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Court : Mumbai

Decided On : Jul-19-2001

Reported in : [2002]112CompCas174(Bom); [2003]42SCL99(Bom)

Judge : R.J. Kochar, J.

Acts : Companies Act, 1956 - Sections 433 and 434

Appeal No. : Company Petition No. 1048 of 2000

Appellant : Kesar Enterprises Ltd.

Respondent : idi Ltd.

Advocate for Def. : Birendra Saraf, Adv., i/b., ;M.K. Ambalal and Co.

Advocate for Pet/Ap. : K.A. Setalvad, Adv., i/b., ;Tyabji Dayabhai, Adv.

Disposition : Petition dismissed

Judgement :

R.J. Kochar, J.

1. The petitioners have prayed for an order of winding up of the respondent-company under Sections 433 and 434 of the Companies Act, 1956, alleging failure on the part of the respondents to pay off the debt to the tune of Rs. 20,57,600.66 as computed in the particulars of claim of the petition and interest thereon. From

the averments in the petition, it appears that there was a contract between the parties to allow the respondent-company to store its material at the storage terminal of the petitioner at Kandla, Gujarat. The petitioners had agreed to extend the storing and handling facility to the respondent-company for its products on the terms and conditions which werereduced in writing in the agreement dated January 22, 1986. According to the petitioners, the respondent-company has failed and neglected to pay to the petitioner the storage charges for three periods, viz., September, 1995, to November, 1996, for an amount of Rs. 7,20,252 ; from June, 1998 to July, 1998, for an amount of Rs. 1,83,020 ; and August, 1998, for an amount of Rs. 84,002.

2. From the statement of outstandings the petitioners have claimed the total debt from the respondent-company to the tune of Rs. 20,57,600 inclusive of interest calculated by the petitioners to the tune of Rs. 10,70,396.66 on the principal amount of Rs. 9,87,274. According to the petitioners, the respondents have no bona fide dispute and genuine reason not to pay the aforesaid amount and that they have admitted the debt to the tune of Rs. 6,86,802 for the first period and there is no dispute over the claim for the second period and they have absolutely no defence for the third period. There was no reply to the statutory notice calling upon the respondents to pay off the debt of the petitioner-company and warning them of the winding up petition on their failure to do so.

3. The respondent-company has filed an affidavit in reply of its company secretary. The respondents have disputed the entire claim as a debt payable by the company to the petitioners. The respondent-company has further questioned the very maintainability of the company petition, as according to it, there was no legal enforceable debt due and payable to the petitioners. They have raised several disputes and contentions in the affidavit in reply. They have also stated on oath that there have been certain modifications in the terms and conditions of the agreement and implied changes on the basis of the discussions and negotiations which always take place in the business arena between the parties dealing with each other commercially. The affiant has dealt with the entire petition parawise and has denied the claim of the petitioner and has prayed for dismissal of the petition.

4. As far as the claim for the first period is concerned, the straight and clean reply of the respondents is that the alleged debt for the period between September, 1995, and November, 1996, is clearly time-barred by limitation as the petition is filed on August 31, 2000, i.e., beyond the statutory limitation period of three years from the cause of action. As far as the second period is concerned, the respondents have no specific defence but in particular it is contended that the entire petition is not maintainable and that the claims cannot be segregated and decided in the winding up petition. For the third period the defence appears to be of total denial on the factual aspect that the petitioners were to shift the material from the tank hired by the respondents to another tank for which a third party, viz., C J. Shah and Co. was to make payment of the hire charges. There was delay in shifting the material by the petitioners and, therefore, they cannot bill the respondents for the storage charges for the said period from August 1, 1998, to August 6, 1998. It is further contended onbehalf of the respondents that there has been substantial dispute in the manner in which the respondents were charged. Initially it was on the basis of calibrated charges, i.e., for full tank irrespective of the actual storage and subsequently, however, the manner of freight was modified from the calibrated to the actual storage of the material. There was change in the freight from the full storage to actual storage. Shri Biren Saraf, learned counsel for the respondents has pointed out that the respondents have made payment on the basis of the actual storage and not on the basis of the full capacity of the tank, though, the petitioners have billed them on the basis of the full calibrated capacity. The modes of billing were changing from time to time and that there was no agreement to pay on full calibrated capacity, says learned counsel for the respondents. According to him, the very fact that the respondents have not made payment on the basis of the full capacity or on the basis of the bills and the fact that the petitioners had accepted the said payment would indicate at least the fact of dispute between the parties. According to Shri Saraf, there was mutual understanding and that point of dispute will require evidence. Shri Saraf further pointed out that for the period of 1997-98, the respondents have always made payment on the basis of the full capacity as agreed. Shri Saraf has vehemently attacked the petitioners for attempting to browbeat the company by lodging a very huge and inflated claim to the tune of Rs. 20 lakhs odd. The petitioners are

