

**Bharath Kumar Vs. The Joint Commissioner**

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**Court :** Chennai

**Decided On :** Jan-29-2015

**Judge :** T.S.Sivagnanam

**Appellant :** Bharath Kumar

**Respondent :** The Joint Commissioner

**Judgement :**

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated :

12. 10-2009 Coram The Honourable Mr.Justice N.PAUL VASANTHAKUMAR Company Petition No.16 of 2009 and Company Application No.311 of 2009 M/s.Ishwar Industries Ltd., rep.by its Director in Charge Mr.Bharath Bhaskar 10th Mile Stone, Mine Madhura Road, P.O., Ishwar Nagar, New Delhi 110065. ... Petitioner Vs. M/s.Lakshmi Machine Works Ltd., Ganapathi Post, Coimbatore 641 006 ... Respondent Petition filed under Sections 433(1)(e) & 434(1)(a) read with Section 439(1)(b) of the Companies Act, 1956, for winding up of the respondent company. For Petitioner : Mr.K.P.Sanjeev Kumar For Respondent : Mr.P.H.Arvind Pandian

**ORDER**

The prayer in this company petition is to wind up the respondent Company under the provisions of the Companies Act, 1956.

2. The petitioner Company is incorporated under the Companies Act, 1956, and its registered office is located at 10th Mile Stone, Mine Madhura Road, P.O.Ishwar Nagar, New Delhi-110065. The authorised share capital of the petitioner company is Rs.20 Crores divided into 1,00,00,000 equity shares of Rs.10/- each, and 1,00,00,000 Cumulative Shares at 12% of Rs.10/- each. The paid-up share capital of the petitioner Company is Rs.17,20,39,000/-. The main object of the petitioner Company is to do business of manufacturers and dealers in machinery of all kinds, particularly textile machinery and all or any of the business of mechanical, electrical, railway, marine, aeronautical, agricultural, sanitary, civil and construction Engineers.

3. One Textool Company Limited (Default Company) is indebted to the petitioner a sum of Rs.36,19,239.38, which includes interest at the rate of 6% per annum until the date of petition and further interest at the said rate till payment together with costs of Rs.53,956/- under the judgment and decree dated 29.6.2000 passed by the IX Additional District Judge, Jabalpur, Madhya Pradesh State, in Civil Suit No.242A of 1995. The said Default Company approached the petitioner to set up a mini Steel Plant in Jabalpur and offered to install 5 Tons capacity of Steel Furnaces at the petitioner's factory at Jabalpur. According to the petitioner, on 18.6.1973, the said offer of the Default Company was accepted by the petitioner and the Default Company supplied parts of the furnace and also sent its representatives for installing the furnace. However, the operation was defective, which was brought to the notice of the Default Company from time to time. The petitioner Company incurred heavy interest and loss and also obtained loans from the Industrial Development Bank of India and even thereafter it could not be run.

4. As against the Default Company, petitioner filed the above suit and the Default company contested the suit by leading evidence and the learned Additional District Judge passed joint and several decree including against the Defaulting Company for a sum of Rs.7,45,313/- and further sum of Rs.7,27,944.60 towards damages and also interest at the rate of 6% per annum from the date of filing of the suit i.e., from 6.7.1977 till the date of payment. As the Default Company was unable to pay its debts the petitioner filed Company petition before this Court in C.P.No.222 of 2001 against the Default Company for winding up. In the said petition, the Default

Company filed an affidavit and memo stating that the matter is pending before the BIFR for reconstruction. Taking note of the said fact this Court closed the Company petition on 8.9.2003 with liberty to the petitioner to revive the Company petition by way of filing fresh petition after the BIFR proceedings are over.

5. The respondent Company herein took over the Default Company pursuant to the order passed in Case No.407 of 2002 before the BIFR and therefore all the assets and liabilities of the Default Company were taken over by the respondent company herein. According to the petitioner the respondent Company is liable to pay a sum of Rs.51,62,873/- to the petitioner company. The petitioner sent a legal notice on 4.6.2007 and called upon the respondent to pay the said amount. The respondent through its Counsel sent a reply on 21.6.2007 and stated that it has preferred an appeal against the Judgment and Decree in F.A.No.145 of 2002 before the High Court of Madhya Pradesh at Jabalpur. The petitioner filed this Company petition on the ground that the High Court of Madhya Pradesh at Jabalpur, has not granted stay of the judgment and decree pending disposal of appeal filed in F.A.No.145 of 2002. Therefore the winding up petition is filed due to the non-payment of the decree amount by the respondent company, who is the successor in interest of the Default Company.

6. The respondent company filed counter affidavit stating that the Respondent Company was established in the year 1962 with latest spinning technology and as on date it caters around 60% of the domestic market and emerged as leader in the export of spinning machinery in the country. As on 31.3.2009 there are 3609 employees in the direct rolls of the Company, apart from about 2500 indirect employees working for the respondent Company. The Company is a debt free Company from the financial year 2004-2005 and it is regularly paying dividend to its shareholders. It is further stated that the statutory notice was served on its Unit address and not at the registered office address and therefore the service of notice itself is defective one, which is a statutory violation and the petitioner is not entitled to file winding up petition on the basis of the above defective notice. It is also stated in the counter affidavit that the petitioner obtained an ex parte decree against M/s.Textool Company Limited viz., the Default Company in C.S.No.242A of 1995, against which appeal in F.A.No.145 of 2002 is pending before the High

Court of Madhya Pradesh at Jabalpur and as on date the appeal is pending. The decree itself having been under challenge i.e, dispute with regard to the liability is pending, there is no cause of action for filing the present company petition. On the above said grounds the respondent prayed for dismissal of the Company petition.

