have actually accrued and which could be recognised and enforced including rights acquired by the general body of creditors on a winding up-see *Re. Eframann Bros. Ltd.*, (2) [(1906) 2 Chan. 696, 704, 705, 707-8, 709-10]; *Re Anglo India Carpet Manufacturing Co. Ltd.*, (10) [(1903) 1 Cha. 114]. Unsecured creditors of the company as such had no right against the property and were not protected by the condition.

22. Orders for extension of the time for registration passed in this country u/s 120 of the Indian Companies Act sometimes omitted to impose the usual condition. Whatever the reasons of the omission might have been the consequences were disastrous. To remedy this evil the legislature intervened and enacted sub-sec. (2) of section 120 of the Indian Companies Act. The effect of this sub-section is to subject every such order to the statutory condition. Even if an order for extension is now made unconditionally the order does not prejudice any right acquired in respect of the charged property prior to actual registration of the charge including the right acquired by the general body of creditors under a winding up order.

23. Sub-section (2) of Section 120 also introduces a change in the practice. Though the sub-section has not put a fetter on the general power conferred by sub-section (1) upon the court to attach to the order such terms and conditions as may be just and expedient, in view of the statutory condition it is no longer necessary to attach to the order the usual condition in the form adopted in (7) (1902) 1 Ch. 79.

24. It was not the practice to insert in the order any condition for the protection of unsecured creditors as such because they necessarily run the risk of dispositions of the property by the company while it is a going concern and are, therefore, not prejudiced by the order; *Re. M. I. G. Trust Ltd.*, (5) [(1933) 1 Ch. 569-70]; *Re. Kris*

Cruisers Ltd., (4) [(1949) 1 Ch. 138, 140-1].

25. I have briefly indicated my views with regard to the effect of winding up order on an application u/s 120 of the Indian Companies Act, in my judgment delivered on the 2nd March, 1955, in *Re. Air Transport Ltd.* That case is somewhat distinguishable because there none of the five alternative conditions of relief had been established. I will therefore examine the matter a little more closely.

26. The effect of Sections 167 and 229 of the Indian Companies Act is that an order for winding up operates in favour of all the creditors of the company and that unsecured creditors of an insolvent company are entitled to payment of a rate able dividend out of the assets of the company, for "the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time" per Sir W.M. James, L.J., in *re. Savin* (11) [(1872) L.R. 7 Ch. App. 760-764].

27. Accordingly Sir W.M. James, L.J., in *Oriental Inland Steam Company*, (12) (9 Ch. App. 557 at 559) observed:

The English Act of Parliament has enacted that in the case of a winding up the assets of the company so Wound up are to be collected and applied in discharging of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and, being so, it has ceased to be liable to be seized by the execution creditors of the company x x x x There were assets fixed by the Act of Parliament with a trust for equal distribution | amongst the creditors.

28. In winding up unlike bankruptcy the liquidator is not the legal owner of the assets of the company and is thereupon not a trustee in the strict sense. But by sections 178. 179(1) and 183(4) of the Indian Companies Act the Liquidator is charged with the duty of taking all necessary steps for the winding up of the company and the distribution of its assets among its creditors. In *Re. Black & Co.*, (13) [(1872) 8 Ch. App. 254 at 262], Lord Selborne observed that the different sections of the Companies Acts "all have in the view the payment *pari passu* and equally, of the debts due to the creditors; and the hand which receives the call necessarily receives them as a statutory trustee for the equal and rate able payment of all the creditors."

29. In *re. Anglo Oriental Carpet Manufacturing Co.*, (9) [(1903) 1 Ch. 914 at 918, 920], Buckley, J., observed:

On November 11, 1901. by force of the Act of Parliament the undertaking and assets of the company passed under the control of the Liquidator, whose duty it was to convert them into money, and out of the proceeds to pay the creditors existing at that date. The assets have been said to be impressed in the hands of the Liquidator

with a statutory trust in favour of the creditors. Upon the commencement of the winding up an immediate duty was cast upon the liquidator to collect the assets and distribute them among the creditors then existing x x x x The order extending the time for registration was made "without prejudice to the rights of the parties acquired prior to the time when such trust deed and debentures shall be actually registered." Whatever the exact limit of those words may be, they certainly in my judgment include the right of creditors, acquired on the passing of the winding up resolution to have the assets realised and distributed among them *pari passu*, x x x x I hold that the rights of the general body of the creditors at the commencement of the liquidation are within the terms of the order, because on the winding up commencing, every creditor had a right to say "so much per cent of the assets belongs to me in a due course of liquidation".

