

Devendra Kumar Jain Vs. Polar Forgings and Tools Ltd.

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Court : Delhi

Decided On : Nov-03-1992

Reported in : [1995]84CompCas766(Delhi); 49(1993)DLT552; 1992(24)DRJ598

Judge : Y.K. Sabharwal, J.

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

Appeal No. : Civil Petition No. 122 of 1990

Appellant : Devendra Kumar Jain

Respondent : Polar Forgings and Tools Ltd.

Advocate for Def. : Mr. Singhia

Advocate for Pet/Ap. : G.S. Aggarwal and; A.K. Singhia, Advs

Judgement :

Y.K. Sabharwal, J.

(1) Petitioner seeks winding up of M/s. Polar Forging and Tools Ltd. (for short 'the company') on the ground that the company is unable to pay its debts. In short the case of the petitioner is as under:-

PETITIONER as per the order placed by the Company supplied to the company furniture during the period from September 1989 to December 1989 and submitted

bills aggregating a sum of Rs.5,25,707.60 inclusive of sales tax, packaging and forwarding charges and freight. The company paid Rs. 4,05,000.00 to the petitioner including payments made before commencement of supply and thus a sum of Rs. 1,20,707.60 was still due and payable by company to the petitioner. The final payment was required to be made by the company to the petitioner latest by the end of January 1990 for the reason that the supplies were completed in December 1989 and the period of 30 days thereafter expired sometime in January 1990. According to practice and usage of the market the petitioner is entitled to interest on the outstanding amount at 18% p.a. from 1st february, 1990. The company has been acknowledging its liability and had also confirmed that the job had been carried out by the petitioner to the satisfaction of the company. The petitioner has demanded payment of Rs. 1,12,707.60 with interest at 18% p.a but the company has not even sent reply to the letters of the petitioner and has further failed to pay the amount within three weeks from the date of receipt of the letters of demand and thus the company is unable to pay its debts and liable to be wound up.

(2) In the affidavit filed in opposition to .the petition various pleas have been taken by the company including the plea that no notice of demand has been served' on the company prior to the presentation of the petition and even otherwise notices' alleged as 'notices of demand' are not legal.

(3) During the pendency of this petition the company has, however, paid to the petitioner a sum of Rs. 1,15,249.60 being the undisputed part of the claim of the petitioner. This payment was made without prejudice to the contentions of the parties in regard to liability to pay interest and validity of the notice under Section 434 of the [Companies Act, 1956](#) (for short 'the Act'). I have heard learned counsel in support of these contentions.

(4) Mr. Aggarwal, learned counsel for the petitioner contends that on Rs. 1,15,249.60 the company is liable to pay interest at the rate of 18% p.a. a admittedly this amount was due as far back as in February 1990 but was paid above two years later during these proceedings. Counsel contends that delay in payment occurred inspire of the fact that the company had confirmed not only the

amount di but also the fact that the petitioner had carried out the work to the entire satisfaction of the company and thus the petitioner is entitled to payment of interest. The Content item of Mr. Aggarwal is that on the failure, refusal and neglect of the company to pay the interest the petition, at this stage, deserves admission and ultimately the company would be liable to be wound up.

(5) Mr. Singhia, learned counsel for the respondents, on the other hand, contends, that assuming sum of about Rs. 1,15,000.00 was due and payable by the company to the petitioner in February 1990 and it was paid after about two years from the due date, the present petition is still not liable to be admitted. Two grounds are urged ' . by Mr. Singhia. (One) There is no contract between the parties for payment of interest and thus for non payment of alleged interest liability the petitioner is not entitled to invoke the winding up jurisdiction and (two) the petitioner has not served the company with a valid notice of demand.

