HONOURABLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE SAMBASIVARAO NAIDU

ORIGINAL SIDE APPEAL NO.2 OF 2022

Date: 25.11.2022

Between:

M/s. Sree Giri Tej Iron and Steel Private Limited,
Rep.by its Managing Director, Savitha Bai,
Office at D.No.43-20-24a, Near Erukamamba Temple,
Dondaparthy Junction, Visakhapatnam,
Visakhapatnam district, A.P.

..... Appellant/respondent

And

M/s. R.K.Steel Udyog Private Limited,
Rep.by its Executive Director, Mr.Sunil Surana,
Office at 602/A, 6th Floor, AI-Karim Trade Centre,
M.G.Road, Ranigunj, Secunderabad, Hyderabad,

.... Respondent/petitioner

The Official Liquidator,
High Court of Judicature at Hyderabad for
the State of Telangana

.... Respondent

This Court made the following:

HONOURABLE SRI JUSTICE P.NAVEEN RAO
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JUDGMENT: (per5 Hon'ble Sri Justice P Naveen Rao)

Heard learned senior counsel Sri Dammalapati Srinivas for learned counsel Sri P.Kasi Nageswara Rao for the appellant, the learned counsel Sri Raghuram Mahadev for the respondent no.1 and the learned counsel Sri J.Srinadha Reddy for the respondent no.2. Parties are referred to as arrayed in the Company Petition.

2. According to the petitioner, respondent is incorporated as a Company under the Companies Act, 2013 (for short, 'the Act'). Petitioner supplied iron and steel worth ₹ 23,99,910/- to the respondent under a running credit account. The respondent defaulted in payments. On 03.07.2013, notice was issued by petitioner calling upon the respondent to pay sum of ₹ 34,17,917/-. The said notice was returned with endorsement 'not claimed returned to sender'. In those circumstances, petitioner filed Company Petition No.50 of 2014.

3. In C.P. No. 50 of 2014, notices sent to respondent returned un-served. Court permitted the petitioner to take out substituted service by publishing in two daily newspapers. Even after publication of notice

in two daily newspapers, no appearance was entered for respondent. The learned single Judge has adjourned the petition to enable respondent to enter appearance, but to no avail. Though Company Petition was admitted on 27.10.2014, but deferred publication of advertisement only to enable respondent to pay the due amounts. On 18.11.2014, Court permitted the petitioner to carry out publication with regard to admission of Company Petition in two newspapers and accordingly the same was published. Still there was no representation for respondent. Petitioner adduced evidence by examining P.W.1 and marked Exs.A1 to A15. The respondent was set *ex parte.*

4. On evaluating evidence relied by the petitioner, the learned single Judge held that having received goods from the petitioner, respondent failed to pay the value of the goods. The learned single Judge also faulted the respondent in not responding to the statutory notices and notices issued in the Company Petition and observed that not contesting the Company Petition shows that respondent was evading the payment of admitted debt. The learned single Judge ordered winding up of respondent. The Official Liquidator was appointed as Liquidator. Aggrieved thereby, this appeal is filed.

5. Learned senior counsel appearing for counsel for appellant would contend that the respondent has not received statutory notice and

notices in Company Petition. As there was no notice, it cannot be said that respondent was avoiding to appear before this Court. He would further submit that the documents marked on behalf of petitioner do not constitute evidence of proof of insolvency. Company has sufficient means to handle its obligations.

6. He would submit that petitioner and respondent have entered into Memorandum of Understanding on 19.03.2021, where under the *inter se* dispute was amicably settled and entire dues were paid. The petitioner also filed Memo vide USR No.41508 of 2022 dated 29.04.2022 in proof of resolution of dispute. He therefore prays to set aside the *ex parte* order.

7. It is further contended that the amount borrowed from Union Bank of India was also cleared and that there are no more liabilities.

8. According to Official Liquidator, consequent to winding up order he had issued notice under Sections 454 and 456 of the Act to the Ex-Directors' of the respondent-company to file statement of affairs to handover all the assets, books and records of the company, but they failed to respond. Therefore, Official Liquidator filed application under Sections 454(5) and 454(5A) of the Act against Ex-Directors in the Company Court. The Ex-Directors have not filed statement of affairs so far.

