

(2004) 11 CAL CK 0025

Calcutta High Court

Case No: C.P. No. 55 of 2004

In Re: Jaya Computers
and Software Ltd.

APPELLANT

Vs

RESPONDENT

Date of Decision: Nov. 23, 2004

Citation: (2005) 59 SCL 587

Hon'ble Judges: Ashim Kumar Banerjee, J

Bench: Single Bench

Judgement

Ashim Kumar Banerjee, J.

This winding up petition was admitted by me by my order dated 29th June, 2001. While admitting the winding up petition I suo motu stayed operation of the said order for a period of two weeks from the said date. The company preferred an appeal on 19th July, 2004. The application for stay was heard by the Division Bench on August 5, 2004. The operative part of the order of the Court of Appeal is quoted below:--

In this view of the matter, we admit the appeal. There will be an order in terms of prayer (a). The appeal might be made ready. Affidavits are not invited to the stay petition. The allegations therein cannot be taken to be admitted. Stay is refused and the Company Court can proceed with the winding up process. On the above lines of reasoning, as and when the appeal might require to be decided and heard out, the parties will have liberty to mention it. Legible copies of the Paper Book might be kept ready for immediate filing, if that is possible and practicable.■

2. From the order of the Division Bench, it appears that the Court of Appeal permitted this Court to proceed with the winding up process.

3. Pertinent to mention that advertisements had already been published prior to the date when the matter was taken up by the Division Bench.

4. The matter appeared before me at the final stage. Affidavits were called For. The matter was heard by me on 18th November, 2004 and today for final adjudication of the winding up proceeding.

5. Mr. Ratnanko Banerjee, learned counsel appearing for the company has contended as follows:--

(i) The order of admission passed by me is a subject-matter of challenge in the appeal and has not attained finality. Hence, the winding up proceeding should not be heard and should be adjourned till the disposal of the appeal.

(ii) Since no other supporting creditor has joined the petitioning creditor herein, the order of winding up if passed would virtually affect the appeal if ultimately disposed of on a later date. To avoid such conflict hearing of this proceeding should be adjourned.

(iii) Although the company has no tangible asset the same is a running one having work force working in various units and earning a profit of Rs. 1 lakh per annum. Such fact should be taken into consideration by this Court.

6. Mr. Banerjee in support of his contention relied upon three decisions which are as follows:

(i) S.P.A. Annamalay Chetty v. B.A. Thornhill AIR 1931 PC 263;

(ii) [K. Muthuswami Gounder Vs. N. Palaniappa Gounder](#), ;

(iii) Mohan Lal Ghosh v. East India Wires Ltd. [2004] 52 SCL 332 (Cal.).

7. Relying on the Privy Council decision and the Apex Court decision, Mr. Banerjee has contended that the dispute raised by the company on merits is now a subject-matter pending for adjudication before the Court of Appeal. Hence, the order of admission has not reached its finality. According to Mr. Banerjee, since no other creditor has joined the petitioner, the order of winding up if passed today would create an anomalous situation in case the appeal succeeds ultimately. According to Mr. Banerjee there are two courses left open to me either to adjourn the hearing or to go into the merits of the matter once again so to say to review my earlier order of admission. The second option although not specifically submitted by Mr. Banerjee, the same has been inferred by me from the sum total of the submission. The third decision cited by Mr. Banerjee is a decision given by me in a winding up proceeding where I have discussed the effect of an order of winding up which I described as a death sentence of a juristic person.

8. The submission of Mr. Banerjee would have been all right had there been no such specific direction from the Division Bench to the effect that the "winding up Court can proceed" with corresponding observation to the effect "stay is refused". I have carefully gone through the Division Bench decision. Their Lordships admitted the appeal holding

the same maintainable even after advertisement. The said decision including the operative part is binding upon me. The matter was ready for hearing after completion of affidavits on the day when it appeared on 18th November, 2004 for final adjudication. If I accede to the request of Mr. Banerjee by adjourning hearing of the winding up proceeding till the disposal of the appeal it would in effect be contrary to the direction given by the Division Bench. The words "the Company Court can proceed with the winding up process", as I understand, is a direction upon this Court to dispose of the matter finally upon consideration of the materials brought before this Court on affidavits. Hence, the prayer of Mr. Banerjee for adjournment is refused.

9. On merits, I am of the view that I cannot go beyond the order of admission. The Division Bench in a recent decision in the case of SRC Steels (P.) Ltd [APOT No. 398 of 2004] observed that the order of admission is a final decision on merits. The same view was taken by the Division Bench in the subsequent decision in the case of Dhariwal Steels (P.) Ltd. [T. No. 318 of 2004]. Hence, I cannot go beyond the order of admission which is final and binding upon me unless it is set aside by the Court of Appeal.

10. Hence, at the final stage I am only to consider the other factors pertaining to the company. On the own showing of the company, the company has no tangible asset. It is earning a profit of a sum of Rs. 1 lakh per year whereas the claim of the petitioning credit is Rs. 22.26 lakhs apart from the interest claimed thereon. Even if the company is directed to pay the said sum by instalment on their own showing they are not in a position to pay the same. If the company is not in a position to pay its debts it is insolvent and deemed unable to pay its debts. Hence, I am convinced that the substratum of this company has gone and it is a fit and proper case that the company should be wound up.

11. Hence, the application succeeds. Jaya Computers and Softwares Limited having its registered office at 20, Old Court House Street, 2nd Floor, Kolkata-700 001 is wound up by this Court under the provisions of Companies Act, 1956. Official Liquidator attached to this Court is directed to take charge of the assets and pay the costs and incidental to this application to the petitioner out of the funds to be lying in his hands.

12. The Official Liquidator is, however, directed not to take possession of the assets of the company for a period of four weeks from date or till the disposal of the appeal whichever is earlier.