30. In *re. Ehrmann Brothers Ltd. Albert v. Ehrmann Brothers, Ltd.* (2) [(1906) 2 Ch. 697 at 704, 705], Vaughan Williams, L.J., observed:

One sees, of course, that if there is an order for extension of time, and before the registration actually takes place, there intervenes a winding up, these words would protect the rights of properties so acquired in that interval x x x (and would protect) creditors who come within the operation and benefit of an order for winding up giving the creditors a right to have such property administered for their benefit.

31. Romer, L. J., at page 700 observed:

In my opinion, the decision of Buckley, J., in the case of *In re. Anglo Oriental Carpet Manufacturing Co.*, (9) [(1903) 1 Ch. 914] was right. In that case the Company had gone into liquidation prior to the registration, and a right had been acquired by the creditors which the Court recognised and put in force through the liquidator, saying that all the assets then existing of the Company not charged must be applied rateably amongst the then existing creditors.

32. The usual condition protecting the rights of parties acquired in the meantime, therefore, clearly protected the rights of the general body of creditors acquired on a winding up. See (9) [(1903) 1 Ch. 914, *In re. Anglo-Oriental Carpet Mfg., Co.*]

33. Buckley's *Companies Acts*, 12th Edition, at page 238 states, "If the Company has gone into liquidation, the creditors have acquired rights against property."

34. The right acquired by the general body of creditors under an order for winding up of the Company is clearly an accrued right acquired in respect of all the assets of the Company including the property concerned and is, therefore, equally protected by sub-section (2) of section 320 of the Indian Companies Act.

35. Even if an order for extension u/s 120 of the Indian Companies Act is made after an order for winding up has been made and a liquidator has been appointed, the applicant cannot " enforce the unregistered charge against the liquidator and cannot also acquire any priority over any creditor of the company. The order in such

circumstances is therefore useless and the Court in the exercise of its discretionary power will not make such order.

36. In re. S. Abrahams & Sons, (14) [(1902) 1 Ch. 695], Buckley, J., refused to make an order for extension on an application made after a resolution for voluntary winding up has been passed on the ground that an unconditional order ought not to be made and that a conditional order was useless in the circumstances. He observed at pp. 700-1:

Unless in very exceptional cases, I think that orders extending the time for registration ought to be qualified as in Joplin Brewery Co., (7). I am unable to see how if a winding up has commenced, an order contained in the words inserted in the order made in that case can do anybody any good. If you have secured and unsecured creditors of a company in liquidation, you must, under an order in the form in In re. Joplin Brewery Co., (7) first pay the secured creditors in full or to the extent of the assets. If there is a surplus after paying the secured creditors in full, the debenture-holder whose debenture has not been registered in time, and who obtains an extension of time on the terms imposed in In re. Joplin Brewery Co., (7) cannot claim priority over but will come in *pari passu* with the unsecured creditors, and this position would obtain without any order from the court u/s 15 of the Act of 1900. Such an order as I made in In re. Joplin Brewery Co., would, in my judgment be useless to the applicant.

37. The case in (14) (1902) 1 Ch. 695 was approved by Cozens Hardy, L.J., in Re. Ehramann Bros., Ltd., (2) [(1908) 1 Ch. 696, 711] and by Hanworth, M.R. In re. M.I.G. Trust Ltd. (5) [(1933) 1 Ch. 542, 561], and was followed by Srivastava, Acting Chief Justice in In re. Dinshaw & Co., (15) [A.I.R. (1931) Oudh, 62] where the learned Chief Justice refused to make an order after the company had gone into liquidation and an Official Liquidator had been appointed.

38. It appears from Palmer's Company Precedents, 16th Edition, Vol. IT, 418-9 that in other cases also the court has refused to make the order for extension when the winding: up has actually intervened.