claiming the amount of interest to the tune of Rs. 10,70,323.66 though in fact there was no agreement to pay interest at all. The principal amount which is computed in the statement is Rs. 9,87,274. Learned counsel further submits that the first part of the claim for the period between September, 1995, and November, 1996, is clearly unenforceable being barred by limitation. The said claim is included in the petition. Thirdly, with a view to terrorise or browbeat the respondent-company and to prejudice the court an attempt is made to demonstrate that huge debt to the tune of Rs. 20 lakhs odd is due and payable by the respondents to the petitioner-company. Shri Saraf has submitted that there has been a bona fide dispute between the parties in respect of the debt and the manner in which the tanks should be charged. The entire claim, according to him, is baseless and that the petitioners are trying to push through this petition the unlawful and unenforceable debt which is barred by limitation. He has further submitted that in a company petition of this nature, the company court cannot compute the debt by simple calculation and arrive at an amount payable to the petitioner-company. This exercise cannot be undertaken by the company court, says Shri Saraf. Learned counsel has questioned the legitimacy of the petition which is ex facie meant to recover the debt from the respondent-company. According to learned counsel, the alternative remedy of civil suit is open and available to the petitioners wherein the parties and the respondents in particular will have an opportunity to adduce the evidence and bring the material on record onthe basis of which the petitioners have claimed such a huge amount as debt. He has further pointed out that the respondent-company has assets to the tune of Rs. 22,689 lakhs. It has paid central excise to the tune of Rs. 2,855 lakhs approximately and has earned huge amount in foreign exchange for the State. The respondent-company has more than 3,000 employees and that its substratum continues to be very strong. To a query from the court, Shri Saraf has candidly disclosed that there is another winding up petition pending before this court filed by debenture holders and in fact the respondents have without prejudice paid a sum of Rs. 5 lakhs and would make payment of another instalment of Rs. 5 lakhs very soon. He has also submitted that the debenture holders are full secured creditors and the assets are much more than the claim of the debenture holders. In the aforesaid circumstances, according to learned counsel, the respondent-company cannot be ordered to be

wound up and admission of the petition would be injurious to the functioning of the respondents as after admission it will be advertised which would cause great harm and damage to the working and credibility of the respondent-company.

5. Shri Setalvad for the petitioner-company has pointed out from the rejoinder dated July 12, 2000, the basis of the claim and has also laid stress on the fact that there has been practically no defence of any nature for the three periods. As far as the point of limitation is concerned, he has submitted that the respondent-company has in fact accepted and acknowledged the debt in their letter dated March 14, 2000, and, therefore, the claim for the first period of September, 1995, to November, 1996, was not barred by limitation. Learned counsel has submitted that assuming that the respondents have some disputes for the first period as well as the third period, it has no dispute for the second period and the debt exceeds Rs. 500 and in that case he is entitled to get the petition admitted. He has relied upon the following judgments :

(i) Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. : [1972]2SCR201 ;

(ii) P. Y. Parry v. Cynotech Bioproducts P. Ltd. : 1999(3)KarLJ68 .

6. Learned counsel has sought support from the judgments of the learned single judge of the Karnataka High Court on the point that if the company does not discharge the debt after the lapse of considerable period of time, the presumption of its insolvency would arise. The first test of solvency, according to the learned judge, is ability to discharge the debts and liabilities within a reasonable period of time and if the record indicates conclusively that this is not done, then the presumption of commercial insolvency is complete.