9. On 09.09.2015, when officials of Official Liquidator went to the Registered Office premises of the respondent-company, none of the Ex-Directors were present. Only officials of the Bank and representative of petitioner were present. In the place also there was no building and construction activity was going on even though the respondent-company continues to show the same address.

10. The Official Liquidator asserts that so far assets of the respondent-company are not handed over to him. Further, as Official Liquidator has not received any information, he is not aware of status of assets of the company and details of financial institutions/secured creditors of those assets.

11. As asserted by the Official Liquidator in his counter-affidavit, the Union Bank of India reported to the Official Liquidator that O.S.No.479 of 2014 was decreed in favour of Bank on 11.10.2019, but recovery certificate was not issued by Debts Recovery Tribunal. The Bank took physical possession of secured asset in the year 2015. Though several times auction was conducted, no one evinced interest to buy the secured asset. In the year 2019, OTS was agreed for ₹ 7.60 crores and borrower company paid entire amount.

12. This information furnished by Union Bank of India tallies with the assertion of the respondent-company. The averments also make it clear

that for the last seven years the Official Liquidator is unable to secure the assets and books of the respondent-company. Except issuing notices now and then, he has not taken concrete steps to implement the orders of this Court. Insofar as Official Liquidator is concerned, matter stands as it was.

13. However, two important developments required to be noticed. Firstly, the dispute with the petitioner is resolved and his dues are cleared. Thus, the genesis leading to this Court ordering winding up of the company and appointing Official Liquidator does not survive any more. Secondly, according to respondent-company, there was outstanding liability only with Union Bank of India and its loan account was regularized as per OTS and there are no other creditors. As noticed above, the Official Liquidator has not received any other claims in the last seven years. There appears to be no other claim against respondent-company.

14. It is appropriate to note that the learned single Judge passed order to wind up the respondent-company as the respondent-company did not appear and present its version, but not on considering the merits of the respective claims.

15. The company Court ordered winding up of the company only on the ground that the Company Petition was not contested and that the

liability with the petitioner was proved. There was no other material to hold that the company was in doldrums and there was no other option but to windup. As required by Section 434 (1) (c) of the Act, there was no occasion to learned single Judge to take into account the contingent and prospective liabilities of the company.

16. In **Meghal Homes Pvt.Ltd. vs. Shree Niwas Girni K.K.Samiti and others**[1]**,** Hon'ble Supreme held as under:

> "47. When a company is ordered to be wound up, the assets of it are put in possession of the Official Liquidator. The assets become *custodia legis*. The follow-up, in the absence of a revival of the company, is the realisation of the assets of the company by the Official Liquidator and distribution of the proceeds to the creditors, workers and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the ultimate step is taken or before the assets are disposed of, to accept a scheme or proposal for revival of the Company. In that context, the court has necessarily to see whether the scheme contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529-A of the Act. Of course, the court has to see to the bona fides of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the company in liquidation."

17. Since the matter is settled between the petition creditor and the appellant company and that settlement has been placed on record and no one has raised objection against recalling the windup order and since dues of the secured creditor have already been satisfied, no useful purpose would be served keeping alive the winding up order. Winding up a company is a last resort. Every effort should be made to ensure that the company revives and business of a company continues in

[1] (2007) 7 SCC 753

accordance with law. Operation of a company also generates employment. But, for the fact that the appellant was set *ex parte* there was no substantial material to show that the financial position of the appellant was so poor there was no other option but to windup the company. As it now stands the appellant has settled its accounts with the petitioner and the secured creditor bank and assert that there are no other liabilities. It is not disputed by the Official Liquidator that there are no other claims received by his Office.

18. Having regard to the facts of the case, the appellant made out a strong case to set aside winding up order dated 16.06.2015 of learned single Judge. Accordingly, O.S.A. is allowed and the order of learned single Judge is set aside. All pending applications shall stand closed.

P.NAVEEN RAO,J

SAMBASIVARAO NIADU, J

Date: 25.11.2022
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