39. In Re. Spiral Globe Ltd. (16) [(1902) 1 Ch. 695], Swinfen Eady, J., made an order for extension though a resolution for winding: up had been passed. In that case learned counsel for the applicant mortgagee pressed for an unconditional order on the ground that an order with the usual condition would be of little use to the applicant because the general body of creditors under the winding up would obtain the benefit of the property of the company. The learned Judge declined to make the unconditional order prayed for so as to prejudice the liquidator and through him the whole body of creditors and made the usual conditional order. The argument and the judgment turned entirely on the question whether a conditional or an unconditional order should be made. It does not appear that learned counsel for the liquidators at all opposed the making of the usual conditional order.

40. The practice in England is not to make an order for extension after a winding up order had been made. Palmer's Company Law, 17th Edn.. page 278: 19th Edn., p. 270 states the practice thus : "An order for extension will not be made after a winding up commences". This practice is not changed by the enactment of subsection (2) of Section 120 of the Indian Companies Act. An order for extension subject to the statutory condition, contained in that sub-section is useless if it is made after a winding up has commenced.

41. Reliance is placed by the learned Advocate-General upon certain observations of Romer, L.J., in *In re. M.I.G. Trust Ltd.*, (5) [(1933) 1 Ch. 542, 571]. The decision in (5) (1933) 1 Ch. 542 was affirmed in (17) (1934 A.C. 256. Both the Court of Appeal and the House of Lords unanimously held that the withdrawal of opposition by an insolvent company to an application for extension during the pendency of a petition for winding up did not amount to fraudulent preference as the liquidator failed to prove that the dominant motive of the company was to prefer the mortgage. In connection with the question whether the preference was due to the suffering of the judicial proceeding and whether the Judge would have made an order for extension in the face of an opposition Romer, L.J., and Hanworth M.R. also construed the relevant section and made observations with regard to what were material consideration in an application for extension of the time of registration, In that case how ever no order for winding up had been made nor had a resolution for winding up been passed and the observation's of Romer, L.J., in (5) [(1933) 1 Ch. 542, 571] that a resolution for winding up was not a material consideration was not strictly necessary for that decision. Those observations are to be contrasted with the observation of Romer, L. J., in *Re. Eframann Bros. Ltd.*, (2) [(1906) 1 Ch. 697, 708 and 709].

42. In *Theeppan Nambudiri v. Sankara Menon* (17) (A.I.R 1955 Mad. 35) a Division Bench of the Madras High Court made an order for extension though an order for winding up had been made and a liquidator had been appointed. With respect I do not agree with the decision and I think that the judgment does not correctly appreciate the ratio of English decisions. I do not agree that the unsecured creditors do not as a result of the winding up order acquire any right in respect of the property concerned and that sub-section (2) of section 120 of the Indian Companies Act has changed the law in this respect. With respect I do not agree that these rights are not protected by that sub-section.

43. I think that the Division Bench of the Madras High Court would have refused to make an order for extension if they came to the conclusion that the rights of unsecured creditors acquired on winding up are protected by sub-section (2) of section 120 of the Indian Companies Act.

44. If there is any doubt regarding the construction of the sub-section with regard to the rights of the unsecured creditors acquired on a winding up, I think I should all the more follow the previous practice and decline to make the order instead of

leaving the unsecured creditors of the doubtful protection of the sub-section.

45. I am satisfied that the omission to register the mortgages and charges and or instruments was due to inadvertence.

46. I am also satisfied that I ought not to make the order because an order for winding up has been made and a liquidator has been appointed.

47. The application is made on the assumption that the several instruments, mortgages and charges require registration u/s 120 of the Indian Companies Act. The learned Advocate-General requested me to leave it open whether or not the mortgages, charges and instruments at all required registration and I accordingly leave that question open. Of course if the mortgages do not require registration u/s 109 of the Indian Companies Act, the application u/s 120 is not maintainable.

48. The application is dismissed.

49. This order is without prejudice to the question whether or not the several mortgages, charges and instruments referred to in the petition at all require registration u/s 109 of the Indian Companies Act and this Court does not adjudge on that question.

50. In the special circumstances of the case, there will be no order as to costs against the applicant. The Liquidator will retain his costs out of the assets. Certified for Counsel. I consider it to be a special case and I allow Mr. Banerjee fees as if he is an Advocate. Solicitors: S. K. Mondal, Attorney for the Applicant. Messrs. T. Banerji & Co. Attorneys for Opposite Party the Official Liquidator.