

Deva Sugars Ltd. Vs. Sicom Ltd.

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Court : Chennai

Decided On : Feb-04-1997

Reported in : [1997]89CompCas504(Mad)

Judge : Abdul Hadi and; P. Sathasivam, JJ.

Acts : [Companies Act, 1956](#) - Sections 433, 434, 434(1) and 439(1)

Appeal No. : O.S.A. No. 207 of 1996 and C.M.P. No. 11792 of 1996

Appellant : Deva Sugars Ltd.

Respondent : Sicom Ltd.

Advocate for Def. : T. Raghavan, Adv., for ;R. Murari

Advocate for Pet/Ap. : T.R. Rajagopalan, Senior Adv., ;T.R. Rajaraman, ;N. Jawahar and ;S.K. Srinivasan, Advs.

Judgement :

Abdul Hadi, J.

1. The respondent in C.P. No. 170 of 1995 on the file of this court has filed this O.S.A. against the order dated August 23, 1996, in the said company petition, admitting the said petition for winding up of the appellant-company herein and directing advertisement of the petition in two English dailies and posting the

petition for hearing on September 25, 1996.

2. The said company petition was filed under sections 433(e), 434(1)(a) and 439(1) of the companies Act, 1956, on the ground that the appellant-company is unable to pay its debts. As per the company petition, as on August 31, 1995, the amount due from the appellant herein was Rs. 3,29,15,282. the principal debtor thereto is one Rajadhiraj Industries Limited and the appellant herein is the guarantor. However, in the guarantee agreement dated January 24, 1995, between the parties it is also stated that the appellant herein would be treated as principal debtor jointly with the said Rajadhiraj Industries Limited.

3. The abovesaid sum is claimed pursuant to the loan granted by the respondent herein, which has to be repaid in several instalments, the first of which being payable on the payable on February 28, 1995. The other instalments are payable in the months of May, August and November, 1995, and likewise in the succeeding years but all the subsequent instalments were not paid at all and statutory notice was given on August 11, 1995. It was no doubt addressed to the principal debtor with a copy to the appellant-guarantor herein. But in the said statutory notice, while referring to the said copy sent to the appellant at the bottom of the abovesaid statutory notice, the following passage addressed to the appellant itself also appears :

'Under instructions from our clients, they (appellant) are hereby advised to pay the above dues of our clients as guarantor thereof within 21 days from the date hereof failing which our clients have instructed us to file winding-up petition against them entirely at their risk as to the costs and consequences thereof which they may please note. This may please be treated as notice under section 434 of the [Companies Act, 1956](#).'

4. The material portions of the impugned order, in the light of the arguments advanced before us, run as follows :

'After the order was dictated on July 23, 1996, counsel for the petitioner mentioned that a material part of the guarantee document, by inadvertence had not been brought to the notice of the court and requested that the matter be posted for

being mentioned. The matter was thereafter listed for being mentioned and opportunity was given to address further arguments. I have heard counsel for the petitioner as also the counsel for respondent... The fact that the loan has been granted to the industries is not in dispute. The execution of the guarantee is also not in dispute. The fact that the monies were demanded by the petitioner and that the amount payable in terms of the guarantee has not been paid is also not in dispute... The petitioner has established that rupees three crores are due to the petitioner from the respondent and that no amount has been paid till date. The respondent-company has failed to repay the amount even after the receipt of the notice issued by the petitioner. The company petition is admitted... The petitioner is therefore, directed to advertise the petition...'

5. Now before us, learned counsel for the appellant makes only two submissions :

6. His first submission is, the learned judge, having earlier dismissed the company petition on July 23, 1996, has no jurisdiction to review the said earlier order which was pronounced on July 23, 1996, without any review petition before him by posting the company petition once again for being mentioned and admitting the company petition as stated above. In this connection, he relies on Surendra Singh v. State of Uttar Pradesh, : 1954 CriLJ475 , Vinod Kumar Singh v. Banaras Hindu University, : [1988]1SCR941 , K.K. Arunachalam v. K. Nallusamy [1995] 2 LW 456 P. Narasimhamurthy v. G. Satyavathi, : AIR 1976 AP400 and Secretary, Selection Committee, Sabarmathi Hostel KMC v. R. Rajesh [1996] 1 LW 77.

7. His second submission is on the merits of the company petition. According to him, the appellants a flourishing running concern and the learned trial judge wrongly proceeded as if the appellant is unable to pay its debts, and admitted the company petition and caused advertisement to be made.

