

In Re: Focus Advertising Pvt. Ltd.

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Court : Mumbai

Decided On : Mar-14-1974

Reported in : [1974]44CompCas567(Bom)

Judge : J.R. Vimadalal, J.

Acts : [Companies Act, 1956](#) - Sections 346, 433, 434(1) and 557(1)

Appellant : In Re: Focus Advertising Pvt. Ltd.

Advocate for Def. : S. V. Oak, ;S. H. Doster, ;N. O. Thakkar and ;V.V. Tulzapurkar, Advs.

Advocate for Pet/Ap. : G. J. Desai, ;D. R. Zaiwala and ;D. R. Dhanuka, Advs.;R. J. Bhatt, Adv.

Judgement :

Vimadalal, J.

1. This is a winding-up petition filed against a company named focus Advertising Pvt. Ltd., on the ground of non-compliance with a statutory notice under section 434(1)9a) read with section 433(e) of the [Companies Act, 1956](#). By a separate order passed by me earlier today, I have already rejected the preliminary objection raised by Mr. Dhanuka on behalf of the company contending that this petition is not maintainable because the petitioners have not furnished therein particulars of

their debts. I have, therefore, proceeded to head the petition on merits. By their attorney's letter dated 25th June, 1973, the petitioners gave the requisite statutory notice under section 434(1)(a) of the [Companies Act, 1956](#), calling upon the company to pay a sum of Rs. 17,428.41 due to them under bills submitted to the company for various blocks prepared and supplied by the petitioners as per the company's orders from time to time. It is an admitted position that no reply was sent by the company to the statutory notice. It is also admitted that no payment was made by the company to the petitioners in respect of that claim. It is well settled that a creditor who cannot obtain payment of his debt pursuant to a statutory notice is entitled as between himself and the company *ex debito justitiae* to an order for winding-up if he brings his case within the Act. It has been held by me in the matter of *Seksaria Cotton Mills Ltd.* (1969) 39 Com. cas 475 . that once there is non-compliance with a statutory notice given by a creditor under section 434(1) demanding payment of a debt owing by the company and the court is satisfied that there is no bona fide dispute in regard to the petitioner's debt, the creditor is entitled to a winding-up order *ex debito justitiae*, and the court will not listen to a defense on the part of the company that it is not commercially insolvent or that its financial position is not such as to be unable to pay its debts. The view which I had taken in the said case now stands certified by the decision of the Supreme Court in the case of *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.* (1972) 42 Com. Cas. 125. It is further stated there by the Supreme Court that where 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. Approving the statement of law contained in *Palmer's Company Law*, 21st edition, page 742, the Supreme Court laid down (PARA.22) that the right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reasons, they object to a winding-up order, the court in its discretion may refuse the order. The Supreme Court has clarified that the wishes of the creditors would be tested by the court on the ground as to whether the case of the persons, opposing their winding-up is reasonable, and in that connection the grounds furnished by the creditor opposing the winding-up would have an

important bearing on the reasonableness of the case. That is also the view taken by the [Court of Appeal in England in the case of *In re P. & J. Macrae Ltd.* (1961) 1 All E.R. 302; 31 Com Cas. 424 WHERE THIS POINT IS CLARIFIED BY STATING THAT BEFORE A MAJORITY OF CREDITORS CAN CLAIM TO OVERRIDE THE WISHES OF THE MINORITY, THEY MUST AT LEAST SHOW SOME GOOD REASON FOR THEIR ATTITUDE, AND THAT THE BARE FACT OF THE OPPOSING CREDITORS BEING IN A MAJORITY IS NOT of the Act plainly confer. The judgment of the Court of Appeal in the said case further states that it is not enough for the creditors to take the view that, notwithstanding the company's indebtedness, they were all more likely in the long run to obtain payment if the company was not wound up, but was allowed to continue trading unless good reasons for taking that view are placed before the court. This decision is based on section 557(1)(a) of our Companies Act, which is identical in terms with section 346 of the Companies Act, 1948, in England, the material portion of which provided that in all matters relating to the winding-up of a company, the court may have regard to the wishes of the creditors as proved that in all matters relating to the winding-up of a company, the court may have regard to the wishes of the creditors as proved to it by sufficient evidence.

