

Michael Hart Vs. M/s. Ninestars Information Technologies Ltd., Represented by its Managing Director, Gopal Krishnan, Chennai

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Court : Chennai

Decided On : Apr-05-2016

Judge : K. Ravichandrabaabu

Appeal No. : C.P. Nos. 2 of 2009

Appellant : Michael Hart

Respondent : M/s. Ninestars Information Technologies Ltd., Represented by its Managing Director, Gopal Krishnan, Chennai

Judgement :

(Prayer: CompanyPetition filed under section 433 (E) and (F) of the Companies Act, 1956, to direct Ninestars Information Technologies Limited, be wound up by and under the orders and directions of this court and to pass an order directing that the Official Liquidator attached to this court be appointed as the Liquidator of the company Ninestars Information Technologies Limited with all the powers under the provisions of the Companies Act, 1956 including the power to take possession of all affairs, assets, management, books, papers and vouchers.)

1. This company petition is filed to wind up the respondent company and to appoint the Official Liquidator to take possession of all and assets management, books, papers and vouchers of the respondent company.

2. This court issued notice regarding admission to the respondent as early as on 20.01.2009. After notice, the respondent entered appearance, filed counter affidavit and opposed the application. This court by an order dated 29.06.2012, after hearing both parties for admission, dismissed the company petition on the reason that the claim of the petitioner is time barred and an e-mail dated 01.04.2008 sent by the respondent will not amount to acknowledgement of liability. Challenging the said order, the company petitioner filed O.S.A.No.11 of 2013 which came to be disposed of on 30.04.2013, whereby the order passed by the learned Single Judge was set aside by remitting the matter back to the Company Court to dispose of the company petition on merits and in accordance with law. The Division Bench has also observed that the said e-mail dated 01.04.2008 has been sent by the respondent company acknowledging its debt and such acknowledgement of debt was made before the expiry of the limitation of period. The said order passed by the Division Bench was challenged by the respondent before the Hon'ble Supreme Court in S.L.A (C) No.32408 of 2013, which came to be disposed of as withdrawn. The said order of the Apex Court was made on 24.02.2015. Thereafter, the matter was listed before this court on 12.02.2016. However at the request of both sides, the matter was adjourned to 08.03.2016 finally for hearing the matter for admission. Accordingly, the matter was taken up and heard for admission.

3. The case of the petitioner is as follows:

The respondent company was incorporated in 2003 with Registrar of Companies, Tamilnadu under the provisions of the Companies Act, 1956. It is an Information Technology company. The respondent company sought the services of the petitioner as a Consultant for them and accordingly, the petitioner was engaged as consultant, by executing a consultancy agreement dated 21.05.2004. The consulting fee agreed to be paid by the respondent to the petitioner was a sum of US\$10,460 per month. In addition to this, the respondent company was also liable to pay other incidental expenses. Though the agreement was originally entered for a period of six months, it was later renewed for further period of six months through another agreement dated 19.11.2004. The petitioner experienced problems with the respondent company in respect of his demand towards monthly

consideration and reimbursements. The petitioner sent invoice every month for his consulting fees. By March 2005, the respondent was due to the tune of US\$ 164,500 to the petitioner. The respondent company avoided in making the payment under the pretext of one or another. The petitioner tendered his resignation on 28.03.2005. The respondent company started negotiation with the petitioner. As a gesture of good faith, the petitioner agreed to settle for an amount of US\$ 140,000. As per the settlement, the respondent company executed a promissory note in favour of the petitioner on 31.03.2005. Despite the said fact, the respondent company failed to make the payment. On 22.02.2008, the petitioner sent a legal notice demanding the payment which was acknowledged by the respondent on 29.02.2008. After receiving the said legal notice, the respondent requested the petitioner to settle for an amount of US \$ 100,000 to be paid in three or four phases. The respondent indicated that it did not have funds to pay the entire claim due to the dire financial crisis. Even after that proposal made by the respondent, no payment was made to the petitioner. Consequently, statutory notice was issued to the petitioner on 15.08.2008 under section 434 of the Companies Act. Despite the said notice, the respondent neither replied to the same nor paid the money. Hence, the present company petition.