7. Shri Saraf, learned counsel for the respondents cited the following judgments :

(i) Vijayalakshmi Art Productions v. Vijaya Productions Pvt. Ltd : 1996(2)CTC396 ;

(ii) Ghanshyam Patel and Sons v. Hind Woollen and Hosiery Mills Pvt. Ltd. .

8. Shri Saraf seeks support of the aforesaid judgments for his contention that legally unenforceable claims cannot be made the basis for a winding up petition. According to him, the substantially large claim falls in the first period and that claim is barred by limitation and that cannot be made basis for the winding up of the respondent-company. He, therefore, prays that the petition itself is not maintainable and deserves to be dismissed.

9. Indeed, the very fact that the petitioner-company has highly inflated its claim to the tune of Rs. 20 lakhs odd indicates and supports the contention of Shri Saraf, learned counsel for the respondent that the petitioner-company has resorted to strong arm tactics and browbeating the respondent-company. There is no dispute that there was no agreement between the parties to pay interest on the amount due and payable under various bills and still the petitioner-company has claimed the very huge amount of interest to the tune of Rs. 10 lakhs odd. Such controversies in respect of entitlement and liability in respect of interest cannot be decided on the basis of the affidavits in the summary proceedings under Sections 433 and 434 of the Companies Act. In my opinion, the respondents have very genuinely and bona fide disputed this basis of the petition. It may be that a part of the claim has gone undisputed but the very basis of the petition is a huge and inflated claim made by the petitioner-company to coerce it to recover its debt which is not actually due and payable and which has been bona fide disputed by the respondent-company. The second defence is also a bona fide and genuine defence in respect of limitation of the claim for the period from September, 1995 to November, 1996. Prima facie this claim is also barred by limitation as the petition is presented on August 31, 2000. The question whether the letter dated March 14, 2000, amounts to an acknowledgment of the debt or not will have to be adjudicated and decided in regular civil suit. Prima facie, however, this claim is not enforceable as it appears to be barred by limitation. As far as the third period is concerned, the respondents have blamed the petitioners for delaying the shifting of the material from one tank to the other which was an agreed fact and for which the respondents could not be held liable. This dispute also would require evidence and there is no admission of the claim. I agree with Shri Saraf that the claim put forward by the petitioner-company and the claim made for winding up cannot be bifurcated or separated and the entire claim will have to be treated as a basis for

winding up. In this case, the petitioners have mala fide inflated their debt to the tune of Rs. 20 lakhs odd by including interest amount to the tune of Rs. 10 lakhs odd and also by including the claim which is prima facie is not enforceable, being barred by limitation. If at all the petitioners thought that a part of the claim was undisputed and was payable by the respondent-company they ought to have filed a civil suit for recoveryof the undisputed and admitted claim. For such claims the summary proceedings are provided for. The winding up petition is an extreme remedy which has to be resorted to sparingly and in cases where there is absolutely no bona fide dispute. Seeking winding up of a petition is praying for the economic death of a running and live commercial organisation. In the present case, it is clear that the substratum of the respondent-company is as strong as it was before. The fact that the respondent-company is earning huge foreign exchange and paying a large amount of central excise to Government and contributing to the revenue of the State Government and that it employs more than 3,000 workers is enough for me not to order winding up of the respondent-company on the ground that the petitioners have to recover an amount of debt which is bona fide disputed. The Supreme Court has time and again pronounced that the winding up petition is not a legitimate proceeding resorted to for recovery of debts. There is a judicial unanimity. The following three judgments of the Supreme Court have very clearly laid down the said legal position :

(i) Hind Overseas Pvt. Ltd. v. Raghunathprasad Jhunjhunwalla : [1976]2SCR226 ;

(ii) Amalgamated Commercial Traders (P.) Ltd. v. A. C. K. Krishnaswami ;

(iii) Pradeshiya Industrial and Investment Corporation of Uttar Pradesh v. North India Petro Chemicals Ltd. : [1994]1SCR815 .

10. In the case of Amalgamated Commercial Traders (P.) Ltd. v. A. C. K. Krishnaswami [1965] 35 Comp Cas 456 the Supreme Court has held as follows (page 463) :

'It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure

will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order'. (Vide Buckley on the Companies Acts, 13th edition, page 451).

