

Pfizer Ltd. Vs. Usan Laboratories P. Ltd.

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Court : Mumbai

Decided On : Nov-23-1984

Reported in : (1985)87BOMLR12; [1985]57CompCas236(Bom); 1985MhLJ554

Judge : Aggarwal and ;S.K. Desai, JJ.

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

Appeal No. : Appeal No. 927 of 1974 in Company Petition No. 759 of 1983 with Notice of Motion No. 2131 of 1984

Appellant : Pfizer Ltd.

Respondent : Usan Laboratories P. Ltd.

Judgement :

Desai J.

1. The appellants before us are the original petitioner in Company Petition No. 759 of 1983 and appeal they impugn the order of learned company judge dismissing the petition. In order to appreciate the order and appellants' contention with respect thereto, a few facts may be noted.

2. The appellants have, in the winding-up petition, claimed that an aggregate amount of Rs. 90,810.71 was due and payable by the respondent-company to them, being made up of the principle amount of Rs. 58,968 and interest thereon as

indicated in the particulars of claim, exhibit 'A' to the petition. To the petition, the appellants had annexed correspondence between the parties consisting of the later addressed to the respondent-company on behalf of the appellants by third attorneys which is a letter dated August 31, 1982, and the reply of the respondents which is one dated September 12, 1982. The principle amount claimed by the appellants (Original petitioners) is in respect of value of 300 kgs. of a chemical 'Biodo bydroxyquinoliner' which was originally supplied by they respondent-company and which was rejected by the appellants. By the said later dated September 12, 1982, the respondent-company appears to have accepted the rejection and promised to supply an equivalent quality by the end of December, 1982, failing which they promised to make repayment of the amount paid by the petitioners as cost of the rejected lot of the said chemical.

3. It may be mentioned that the appellants' attorneys' latter dated August 31, 1982, specifically called upon the respondent-company to repay the said amount of Rs. 58,968 (the principal amount indicated in the particulars of claim, exhibit 'A' to the petition) and mentioned and the latter should be treated as notice under s. 434 of the [Companies Act, 1956](#).

4. It appears to have been urged before the learned company judge that there was no warrant for the appellants' claim of interest at the rate as indicated in exhibit 'A' to the petition, which is also the rate as mentioned in the statutory notice above referred to. Based upon the plea, the following order as reflected in the minutes has been passed by the learned company judge :

'The statutory notice claims interest at the rate of 18%. There is no basis for such rate.

The refusal of the company to honour the statutory notice is justified.

Petition dismissed. No order as to costs.'

Shri Tulzapurkar, appearing on behalf of the appellants, has impugned the said order submitting that even assuring the claim in the statutory notice as to interest as also in the winding-up petition (exhibit 'A') was or could be held to totally

unjustified, if the other portion of the claim which is far in excess of Rs. 500 was held to be prima facie good, dismissal of the petition as well as the expression of the opinion that the statutory notice was improper were not correct in law.

5. Under s. 433 of the Companies Act, one of the grounds on which a company could be sought to be wound up by the court is when it is unable to pay its debts. Section 434 raises a presumption and provides that a company is deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding five hundred rupees had served a notice on the company and the company has failed for a period of three weeks to comply with the said requisition.

6. The short question we are considering is the position of the notice or of the subsequent petition when a part of the claim made by the creditor is seriously in dispute, but the remaining portion which prima facie would appear to be in order exceeds the limit of Rs. 500 indicated in s. 434. Shri Tulzapurkar submitted that the position is not *res integra* being concluded by the decisions both of the English court and of the Calcutta High court, which decisions have taken a view contrary to the view which found favour with the learned company judge. Our attention was invited to these decisions and it becomes necessary, therefore, to refer to them.

7. In point of time, the first of the decisions is the decision given by Plowman J. in *In re Tweeds Garages Ltd.* [1962] 1 CH 406; [1962] 32 Com 795. The relevant observations are to be found at pp. 413 and 414 of the report. An opinion has been expressed in the said judgment that it would be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing.

8. Almost to the same effect are the observations in *Cardiff Preserved Coal and Coke Co. v. Norton* [1867] 2 CH App 405. A contention had been advanced before the appellate court that the winding-up order which was being considered was bad because the creditor had demanded a sum of 628, and it appeared that he was entitled only to 411 7s. 9d. This argument has been decisively rejected by Lord Chelmsford L.C., speaking for the Bench, at p. 410 of the report. It has been observed that even if the creditor has made a demand upon the company for payment for more than what was due, that *per se* will not make the notice or the

consequential winding up order bad or invalid, provided that there was a debt in excess of 50 due to the creditor.

9. Both the above decision have been cited and followed by a single judge of the Calcutta High Court in of Lynx Ltd. v. Simon Carves India Ltd. [1971] 41 Com Cas 174 The learned single judge was considering the validity of a notice under s. 434 if the [Companies Act, 1956](#), and the contention raised was that the notice must be deemed to be had been given was disputed and prima faces the dispute was required to be upheld. It was observed (p. 193 of 41 Comp Cas) :

'I, therefore, hold that a notice under section 434 of the [Companies Act, 1956](#), will not be rendered invalid only because of the fact that amount of debt mentioned in the notice may not be exactly the correct amount of the debt due, provided the amount mentioned in the notice includes due and exceeds the sum of Rs. 500.'

10. In our opinion, the aforesaid decisions set out the correct principle and once we have reached the conclusion, it will have to be hold that the dismissal of the winding-up petition on the basis indicated in the impugned order would be clearly bad and the order required to be set aside. Merely because there could be a serious dispute as to the liability to pay interest at all or at the rate of 18 per cent. would not render the statutory notice invalid or result in a dismissal of the winding-up petition. The company judge was required to consider the claim of the petitioners in respect of the principal amount and to come to a conclusion whether or not there was any real and substantial dispute with regard to the said claim. If there was a genuine and bona fide dispute, then certainly it was within his discretion and jurisdiction to dismiss the petition and regulate the petitioner to claim the amount by regular suit. However, he did not go into this aspect by chose to dispose to the winding-up petition by dismissing the same on an erroneous basis which we have earlier indicated. If that be so, the impugned order will be required to be set aside and the petition will now go back to the company judge for reconsideration of the position and to decide whether it is required to be admitted and whether further direction after admission are required to be given.

11. In the result the appeal is allowed. The impugned order dismissing the winding-up petition is set aside. The winding-up petition will stand restored to the

company judge who will precede with the same at the stage it was no July 11, 1984, when the impugned order, which we have set aside, was passed. It will be open to the respondents, if so advised, to file affidavits opposing admission and to advance for the consideration of the company judge such contentions as may be available regarding the principle amount claimed in exhibit 'A' to the petition and mentioned in the statutory notice. In the circumstances of the case, the parties are directed to bear their own costs of the appeal.

12. In view of this appellate order, there will be no order on the Notice of Motion No. 2131 of 1984. The parties will bear their own costs of the said motion.

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