4. Counter affidavit is filed by the respondent wherein it is stated as follows:

The company has not offered any sum to the petitioner as stated in the promissory note nor executed the same. The respondent company is financially sound and there was no necessity to deny payment of any legitimate claim. The petitioner has not obtained a civil decree against the respondent for the alleged sum claimed by him. Winding up petition is filed based on the promissory note allegedly executed in the name of the petitioner. Therefore, the petitioner can approach the civil forum and establish his money claim due under the alleged promissory note. If he succeeds, he may proceed to file execution petition and not to file a petition of this nature. When the respondent company has got an employee strength of more than 800 technical qualified persons, a petition for winding up cannot be admitted for adjudication. The Company Court cannot act like a Civil Court. Though the petitioner was appointed to act as the agent of the respondent, he has not procured a single business to the respondent. The petitioner has not even earned

a single pie for the respondent company and has not done any work which warrants payment of service charges. The respondent strongly denied the execution of promissory note dated 31.03.2005 through e-mail dated 01.04.2008. The respondent also denied sending such e-mail dated 01.04.2008 and puts the petitioner for strict proof of the same. Since the dispute between the parties is purely of civil nature, the petitioner cannot maintain the present company petition.

5. The learned counsel for the petitioner submitted as follows:

The promissory note executed by the respondent and the e-mail sent by them admitting the execution of such promissory note are enough to hold that there is an admission of liability to pay US \$ 140,000 to the petitioner which has not been paid by the respondent company inspite of receiving the statutory notice. In their e-mail, the respondent has admitted that the company was facing a financial crisis and therefore, they could not honour the commitment. When there is an admitted liability followed by their admission of their incapacity to make the payment in view of financial crisis, it is enough for this court to admit this company petition for further course of action. The statutory notice issued by the petitioner was not replied even though it was acknowledged.

6. In support of her contention, the learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court reported in AIR 1971 Supreme Court 2600, M/s.Madhusudan Gordhandas vs Madhu Woolen Industries Private Ltd., to contend that the court has to see as to whether the defense of the companies is in good faith and that the court will not act upon a defense that the company has the ability to pay the debt where the debt is undisputed. She also relied on the decision reported in 2002 (3) MLJ 750, Imperial Corporate and Services (P) Limited vs Aruna Sugars and Enterprises, Chennai.

7. Per contra, the learned counsel appearing for the respondent submitted as follows:

The alleged liability is not an undisputed liability. The promissory note was not issued by the respondent company. Even otherwise, the same was executed subject to final round verification. When no such verification had taken place, the

petitioner cannot rely upon such promissory note. The e-mail sent by the respondent is only an offer to make payment and not accepting the liability of such payment. If there is some dispute with regard to the quantum, the company petition cannot be entertained. In support of such contention, he relied on the decision reported in (1965) 35 CompCas 456(SC), Amalgamated Commercial Traders (P.) Ltd. vs A.C.K.Krishnaswami. He further submitted that the respondent company is a running company having 1000 employees and therefore, it is not in loss. In support of his overall contentions, he relied on the following decisions:

i) 100 (2002) DLT 14, NEPC India Ltd. vs. Indian Airlines Limited,

ii) AIR 2005 SC 4175, Mediquip Systems Pvt. Ltd. vs Proxima Medical System GMBH;

iii) (1994) 79 CompCas835(SC), Pradeshia Industrial and Investment Corporation of U.P. vs North India Petrochemical Ltd.,

iv) (2010) 159 CompCas369 (SC), IBA Health (I) Pvt. Ltd. vs Info-Drive Systems Sdn. Bhd.

8. Heard the learned counsels appearing on either side and perused the materials placed before this court.

9. This company petition is filed for winding up of the company on the ground that the Company failed to pay its admitted liability to the petitioner and is unable to pay all its debts arising in the usual and ordinary course of business, consequently becoming as a commercial insolvent. The claim of the Company petitioner is that his service as a consultant for the respondent company was utilised after entering into a Consultant agreement dated 21.05.2004 agreeing to pay a sum of US\$ 10,460 per month as consultancy charges and that the respondent company failed to pay such monthly remuneration towards such service rendered by the petitioner and consequently an amount of US\$ 140,000 was due and payable without interest till 31.10.2005 and it works out to US\$ 217700 including the interest till date of the filing of the company petition.

10. Originally, after notice to the respondent company and hearing both parties, the Company Court, by its order dated 29.06.2012, dismissed the company petition on the sole ground that the claim of the petitioner is barred by limitation and that there is no acknowledgement of the liability within the period of limitation.