(6) In order to appreciate the grounds urged by Mr. Singia few more facts may be notice. The order dated 3rd September 1989 containing the terms and conditions on which the furniture was supplied to the company has been placed on record. The order stipulates the stages at which the payments were required to be made by the company to the. petitioner. As per those stipulations the payment should have been made by the company to the petitioner latest by end of February 1990. The payment was not made. By registered Ad letter dated 10th May 1990 the petitioner requested the company to make the payment of Rs. 1,20,707.60 within one week of the receipt of the letter and also stated that in case the payment is not released as requested the petitioner will be constrained to charge overdue interest at 18% p.a. from the due dates of payment till realisation. Similar requests were repeated by the petitioner in his letters dated 6th June, 1990 and 30th June, 1990. As payment was still not made this petition was Filed. The company admitted the liability of only about Rs. 1,15,000.00 and paid that amount to petitioner during pendency of these proceedings. The delay in making this payment to the petitioner is about two years.

(6) The question to be determined is, whether in absence of specific contract for payment of interest even where the price of the goods is not paid admittedly by the

due date, can the liability to pay interest and rate thereof be adjudicated by the Company Court in a petition Filed for winding up of the company and on failure of the company to make payment of interest amount as may be adjudicated, can the Company Judge direct winding up of the company or the question of interest should be left to be determined by a civil court where creditor should file a suit for recovery of the interest amount.

(7) On the aforesaid question divergent opinions have been expressed by Allahabad and Madras High Courts. Counsel for the parties have not cited any decision of this Court. In my opinion, it is the duty of the court to adopt that approach which would result in avoiding multiplicity of litigation. When the Company Court is seized of the matter and liability to pay the principal amount is not only admitted by the company but that amount is in fact paid in the winding up proceedings so as to avoid an order for the winding up, the Company Court will be fully competent to determine whether the creditor is also entitled to interest and direct winding up of the company on its failure to make payment of such amount. Reference may also be made to Section 61 of the Sale of Goods Act, 1930 which inter-alia, provides that in the absence of a contract to the contrary the court may award interest at such rate as it thinks fit on the amount of the price to the seller in a suit by him for the amount of the price from the date of the tender of the goods or from the date on which the price was payable. The interest amount can be determined by the company court in exercise of power under the provisions of the Sale of Goods Act or on the principles underlying the said provisions. Learned counsel for the Company relies upon a decision of Allahabad High Court in *Ultimate Advertising and Marketing v. G.B. Laboratories Ltd.*, 66 Comp Cas 232 holding that the winding up court could not investigate into the question of rate and quantum of interest and unless it was established that the amount claimed was either agreed upon or admitted or decreed by a competent court, the amount did not become a debt. The learned Judge came to the conclusion on the facts of that case that the amount claimed as interest had yet to be established as a debt in spite of the fact that the principal amount was paid in the proceedings for winding up initiated by the creditor. In the present case the petitioner has specified the balance amount payable by the company and specified the rate of interest at 18% p.a. Due dates when the balance price of the goods was payable have also

been specified. The rest is a matter of mathematical calculation and the petition for winding up cannot be dismissed on the ground that mathematical calculation as to the amount of interest have not been stated. The exact amount of interest payable is likely to change depending upon the time when the payment of the principal amount is made. The court in its discretion, on consideration of all the facts and circumstances of the case and the financial market conditions, in the absence of agreement as to rate of interest between the parties, can award a reasonable rate of interest. There may not be a specific contract for payment of interest but if the contract provides for payment of the price of the goods by a particular date it is clear that the creditor would ordinarily be entitled to interest if the amount is not paid by the due dates. As noticed above, the court has discretion to award interest at a reasonable rate on the amount of price from the date on which the price was payable to the seller. Unlike the facts of the cited decision the petitioner has been writing to the company that in case the outstanding balance is not released the petitioner will be constrained to charge overdue interest-at 18% p.a. from the due dates of payment till realisation. With utmost respect, I am unable to concur with the opinion expressed by learned single Judge in the cited decision to the effect that winding up court cannot investigate into a question of rate and quantum of interest even where the principal mount is admitted by the company and paid in the course of the winding up proceedings. I am in respectful agreement with the opinion expressed by a Division Bench of the Punjab & Haryana High Court in *Stephen Chemical Limited v. Ilimo Search Limited*, 60 Comp Cas 702 nd single Bench decision of the same court in *Delhi Cloth & General Milla Co. Ltd v. Stepan Chemicals Limited*, 60, Company Cases Page 1046 to the effect that the forum of the Company Judge is the appropriate forum for determining as to whether the creditor is entitled to interest where the company admits its liability and, in fact, pays the amount.