8. On the other hand, learned counsel for the respondent relies on certain passages in the above cases, Vinod Kumar Singh v. Banaras Hindu University, : [1988]1SCR941 , and Surendra Singh v. State of Uttar Pradesh, : 1954 CriLJ475 , themselves to meet the above referred to the first submission of learned counsel for the appellant. He specifically points out that even though on July 23, 1996, the learned judge pronounced the order, dismissing the company petition, he did not

sign the order and that since counsel for the petitioner in the company petition immediately thereafter represented before the learned trial judge about the fact that the above referred to material part of the guarantee document was not earlier brought to the notice of the learned judge, the learned judge posted the matter the very next day and after affording opportunity to both learned counsel heard both of them and then only passed the impugned order dated August 23, 1996. In the above circumstances, according to the said counsel, in the light of the observations in the Supreme Court decisions themselves, the learned trial judge could correct his earlier order pronounced on July 23, 1996, but not signed. On the merits, that is, relating to the above referred to second submission of learned counsel for the appellant, he points out that apart from paying the first instalment of Rs. 5 lakhs odd in February, 1995, there was no payment of all the subsequent instalments in May, August and November, 1995, and subsequently in all the four instalments in 1996. He also points out that as per clause 20 of the loan agreement dated January 24, 1995, 'in the event of the company (principal debtor) committing default in payment of any interest or principal amount.. on the due dates... the entire amount of the said loan or the balance which may be remaining due and payable... shall... become immediately payable..' That is why, according to him, the entire sum of about Rs. 3 crores was demanded by the abovesaid statutory notice and the above extracted passage found in the statutory notice underneath the place where the factum of copy of the said notice being sent to the guarantor-appellant is mentioned. He also points out that admittedly there was no reply by the appellant-company to the above referred to statutory notice. He also reiterates the reasoning found in the impugned order.

9. We have considered the rival submissions. Regarding the first of the abovesaid submissions of learned counsel for the appellant, we may straightaway point out that the observations in *Surendra Singh v. State of Uttar Pradesh*, : 1954 CriLJ475 , and *Vinod Kumar Singh v. Banaras Hindu University*, : [1988]1SCR941 , are against the argument of learned counsel for the appellant. In the said *Vinod Kumar Singh v. Banaras Hindu University*, : [1988]1SCR941 , the learned judges have quoted the following observations of Bose J. in the earlier decision in *Surendra Singh v. State of Uttar Pradesh*, : 1954 CriLJ475 :

'After the judgment has been delivered provision is made for review. One provision is that it can be freely altered or amended or even changed completely without further formality, except notice to the parties and a rehearing on the point of change should that be necessary, provided it has not been signed. Another is that after signature a review properly so called would lie...'

10. From this it is clear that before the judgment pronounced is signed by the learned judge, it can be changed after notice to the parties and rehearing on the point even without a formal review petition. The above referred to observation of Bose J. in *Surendra Singh v. State of Uttar Pradesh*, : 1954 CriLJ475 , has been referred to in *Vinod Kumar Singh v. Banaras Hindu University*, : [1988]1SCR941 , impliedly approving it. That is why, later in paragraph 7 of the judgment in *Vinod Kumar Singh v. Banaras Hindu University* AIR 1998 SC 371, it is stated thus :

'But, while the court has undoubted power to alter or modify a judgment, delivered but not signed, such power should be exercised judicially, sparingly and for adequate reasons.'

11. No doubt, learned counsel for the appellant very much relies on what is contained in paragraph 9 of the said judgment in *Vinod Kumar Singh v. Banaras Hindu University*, : [1988]1SCR941 , which runs as follows :

'Once that stage is reached and the court pronounces the judgment, the same should not be reopened unless there be some exceptional circumstance or a review is asked for and is granted... In the instant matter, we find that there is no material at all to show as to what led the Division Bench which had pronounced the judgment in open court not to authenticate the same by signing it. In such a situation the judgment delivered has to be taken as final and the writ petition should not have been placed for fresh hearing.'

12. But in this observation too, we find that in 'exceptional circumstances', even without formal review petition, the court could reopen the matter even after pronouncing the judgment, but before signing the same.

13. But, learned counsel for the appellant lays emphasis on the last part of the abovesaid passage, stating that 'there is no material at all to show as to what led the Division Bench which had pronounced the judgment in open court not to authenticate the same by signing it.' According to him, in the present case, in the impugned order, the learned judge has not stated the reasons for dismissing the company petition earlier on July 23, 1996, and the reasons for setting aside the earlier order and admitting the company petition. But, this submission has no merit. Even in the first sentence of the impugned order, the learned judge says, 'after the order was dictated on July 23, 1996, counsel for the petitioner mentioned that a material part of the guarantee document, by inadvertence, had not been brought to the notice of the court and requested that the matter be posted for being mentioned. The matter was thereafter listed for being mentioned and opportunity was given to address further arguments'. This clearly shows that only because the abovesaid material part of the guarantee document was not brought to the notice of the learned judge earlier, by inadvertence the earlier order dated July 23, 1996, came to be pronounced, though not signed, and that when that material part was subsequently brought to the notice of the learned trial judge after giving opportunity to both parties to address further arguments, it passed the impugned order on August 23, 1996. The fact that the above referred to material part was not noticed earlier could certainly be taken as an exceptional circumstance spoken to in paragraph 9 in *Vinod Kumar Singh v. Banaras Hindu University*, : [1988]1SCR941 , and it can also be said that the learned judge has exercised the power to modify his earlier judgment 'for adequate reasons'. Further, in view of the fact that he has allowed both learned counsel to argue afresh in the light of the aforesaid material part of the guarantee document, there is no infirmity at all in the impugned order in so far as the above referred to first submission is concerned.