11. The said order of the Company Court was taken on appeal in O.S.A.No.11 of 2013. The Division Bench of this Court by order dated 30.04.2013 allowed the appeal by setting aside the order of the Company Court and remitted the matter back to this court for disposal of the company petition on merits and in accordance with law. The relevant finding at paragraphs 38 and 39 of the above said order of the Division Bench are extracted hereunder:

"38. It is also noted that the E-mail dated 1.4.2008, had been sent by the Managing Director, Gopalakrishnan, admitting the liability of the respondent company and the issuance of the promissory note is in favour of the appellant. In the said E-mail the respondent company had clearly admitted the fact that it could not make the payments, payable to the appellant, due to financial constraints. The admission of the Managing Director of the respondent company in the E-mail, dated 1.4.2008, relates to the issuance of the promissory note and to the fact that the respondent company owed an amount of US \$ 1,40,000 to the appellant. While so, the learned Single Judge had dismissed the company petition, in C.P.No.2 of 2009, as barred by limitation. The learned single Judge had held that the period of limitation had started to run from 28.3.2005, the date on which the appellant had tendered his resignation, as consultant in the respondent company. However, from the records available it could be seen that there were certain negotiations that had taken place between the appellant and the respondent company, based on which it had been agreed that the amount to be settled in favour of the appellant would be reduced to US \$ 1,40,000. Only thereafter, the respondent company had issued a promissory note, dated 31.3.2005, promising to pay US \$ 1,40,000 to the appellant, before 31.10.2005, without interest. Thus, it could be seen that the amount of US \$ 1,40,000 had become due and payable by the respondent company, on 31.10.2005. Further, on a perusal of the promissory note, dated 31.3.2005, it could be noted that, if the agreed amount was not paid by 31.10.2005, interest would accrue to the amount payable, on a monthly basis, at

the rate of 1.5%. As such, the respondent company was at liberty to make the payment of the agreed amount of US \$ 1,40,000, before 31.10.2005. Accordingly, the period of limitation, with regard to the amount payable to the appellant, by the respondent company, would start running from 31.10.2005 and not from 28.3.2005, as held by the learned Single Judge.

39. It is not in doubt that an E-mail, dated 1.4.2008, had been sent by the respondent company, acknowledging its debts, as required under Section 18 of the Limitation Act, 1963. As the acknowledgement of debt had been made by the respondent company, before the limitation period of three years from 31.10.2005 was over, a fresh limitation period had started from the date of such acknowledgement i.e. from 1.4.2008. Thus, the company petition, in C.P.No.2 of 2009, which had been filed by the appellant, on 24.11.2008, is within the period of limitation. However, the learned Single Judge had held that the company petition, in C.P.No.2 of 2009 is not maintainable, as the period of limitation had expired. Thus, it could be seen that the learned Single Judge had erred in dismissing the company petition filed by the appellant, in C.P.No.2 of 2009. In such circumstances, the order passed by the learned Single Judge, dated 29.06.2012, in C.P.No.2 of 2009, is set aside. The matter is remitted back to the learned Single Judge to be disposed of on merits and in accordance with law. Accordingly, the original side appeal stands allowed."

12. From perusal of the order passed by the Division Bench which has become final, conclusive and binding on parties, as the Special Leave Petition filed by the company before the Hon'ble Supreme Court of India also came to be withdrawn on 22.04.2014, it is crystal clear that the contention of the respondent company with regard to the limitation or the questioning the execution of the promissory note cannot be agitated once again before this court. The Division Bench has categorically found that the respondent company who extended the promissory note also sent the e-mail dated 01.04.2008. It is the further finding of the Division Bench that the claim is not barred by limitation. Therefore, the fact remains that there is a promissory note executed by the respondent company promising to pay a sum of 140,000 US\$ to the petitioner followed by the e-mail dated 01.04.2008, confirming the execution of such promissory note in favour of the company

petitioner. However now an attempt is made by the learned counsel appearing for the respondent that the promissory note was not executed by the respondent company and on the other hand, the same was executed by sister company. I am not convinced to accept the said submission for more than one reason. First of all, the respondent is estopped from raising such contention having lost before the Division Bench. Secondly it is evident that such feeble attempt is being made only to escape the liability of the respondent company, especially when in the e-mail dated 01.04.2008 sent by the Managing Director of the respondent company to the applicant it is accepted about the execution of such promissory note by specifically stating that the same was issued in absolute good faith. Therefore, the amount of 140,000US\$ agreed/promised to be paid is, undoubtedly, to be treated as an admitted liability of the respondent company.