7. Heard the learned counsel for the petitioner company as well as respondent company.

8. It is the admitted case of both the petitioner as well as respondent that the respondent company is the successor-in-interest of the Default Company viz., Textools Company Limited, and the judgment and decree obtained against the Default Company has not become final. The appeal filed against the judgment under which the petitioner is claiming the amount is pending before the High Court of Madhya Pradesh at Jabalpur in F.A.No.145 of 2002. The only contention of the petitioner is that there is no stay of the said decree. The learned counsel for the respondent submitted that the stay petition is not dismissed and the appeal having been admitted and pendency of the same shall be treated as continuation of original proceeding. Thus, the dispute with regard to the debts payable to the petitioner by the respondent in the capacity of successor company of the Default Company is yet to be finally determined/adjudicated.

9. In the counter affidavit it is established that the respondent Company is in sound financial position and it is a leading exporter of textile spinning machinery in the country. Out of the total intalled capacity of 39 million spindles in India, 24 million spindles are supplied by the respondent company alone. It is also the case of the respondent that the Company is a debt free Company from the year 2004-2005 and the inability to pay the debt, if any, to the petitioner company is also not established for maintaining the Company petition.

10. In the counter affidavit it is further stated that the statutory notice was not served on the respondent's registered office and it was served only on its unit office and the same is in violation of section 434(1)(a) of the Companies Act, 1956.

11. The above facts viz., pendency of the appeal against the judgment and decree before the High Court of Madhya Pradesh at Jabalpur, the financial status of the

respondent, the non-service of the statutory notice at the registered office of the respondent company, are not denied by the petitioner company by filing reply to the counter affidavit. Under section 433(e) of the Companies Act, 1956, if a company is unable to pay its debts, it could be wound up. Here the alleged debts payable by the respondent company to the petitioner company is not finally determined due to the pendency of appeal in F.A.No.145 of 2002 before the High court of Madhya Pradesh at Jabalpur. It is well settled in law that appeal is continuation of the original proceeding. Therefore the alleged amount payable by the respondent company to the petitioner Company is yet to be determined. Unless and until the amount is determined and if the Company is unable to pay the said amount/debts, no winding up petition can be entertained.

12. Whether winding up petition can be maintained during pendency of the suit, came up for consideration before the Division Bench of this Court in the decision reported in (2008) 145 Company Cases 693 (Mad) (Rediffusion-Dentsu, Young & Rubicam P. Ltd. v. Solidaire India Ltd.), wherein in paragraph 15 the Division Bench held thus,

"5. Whenever a company petition is filed seeking winding up, the Court must consider the circumstances in every case and come to a necessary conclusion. Needless to say that granting of the relief of winding up is a discretionary relief; but, the Court when exercise this discretionary power, it must be governed by justice and equity. The Court must exercise its discretion judiciously also. It is well settled principle of law that if there is any substantial defence put forth by the respondent, the same has got to be decided by the Court only on appreciation of evidence. Having filed a suit calling the respondent, the third defendant therein, as the agent of the first defendant and necessary issues having been framed touching the liability of all the defendants, filing a company petition like this was nothing but a device to pressurise for payment of the said sum by the third defendant. It is well settled that the winding up petition cannot be made as a device to pressurise the respondent to make payment as per the demand. In view of the pendency of the suit with the above said specific averments and seeking a decree for recovery of money against all jointly and severally, which is exactly the subject matter in the company petition and the fact that pursuant to the substantial

defence, necessary issues have also been framed in that suit, this Court is of the considered opinion that at no stretch of imagination, an order of winding up could be made and hence this Court is unable to see any reason to interfere in the order of the learned Single Judge."

It is well settled principle of law that the appeal is continuation of the original proceedings as per the judgment of the Supreme Court in the decisions reported in (2008) 6 MLJ842(SC) (Jagdish Singh v. Madhuri Devi) and (2008) 6 MLJ1067(SC) (D.Purushotama Reddy v. K.Sateesh). Whether the dispute is pending as a suit or arbitration, does not make any difference for winding up proceedings.

13. Whether after initiating arbitration proceedings for determination of the amount, if any payable by the Company against whom winding up proceedings are initiated, winding up petition is maintainable was also considered in the decision of the Supreme Court reported in (2005) 7 SCC42(Mediquip Systems (P) Ltd. v. Proxima Medical System GMB); Bombay High Court decision reported in Vol.107 Company Cases 288 (Manipal Finance Corporation Ltd. v. CRC Carrier Ltd.); and in the decision of mine in C.P.No.107 of 2009 dated 8.10.2009 (M/s.Chettinadu Constructions v. M/s.Muthukumarasamy Textiles Ltd.). In the above referred decisions it is held that after commencement of the arbitration proceedings, no company petition for winding up can be admitted.

14. Applying the above principles stated in the above decisions to the facts of this case and having regard to the financial status of the respondent company, I am of the view that the Company petition filed by the petitioner company to wind up the respondent company is not maintainable and the same is liable to be dismissed and accordingly dismissed. No costs. Connected C.A.No.311 of 2009 is also dismissed. vr

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