2. Having regard to this legal position, Mr. Dhanuka on behalf of the company has opposed the winding-up petition on two grounds which, indeed, are the only grounds which can be available to a company where a winding-up order is sought on the basis of a statutory notice. These two contentions are: (1) that there is a bona fide dispute raised by the company in respect of the petitioners' claim which is of an unascertained amount; and (2) that that majority in number and value of the creditors of the company are supporting the company and opposing the making of a winding-up order. As far as the first of those contentions is concerned, there is no substance whatsoever is the same. First and foremost, there is no statement made by the company in its affidavit-in-reply, dated 21st January, 1974, to the effect that nothing is due to the petitioners, or to the effect that a specified amount less than that claimed is due to the petitioners. In the affidavits-in reply the company, to use a popular expression, merely sits on the fence in regard to the petitioners' claim by stating that it disputes the same without setting out how or in what manner it seeks to dispute it. There is, therefore, no bona fides on the part of

the company disclosed by that affidavit in regard to their alleged dispute of the petitioners' claims. Indeed, the company adopted the same posture when, through its attorneys, it addressed a letter dated 19th November, 1973, to the petitioners. What is more, even in paragraph 17 of the said affidavit-reply whatsoever was sent by the company to the statutory notice dated 25th June, 1973, admittedly received by it. In paragraph 7 of the affidavit-in-reply the company is at pains to explain this very inconvenient fact by stating that since its relations with the petitioners were cordial, instead of sending a written reply to the said notice, it had personally contacted the petitioners' representative, one Yusuf, and requested him to attend the company's office for verification of the bills and collect the amounts which may be found due as a result thereof. I do not believe the explanation sought to be offered by the company for its failure to reply to the statutory notice because, in my opinion, a company which in terms is threatened with a winding-up proceeding in a statutory notice would not allow the same to remain unanswered in such a casual manner as alleged in the said paragraph 7. Moreover, what has, perhaps, the most important bearing on the question of the bona fides of the company in respect of the alleged dispute of the petitioners' claim is the fact that when this petition came up for admission before my brother, Kania, J. on the 5th September 5, 1973, an express and unqualified admission of the petitioners' claim was made by the company through its counsel, which was recorded by the learned judge, and on the strength thereof an adjournment was obtained on that occasion. Having regard to these facts, in my opinion there is complete want of bona fides in the dispute that is now sought to be raised by the company in regard to the petitioners' claim which is the subject-matter of the present proceeding. At the end of his argument Mr. Dhanuka made an offer, without prejudice, that the company is willing to deposit in court a sum of Rs. 89,835.88 in respect of the aggregate of the claims of the petitioners and of two other creditors, viz., Gulam Mohamad and Commercial Art Engravers Pvt. Ltd. I, however, see no reason to refrain from passing a winding-up order merely by reason of such an offer unless a provision of that nature is made for all the creditors appearing in the case and is consented to by them, on the footing that they would file separate suit to recover their claims to the credit of which those amounts would have to be transferred. Such an order cannot be made in invitum

and, I, therefore, take no notice of the same.

3. Turning to the second contention of Mr. Dhanuka, namely, that the majority in number and value of the creditors are opposing the winding-up, the position appears to be that there are 8 creditors whose claims are of the aggregate value of Rs. 7,68,000 who are supporting the company and opposing the winding-up as against 9 creditors, whose aggregate claims amount to Rs. 3,03,862.07, who are in favour of the winding-up of the company, including the petitioners. As appearing from the authorities discussed above, it is necessary for the creditors, who support the company and oppose the winding-up, to satisfy the court that there is some good reason for that attitude of theirs. If one turns to the eight stereotyped affidavits filed by each of those creditors, all that is stated therein in each of those creditors does not want the company to be wound up but wants it to continue to do business, and that each of them is satisfied from the balance-sheet and the various other statements that the company is commercially solvent. It is further stated therein that each of the creditors has full faith and confidence in the management of the company and the company expects to make payment in the near future. In my opinion, this is precisely what was considered inadequate by the English Court of Appeal in *Macrae's case*¹. (1961)31 Com. Cas. 424 I agree with the view taken in *Macrae's case*¹ that where statements of that nature made by the creditors to support the Company cannot be of any avail for the purpose of overriding the right which the petitioners have *ex debito justitiae* to a winding-up order, once I come to their conclusion, as I have, that there is no bona fide dispute in regard to their claim and that there is admitted non-compliance with the statutory notice given by the petitioners in respect thereof.

4. In the result, I make the petition absolute in terms of prayers (a) and (b). The company must pay the costs of this petition in two sets--one to the petitioner and the other to the creditors who have supported the petition. I direct that the official liquidator should not take charge till Tuesday morning. In the meantime, the company, through its counsel, gives an undertaking to the court that it will not effect any recoveries of its dues from its own creditors and will not pay off any of the existing creditors in respect of the amounts now due to them. Mr Dhanuka on behalf of the company further gives an undertaking to the court to the effect that

the company will not dispose of, encumber, or deal with, the assets of the company, except in the ordinary course of its day-to-day business. Mr. Dhanuka states that, if the company makes any application for stay to the Appellate Bench of this court, it will give prior notice to the petitioners.

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