(8) My conclusion is that in a case where the liability to pay the principal amount is not disputed by the company the creditor need not be forced to initiate separate litigation for recovery of the interest amount and the interest amount can be determined by the Company Judge in the winding up proceedings and on failure of the company to pay that amount the Company can be ordered to be wound up on the ground that it is unable to pay its debts.

(9) The validity of the letters of demand is challenged by the Company on the ground that in the letters of demand the petitioner has not stated as to what would be the consequences in case of non payment of the amount and thus it is contended that the letters alleged as 'notices of demand' are not legal and do not constitute proper demand as required by section 434(i)(a) of the Act. Section 434(i)(a) reads as under:-

'A Company shall be deemed to be unable to pay its debts- (a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.'

(10) The aforesaid provision do not require the creditor to state in the notice as to what would be the consequences if the sum due is not paid by the company to the creditor. Under Section 434(i)(a) presumption about insolvency of the company is liable to be drawn where the creditor serves on the company a demand requiring it to pay the sum due and in case the 'company for three weeks after service of demand neglects to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Neither the Act nor the Rules provide for any particular form of demand. It is also well settled that in the demand served on the company under Section 434(i)(a) the non specification of the period of three weeks does not result in invalidating the demand. According to Palmer's Company Precedents(Part II) 17th " Edition (Page 26) the demand need not be in a special form. It need not use the word 'demand'. A pre-emptor request or 'call' for payment would no doubt suffice. A demand in excess of what is due can still be a valid statutory demand. It is correct that the petitioner in the letters sent to the company requesting it to make payment of the balance outstanding amount with interest at 15% p.a. has not stated as to what consequences will follow and what he will do in case payment as requested was not made but, in my opinion, it does not affect the validity of the demands made by the petitioner from the company. The law does not require that demand must recite a threat for proceeding for winding up in case of non payment.

(See N.K. Gossain and Co. Pvt. Ltd v. Dytron (India) Ltd, 1990 Company Cases Vol. 69 Page 757- Calcutta High Court). With respect I am unable to agree with the opinion expressed by Allahabad High Court in Paramjit Lal Badhwar v. Prem Spinning and Weaving Mills Co. Ltd., 60, Company Cases Page 420 and the opinion of Kerala High Court in K. Suresh Shenoy v. Cochin Stock Exchange Ltd., (1988) 3 Com L J 350 to the effect that though in the notice sought to be given under Section 434(i)(a) it is not necessary that there should be an indication that it is given under section 434(i)(a) and there is no specified mention of that section, there should be some indication given to the company that in the case of non compliance with the terms of the notice, the creditor will take steps for the winding up of the company. The law does not prescribe any such requirement. It also seems that an earlier decision of Allahabad High Court in Babu Ram and another v. Krishna Bhardwaj Cold Stores and General Mills Co. (P) Ltd. and others, 1965(2) C.L.J.215 was not brought to the notice of the learned Judge which decided the case of Paramjit Lal Badhwar (Supra). In Babu Ram's case it was held that the law does not require that the notice- must recite a threat of a proceeding for winding up in case of non payment. In my view, prima facie, the letters dated 10th May 1990, 6th June 1990 and 30th June 1990 constitute a valid demand under Section 434(i)(a) of the Act.

(11) The petitioner is claiming interest at the rate of 18% p.a. In my opinion, in the facts and circumstances of the case, 12% would be just and reasonable rate of interest. The company is, therefore, liable to pay to the petitioner interest calculated at 12% p.a. on Rs. 1,15,000.00 from 1st March 1990 till the payment of that amount was made to the petitioner in these proceedings. The parties may calculate the exact amount of interest. The company may make the payment of interest amount to the petitioner on or before 20th November 1992.

(12) In case payment as directed by this order is not made it will be presumed that the company is unable to pay and the petition shall stand admitted and the petitioner will take steps to get the citation published in 'Statesmen', 'Jansatta' and 'Delhi Gazette' indicating that the petition will be listed before court on 26th February, 1993.