We are satisfied that the debt in respect of which notice was given under Section 434 was bona fide disputed by the appellant-company. The appellant-company had received legal advice and it had acted on it. On the facts it seems to us clear that the appellant-company did not dispute the debt in order to hide its inability to pay debts. Further we are satisfied that the question whether the declaration of dividend dated December 30, 1959, is valid or not raises a substantial question as to the interpretation of Section 207 of the Companies Act. Further, whether the declaration dated December 30, 1959, is several or not is also a substantial question. We do not propose to decide whether the declaration of dividend was valid or not or whether it was several or not, because in these proceedings we are only concerned with the question whether the debt was bona fide disputed by the company on substantial grounds. If the debt was bona fide disputed, as we hold it was, there cannot be 'neglect to pay' within Section 434(1)(a) of the Companies Act. If there is no neglect, the deeming provision does not come into play and the ground of winding up, namely, that the company is unable to pay its debts is not substantiated.'

11. In the case of Hind Overseas Pvt. Ltd. v. Raghunathprasad Jhunjhunwalla : [1976]2SCR226 has observed as under (page 106) :

'Section 433(f) under which this application has been made has to be read with Section 443(2) of the Act. Under the latter provision where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up if it is of opinion that some other remedy is available to the petitioners and that they are acting

unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

Again, under sections 397 and 398 of the Act there are preventive provisions in the Act as a safeguard against oppression in management. These provisions also indicate that relief under Section 433(f) based on the just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company.'

12. In the case of Pradeshiya Industrial and Investment Corporation of Uttar Pradesh v. North India Petro Chemicals Ltd. : [1994]1SCR815 has observed as follows (page 844) :

'It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. v. A. C. K. Krishnaswami this court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451:

'It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court'. Examined in the light of the above, we are unable to uphold the judgments of the court below on the facts narrated above. Our reasons are as under :

(1) The basis of the claim of the first respondent for Rs. 72.50 lakhs is the promoters' agreement dated July 1, 1988. This agreement has been cancelled by the appellant by notice dated October 31, 1992. Though the learned single judge of the High Court referred to this aspect he had not pursued it further. He has not considered as to what would be the consequence. Unfortunately, the Division Bench has overlooked this aspect when it held thus :

'In the present case, there is an allegation in the petition that there was an agreement between the company and Dalmia Dairy Industries for promoting the petitioner company and that under the terms of that agreement the company had to pay certain amounts. There is nothing on record to suggest that such an agreement was not entered into'. (2) The first respondent is not a creditor. The appellant is not a debtor because it is a financial institution for an amount which is agreed to be subscribed. Neither the learned single judge nor the Division Bench has decided this important question whether there is a debt and the company has either neglected or is unable to pay.

(3) The same claim is the subject matter of arbitration which is pending adjudication. Therefore, there is no definiteness about it.

(4) In view of all these, there is no prima facie dispute as to the debt.

(5) The defence raised is a substantial one and not mere moonshine. We find it difficult to appreciate the reasoning of the learned single judge when he holds that there are arguable issues and, therefore, the winding up petition has to be admitted. On this aspect the courts below failed to note that the admission of the winding up petition is fraught with serious consequences as far as the appellant is concerned.'

13. It is further pertinent to note that in the agreement between the parties, there is a clause of arbitration which reads as under :

'All disputes or differences whatsoever arising between the parties hereto, shall be settled by arbitration at Bombay, as per rules of Arbitration of the Indian Council of Arbitration whose award shall be final and binding on both parties.'

14. It is not at all fair for any party to the agreement not to resort to the arbitration clause having once agreed to resort to the arbitration in the case of disputes or differences which arises between them. In all fairness, the petitioners ought to have resorted to the aforesaid arbitration clause before resorting to the extreme remedy of seeking the respondent-company to be extinguished or wiped out from the industrial scene. The petitioners have neither resorted to the remedy provided

under Code of Civil Procedure nor have resorted to the agreed course of arbitration. In the aforesaid circumstances, I am not at all inclined to accept the contention of the petitioners to exercise my equitable jurisdiction in their favour to order admission of the winding up petition to finally wind it up.

15. In the aforesaid circumstances, the petition stands dismissed. The petitioner shall pay costs of Rs. 25,000 to the respondent-company for having abused the process of the law and the court.

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