13. Another attempt is made by the learned counsel appearing for the respondent company to contend that what was offered through e-mail dated 01.04.2008 was only 100,000 US\$ that too in 3 or 4 crunches and not the entire claim of the company petitioner. Here again I would like to point out that when a promissory note was executed in favour of the petitioner, promising to pay 140,000 US\$ and when such execution is admitted in the subsequent communication dated 01.04.2008 even though by offering a lesser payment, it cannot be permitted to contend that there is no admitted liability of US \$ 140000. On the other hand, such offer of the respondent company to pay lesser amount will not absolve the respondent company from its admitted liability of 140,000 US\$. Therefore, there is no difficulty for this court to come to a conclusion that such admitted liability has not been paid even after the issuance of the statutory notice. Hence, this court is left with no other option except to accept the contention of the company petitioner and admit the company petition to proceed further in this matter.

14. The learned counsel appearing for the company petitioner relied on AIR 1971 Supreme Court 2600, M/s.Madhusudan Gordhandas vs Madhu Woolen Industries Private Ltd., wherein at paragraph No.21, it has been observed as follows:

"21.Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that

particular debt (See Re.A.Company 94 SJ 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 substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."

15. The learned counsel appearing for the company petitioner further relied on 2002(3) MLJ 750, Imperial Corporate and Services (P) Limited vs. Aruna Sugars and Enterprises, Chennai, wherein this court has observed at paragraph Nos.7 and 8 as follows:

"7...It is clear that the principles on which the Court acts are first that the defence of the company is in good faith and one of substance; secondly, the defence is likely to succeed in point of law; and thirdly the company adduces prima facie proof of the facts on which the defence depends. I have already referred to the admission of the Managing Director of the respondent company-vide letter dated 30.12.98 and the reply by the respondent company dated 30.9.1999. In such a situation absolutely there is dispute regarding the effects and steps taken by the petitioner. On the other hand, only in the reply notice dated 30.9.99, the respondent for the first time complained about the unsatisfactory work. As rightly contended, there is no bonafide dispute and the same is not made any good faith.

8. Mr. Arvind P.Dattar, by drawing my attention to the balance sheet of the respondent company, would contend that even today it is a running company and there is no need to order winding up. In this regard, it is relevant to refer a Division Bench decision of this Court in the case of Sree S. Mitts v. Dharmaraja Nadar, wherein their Lordships held that for determining the question as to whether the Company would be able to meet its then demands, the value of such assets without which it could not carry on business, should not be taken into account. According to them, the test of inability to pay the debt under Section 433(e) was not whether the company, if it converted all its assets into cash, would be able to

discharge its debts, but whether in a commercial sense the existing liabilities could be paid by it while it continued to carry on as a company. In the light of the above observation, the claim that the respondent is a running company is not a relevant material.

16. On the other hand, the learned counsel for the respondent relied on the following decisions:

100 (2002) DLT 14, NEPC India Ltd. vs. Indian Airlines Limited, a decision of the Delhi High Court, AIR 2005 SC 4175, Mediquip Systems Pvt. Ltd. vs Proxima Medical System GMBH and (1994) 79 CompCas835(SC), Pradeshia Industrial and Investment Corporation of U.P. vs North India Petrochemical Ltd., are cited to contend that if there is a bonafide dispute and the defense is a substantial one, the court will not wind up the company. There is no difficulty in accepting the above proposition. However, when I find that there is no dispute much less a bonafide one with regard to the claim made by the company petitioner and that the company has come forward only to offer a lesser amount than the admitted liability, I find that, under the present facts and circumstances, the above decisions are not helping the respondent in any manner.

17. (2010) 159 CompCas369 (SC), IBA Health (I) Pvt. Ltd. vs Info-Drive Systems Sdn. Bhd. and (1965) 35 CompCas 456(SC), Amalgamated Commercial Traders (P.) Ltd. vs A.C.K.Krishnaswami, are cited to contend that a Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bonafidely disputed debt. This court is fully conscious of its jurisdiction as well as the scope of the company petition. Certainly, this court is not functioning as debt collecting agency. At the same time, under the present facts and circumstances of the case, when this court finds that there is no dispute on the debt much less a bonafide one and that this winding up petition is also not for collecting the debt and on the other hand, only to wind up the company which has failed to pay the admitted debt/liability, as contemplated under section 433(E) of the Companies Act, 1956, I do not think that the above decisions of the Apex court will help the respondent company in any manner.

