

Gopalakrishnan Vs. Asianet Satellite Communications Ltd.

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Court : Kerala

Decided On : Jul-29-2005

Reported in : [2006]129CompCas698(Ker); 2005(3)KLT957;
[2006]68SCL484(Ker)

Judge : J.B. Koshy and; K.R. Udayabhanu, JJ.

Acts : [Companies Act, 1956](#) - Sections 433, 433(1), 433(2), 434(1) and 439(1);
Companies (Second Amendment) Act, 2002

Appeal No. : M.F.A. No. 623 of 1999

Appellant : Gopalakrishnan

Respondent : Asianet Satellite Communications Ltd.

Advocate for Def. : S. Venkita Subramanya Iyer, Sr. Adv. and; V. Giri, Adv.

Advocate for Pet/Ap. : K.L. Narasimhan, Adv.

Disposition : Appeal dismissed

Judgement :

J.B. Koshy, J.

1. Appellant filed a petition Under Sub-section 433 and 439(1)(b) of the [Companies Act, 1956](#) (hereinafter referred to as 'the Act') for winding up of the

respondent-company alleging that the respondent company is unable to pay its debts which is one of the grounds for winding up of a company under Section 433(e) of the Act. The learned Company Judge dismissed the application on the ground that (1) there was no statutory notice and (2) respondent-company bona fide disputed the claim.

2. It is the case of the appellant that he is a financial management consultant and sole proprietor of G.K.Financial and Management Consultancy Services. As per Annexure A extracts of the minutes/Board resolution of the Vth meeting of the Board of Directors, the company decided to avail the specialised services of the appellant for obtaining share capital, bank loan, NRI deposits etc. Rate of remuneration was also mentioned in Annexure A. By Annexure B letter dated 5-1-1994, appellant requested the respondent/company regarding settlement of the services. We quote the same:

'During my discussion with Mr.Sasi Kumar, President, Asianet Communications Ltd., regarding payment for my services for raising the share capital of Asianet Satcom, he told me that in consonance with your Board decision of 23rd June, 1993, I must get my consultancy service charges from you for raising Rs. 13.25 crores from M/s.Hathway and their Associates, and he would take care of the payment for the amount received by Asianet Communications Ltd. Mr.Sasi Kumar has already discussed this matter with you in my presence. Perhaps you may like to discuss this matter with the representative Directors of M/s.Hathway and Associates before you decide the amount to be paid to me.

As regards my service charges for the NRI connection schemes, I leave the matter to your discretion.

It is better if at all you require any of my services from 1st January, 1995 you decide the terms, so that there will not be any ambiguity.'

Thereafter, the appellant raised Annexure C invoice dated 11-3-1995 for Rs. 67 lakhs with a covering letter for expeditious payment. Respondent company denied the same by Ext.R1 letter dated 18-3-1995. According to the company, they have paid more than Rs. 30 lakhs and appellant has not done any services and no

amount is due to the petitioner as claimed in the invoice. M/s.Hathway Investments Private Limited also informed the company by Ext.R2 letter dated 27-3-1995 that no amount is payable to the appellant/petitioner. Petition dated 2-6-1995 was filed for winding up of the company without issuing any reminder or further notice. Section 433(e) of the Act provides as follows:

'433. Circumstances in which company may be wound up by Tribunal:-- A company may be wound up by the Tribunal, -

xxx xxx xxx xxx (e) if the company is unable to pay its debts;'

Section 434(1)(a) reads as follows:

'434. Company when deemed unable to pay its debts:-- (1) 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;

(Rupees Five hundred mentioned in the above section was amended as Rs. One lakh by the Companies (Second Amendment) Act, 2002 (Act 11 of 2003).'

3. By winding up, life of a company is put to an end. Therefore, winding up of a company can be ordered only very cautiously and carefully. A company can be ordered to be wound up if it is unable to pay its debts. For raising a presumption to that effect, firstly, a statutory notice should be served on the company demanding payment and the company has for three weeks neglected to pay or otherwise satisfy him. Failure to pay the amount in spite of several communications including service of statutory notice is an evidence of neglect and inability. Here, Annexure C invoice with covering letter was, admittedly, received by the company. That only shows that an invoice was raised by the appellant. That is based on Annexure B. Annexure B itself shows that rates are not fixed and the basis is not settled. It is