14. Further, the appellant having already argued the company petition afresh after it was posted for being mentioned, he cannot, after the company petition is admitted and advertisement ordered, turn round and seek to contend that the learned judge should not have reopened the matter and modified his earlier judgment.

15. In *K.K. Arunachalam v. K. Nallusamy* [1995] 2 LW 456, the Division Bench judgment relied on by learned counsel for the appellant, no doubt it has been held thus :

'We are unable to appreciate how after an order is passed it could be reversed by bringing it for being mentioned and getting the whole matter reconsidered. In this case, the procedure adopted by the party for bringing up the matter for being mentioned on the ground that his counsel was not heard is not in accordance with law.'

16. But, it must be stated that in the above decision, there is no finding or material to show that the order referred to in the abovesaid passage was not signed by the learned single judge who passed the same. Where a judge wants to correct his order after its pronouncement, but before signing it, the above referred to observation of the Supreme Court alone would govern the case.

17. Likewise *Secretary, Selection Committee, Sabarmathi Hostel, KMC v. R. Rajesh* [1996] 1 LW 77, the Division Bench decision also will have no application to the present case. Even in the said decision, which followed *K.K. Arunachalam v. K. Nallusamy* [1995] 2 LW 456, there is no finding or material to show that the order, of which a party is aggrieved, was not signed by the learned judge.

18. Learned counsel for the appellant also relies on *P. Narasimhamurthy v. G. Satyavathi*, : AIR 1976 AP400 , which was decided by a learned single judge of the Andhra Pradesh High Court. There, after the order in the relevant civil miscellaneous petitions was pronounced in the open court, learned counsel for the petitioner therein in one C.M.P. urged that he would withdraw the main civil revision petition itself and that therefore, the learned judge who pronounced the order should not sign the said order. But the learned judge negatived the said request on the ground that he (learned judge) cannot but sign the said order already pronounced and it is open to the petitioner to withdraw the main civil revision petition, if he is so advised. For so doing, the learned judge therein no doubt relied on certain observations of Bose J. in *Surendra Singh v. State of Uttar Pradesh*, : 1954 CriLJ475 , to the effect that the judgment is the final decision intimating to the parties by formal pronouncement in open court and that once the

said pronouncement is so made, the other subsidiary things, viz., the manner in which it is to be recorded, authenticated or signed, have no effect upon the hard core, viz., the formal intimation of the decision. But, it must be noted that in the very same judgment, Bose J. has also observed what we have pointed out earlier in paragraph 6 above. So, before signing the judgment, if the said judgment is corrected after giving notice to the parties and giving them opportunity to address fresh arguments in relation to the said correction there is nothing improper. In view of this observation of the Supreme Court in the said decision and its reiteration in the subsequent, *Vinod Kumar Singh v. Banaras Hindu University*, : [1988]1SCR941 , there is no infirmity in the impugned order.

19. We may also add that in *Sangam Lal v. Rent Controller Eviction Officer*, : AIR1966 All221 [FB] also it has been held until the judgment is signed it can be altered or amended or even changed completely, provided notice is given to the parties and they are heard before the proposed change is made.

20. Coming to the second submission of learned counsel for the appellant, it is clear that a huge amount is due to the respondent. Even though the appellant is termed as guarantor in the guarantee document, it is also mentioned therein that he would be treated as principal debtor. Further, the loan granted is not in dispute and the execution of the guarantee document is also not in dispute. The demands made by the respondent for the amount due including the statutory notice is not in dispute. Further, even though the statutory notice is addressed to the principal debtor, specific demand is made even against the guarantor and also specifically saying in what is contained in the above referred to extracted passage underneath the aforesaid statutory notice, that the said contents would be treated as statutory notice under section 434 of the Companies Act against the guarantor also. Despite the above-referred to statutory notice, admittedly there was no reply by the appellant-guarantor. Nor any payment has been made subsequent to the statutory notice. Even earlier, several instalments have not been paid. That apart, in our order dated October 29, 1996, in C.M.P. No. 13246 of 1996 in the O.S.A., we have stated that the appellant could as well pay the sum claimed to the respondent since it is represented that the appellant is a flourishing concern. When such an order was passed, learned counsel for the appellant wanted time to consult his

client and that is why the matter was adjourned to October 30, 1996. But, so far, not even part of the amount claimed has been paid, nor any counter suggestion has come from learned counsel for the appellant regarding the appellant making payment of the amount claimed. In the above circumstances, it is clear that the appellant is unable to pay its debts.

21. The net result is, there is no infirmity in the impugned order. Accordingly the appeal is dismissed, but in the circumstances of the case, there will be no order as to costs. Consequently C.M.P. No. 11792 of 1996 is dismissed.

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