18. Further, the conduct of the respondent company all throughout the proceedings would show that their inability to pay the debt to the petitioner is evident. This company petition is filed in the year 2009. No doubt, the same was dismissed originally by the Company Court in the year 2012. However the appeal filed against the said order came to be allowed by the Division Bench on 30.04.2013 specifically by rejecting the technical objections raised by the respondent company. Though the said order was attempted to be challenged before the Apex Court, the respondent company has only chosen to withdraw the said appeal on 24.03.2015. Thereafter, the matter is listed before this court on 12.02.2016, almost after one year. Either after the dismissal of the appeal by the Division Bench of this court or atleast after withdrawing the special leave petition before the Apex Court, the respondent company should have come forward to settle the dues to the company petitioner. On the other hand, it is seen that even thereafter, though several negotiations were held between the parties, the respondent failed to pay the dues and on the other hand, it appears that only a meagre sum was offered to the company petitioner.

19. No doubt, it is true, not that all the "failures" to pay the debt would fall under the purview of "unable" to pay the debt. But at the same time, if such "failure" is not resulting out of any bonafide contention on the part of the company and on the other hand, inspite of having sufficient opportunity to settle the dues, if the company fails to do so, this court can, going by the facts and circumstances of the case, certainly bring such "failure", under the purview of "unable" to pay the debt or due, while considering the application for winding up. At this juncture, it is to be noted that "admitted liability" is totally different and distinguishable one from an "offered amount" by the borrower after admitting such liability. Therefore such offering of lesser amount, that too by citing financial crisis, cannot be considered as the "disputed liability".

20. Therefore, this court can, without any hesitation come to a conclusion that the respondent company is not only due to the company petitioner and also is unable to pay its dues inspite of having sufficient opportunities to do so. I am also unable to appreciate the contention of the respondent company that no business was done through the petitioner and therefore, the claim is unsustainable. If there was

no such business, then a question would arise as to why an execution of promissory note followed by sending an e-mail acknowledging such execution however by making only a lesser amount, not on the ground of no business but on the ground of financial crunches of the company, has taken place. The answer to such question certainly would go against the company.

21. On the other hand, on appreciation of entire facts and circumstances of the case, this court finds a justification on the part of the company petitioner to knock the door of the company court seeking for winding up of the company. When that is the one of the legal course available to the company petitioner, this court cannot shut its door to the company petitioner, on technical reasons. In my considered view, while rendering substantial justice, neither the technicalities nor, to certain extent, untenable factual objections, can block the way of this court in doing so. In this case, the Division Bench has already rejected those objections. It is well settled that when substantial justice and technicalities are pitted against each other, only the substantial justice should prevail over all other technicalities. On this principle, I always prefer to refer to the decision of the Apex Court reported in 2013(4) SCC 97, *Laxmibai vs Bhagwantbuva*, wherein at paragraph No.49, it has been observed as follows.

"49....When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best."

22. Therefore, I find that there is every justifiable reason to admit the company petition. Accordingly, the company petition is admitted.

(i) Issue Notice on the Court Notice Board.

(ii) Issue Notice to the respondent.

(iii) Issue Notice to the Registrar of Companies, Madras.

(iv) Affixure of notice at the premises of the Registered Office of the respondent company.

(v) The petitioner is directed to publish the company petition in one issue of Tamil daily "Malai Murasu" in one issue of English Daily "Indian Express" and in the Tamil Nadu Government Gazette fixing the date of hearing on 10.6.2016.

(vi) The petitioner is directed to publish the company petition giving at least fourteen days clear advance notice.

(vii) The Official Liquidator, High Court, Madras as Provisional Liquidator is directed to take charge of the assets of the respondent company. The Ex-Directors of the respondent company is directed to file their statement of affairs before the Official Liquidator within a period of 21 days. The company shall deposit a sum of Rs.20,000/- towards initial expenses before the Official Liquidator in this matter.

Call the company petition on 10.6.2016.

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