true that demand as mentioned under Section 434 need not be in any special form. It is not even necessary to use the word 'demand' in the statutory notice. As stated in Palmer's Company Precedents, Part II, 17th edition, page 26 the use of the polite words, 'request' does not make it the less a demand, if it is stern enough to indicate that payment must be made. This Court in K. Suresh Shenoy v. Cochin Stock Exchange Limited (1988 (2) KLT SN 100 P.67 : (1989) 65 Comp. Cases 240 (Ker.) held that though in the notice sought to be given under Section 434(1)(a) it is not necessary that there should be an indication that it is given under Section 434(1)(a), there should be some indication given to the company that in case of non-compliance with the terms of the notice or demand, the creditor will take steps for winding up of the company. A contrary view was expressed by the Delhi High Court in Devendra Kumar Jain v. Polar Forgings and Tools Ltd. ((1985) 84 Comp. Cases 766). There it was held that it is not necessary that the notice should carry a wording that if the demand is not met, a winding up petition would be filed. A request for payment with interest can be treated as a valid demand and the law does not require that the demand must recite a 433 proceedings for winding up in case of nonpayment. In this case, no such demand notice was issued. Series of decisions were cited by both sides following both view points. Even if we accept the Delhi High Court decision, in this case, there was not even such a demand. Annexure C invoice/bill was forwarded for the first time. The respondent company informed that they are not liable to pay the amount for various reasons. Thereafter, after forwarding the bills, no further demand was made either in the form of a request, demand or notice. Only a bill is forwarded and the claims in the bill were not accepted by the other side. Thereafter, absolutely no notice or demand or request for payment was made. Mere sending of a bill for the first time cannot be treated as a notice or demand for the purpose of satisfying the statutory demand or notice as contemplated under Section 434(1)(a) of the Act. Therefore, we fully agree with the learned Company Judge (Justice P.K.Balasubramanyan as he then was) that mere handing over a bill or invoice with a request to pay the same cannot be construed as a notice within the meaning of Section 434(1)(a) of the Act. It is true that even in the absence of a notice, petitioner can adduce evidence to show that the company is unable to pay its debts and has become bankrupt. No evidence was also adduced by the appellant to show that the company is unable

to pay its debts. In Annexure C, no time limit was also fixed for making payment. In this connection, we also refer to the decision of the Calcutta High Court in *Pancham Tea Co. Ltd. v. Darjeeling Commercial Co. Ltd.* ((1977) 47 Com. Cases 15 (Cal.).

4. In order to raise a presumption of inability to pay, mere non-payment of the demand amount, despite service of statutory notice, is not enough. It is the burden of the petitioner to show that the company has omitted to pay without reasonable cause or winding up shall be refused if there is bona fide and reasonable dispute as to substantial part of the debt on which the petition is based. When a debtor company bonafide believes, even if wrongly, that it is justified in law to refuse to pay, such a refusal cannot be regarded as neglect to pay. A company petition for winding up cannot be used to bring pressure upon the company in order to make it to pay the petitioner cheaply and expeditiously when the company bonafide disputes the claim. Petition for winding up cannot be made as a shortcut and cheap device to coerce payment and to avoid contesting in civil court. The Apex Court in *Madhusudan Gordhandas and Co. v. Madhu Woolen Industries Private Ltd.* : [1972]2SCR201 held as follows:

'21. ... The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.'

If the debt is undisputed, the court will not act upon a defence that the company has ability to pay the debt. But, if the company chooses not to pay a particular debt, the dispute should also be bona fide and substantial. In this case, as soon as the bill was received, the company replied saying that no amount is due. The appellant submits that the balance sheet of the company, Annexure E, shows that consultation charges of Rs. 34.44,516/- was paid. In fact, it is the contention of the respondent also that more than Rs. 30 lakhs was paid. But, the petitioner has not done the service and excess amount was actually paid. They are not disputing Annexure A decision of the Board of Directors. But, the defence is that he has not done any useful work in getting the above service. The bank loan obtained from

the Federal Bank was sanctioned even before Annexure A Board resolution. Ext.R2 would show that prima facie no amount is due to the petitioner due to the transactions in connection with M/s. Hathway Investments Private Limited. We are not going to conduct a threadbare discussion with regard to the correctness of the claims of the petitioner and counter-claims filed by the company. We are only stating that bonafide and substantial objections to the bill were raised by the company and intimated to the claimant as soon as it received Annexure C invoice. Annexure B letter produced by the claimant itself shows that there are bonafide disputes and basis for the claim is not settled. Whether petitioner is entitled to get the benefit and how far the defence of the company can be sustained are issues to be considered by the civil court if civil case is filed. The company court would not allow a winding up petition to be used for the purpose of deciding a dispute as to the existence of debt which is resisted bonafide on substantial grounds. Matters now raised cannot be sorted without evidence and cannot be decided in a company petition for winding up as held in Rohtak and Hissar Districts Electricity Supply Co.P.Ltd. v. Amausi Textile Mills P. Ltd. ((1999) 19 SCL 541). It is true that if no real or bona fide dispute is raised, the claims put forward by the company as a cloak to write its inability to pay its debts, application for winding up would be allowed as was held in Vanaspati Industries Ltd. and Anr. v. Firm Prabhu Dayal Hari Ram through Shri Narain Das and Anr. (AIR (37) 1950 East Punjab 142). In this case, we are of the view that when Annexure C invoice was raised, the claim was disputed bona fide and the dispute was substantial in nature and the petitioner failed to prove that the company was unable to pay its debts and, therefore, it is not liable to be wound up in view of Section 433(e) of the Act. Company Judge has considered the matter in its right perspective. Hence we dismiss the appeal.