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Court : Chennai

Decided On : Sep-20-1963

Reported in : AIR1964Mad191

Judge : Veeraswami, J.

Acts : [Companies Act, 1956](#) - Sections 433 and 439; Limitation Act, 1908 - Sections 19; [Evidence Act, 1872](#) - Sections 115

Appeal No. : Company Petn. No. 16 of 1963

Appellant : A.C.K. Krishnaswami

Respondent : Stressed Concrete Constructions Pvt. Ltd.

Advocate for Def. : G. Vasanta Pai, ;Padmanabha Pai, ;A. Basil Philip and ;N. Ramachandran, Advs.

Advocate for Pet/Ap. : S.V. Subramaniam, Adv.

Disposition : Petition dismissed

Judgement :

Veeraswami, J.

1. This petition is by a creditor of the company for its compulsory winding up. The ground on which the petitioner seeks the order is that the company, in spite of his

notice of demand dated 31-10-26400, to pay a sum of Rs. 26400 for services rendered as its managing director from 1-7-1958 to 6-8-1959, has failed to comply with the demand. down to date. The other ground of the petitioner is that the company is also unable to pay its debts.

2. This is a private limited company, of which the petitioner was the managing director until 6-8-1959. He resigned that office with effect from, the next day. But he continued to be a director of the company for sometime thereafter. His case is that under Article 107 of the Articles of Association, he was entitled to draw Rs. 2000 per mensem as remuneration for his services as managing director of the company, that though prior to April 1958 he did not draw his salary, he, however, did so for April to June .1958. The company's year of account is stated to be 30th June. He claims that since the beginning of July 1958 to the date of his resignation, the company was liable to pay his remuneration. According to him, in the balance sheet for the year 1958-59 a sum of Rs. 24000 was debited to the profit and loss, account as payable to the petitioner as remuneration for that period. He has also claimed, though wrongly as evident from Ex. R. 1 (a), that at the general body meeting of the company on 31-3-1960, the accounts, as shown in the balance sheet, were passed. The petitioner asserts, therefore, that there could be no doubt that the sum of Rs. 24000 was owing to him from the company by way of remuneration.

3. Alternatively, the petitioner refers to the affidavit of the Registrar of Companies, in which it is stated that the company had, as on 30-6-1962, realisable assets of the value of Rs. 5,51,253, against liabilities of Rs. 14,59,260, and contends that in view of this the company is unable to pay its debts.

4. My impression, formed in the course of the arguments before me, is that the petitioner has resorted to this application for winding up as a means of recovering his debt, instead of instituting a suit for the purpose and establishing his debt. But, I am not inclined to dispose of the application on that ground. On behalf of the company, the plea is that the petitioner had waived his right to remuneration for the period from July 1958 to the end of June 1959. I am not satisfied that this plea has been made out. As a matter of fact as late as 17-12-1959, the directors

resolved requesting the petitioner to waive his claim. There is no evidence that the petitioner complied with that request at any time. On the other hand, by his letter dated 31-10-1960 the petitioner clearly denied having agreed to forego his remuneration for the period. The contention for the company is that the circumstantial indications would show that there had been such a waiver. The circumstances referred to are that the petitioner, for the period prior to April 1958 had waived his remuneration for each year, and that in an earlier petition for liquidation, which went up in O.S. appeal, he did not figure before the division Bench dealing with that appeal as a creditor in response to an advertisement. As for the first circumstance, assuming that the petitioner had been waiving his remuneration every year prior to July 1958, it does not necessarily follow from it that he waived for the subsequent year from July 1958. The effect of the other circumstance is merely that the petitioner by not acting as a creditor, was not interested either in supporting or opposing winding up. It seems to me, therefore, that the plea of waiver is not true.

5. The next contention for the respondent is that even assuming that the amount claimed by the petitioner is due to him, the claim became barred by 8-1-1963, when the present petition, was filed. I have already stated that at the directors' meeting dated 17-12-1959, they resolved to request the petitioner to waive his claim. Impliedly it might be taken that the request for waiver presupposed acceptance of liability to pay the salary. But I consider that this cannot be treated as an acknowledgment of liability Under Section 19 of the Limitation Act. Nor am I inclined to regard the letter of the company dated 28-10-1960, to the petitioner as containing an acknowledgment. On both these dates, namely, 17-12-1959 and 28-10-1960, the petitioner continued to be a director. Even if the Board of Directors, on those dates, had expressly acknowledged the debt in writing signed by them, it would nevertheless not operate as an acknowledgment to save time; because, in effect, it would be an acknowledgment made, by a director of a debt due to himself. To such a case, the principle of *In re the Coliseum (Barrow) Ltd.*, (1930) 2 Ch. 44, *In re Transplanter (Holding Co.), Ltd.*, 1958 1 WLR 822 and *Thirumalai Iyengar v. Official liquidator, Srinivasa Mills Ltd.*, : AIR1962 Mad253 , would be applicable. It is true the petitioner was not a party to the proceedings of the Board of Directors at its meeting dated 17-12-1959. But, that in itself can make no

difference to the application of the principle. Further, even on the assumption that the proceedings at that meeting of the Board of Directors amounted to an acknowledgment the debt would still be barred on 8-1-1963, when the present application was filed for winding up.

6. It was contended for the petitioner that the proper article of limitation applicable to the claim was Article 120. The argument is that remuneration payable to a managing director is not salary and a claim in respect of it is not covered by any article of the Limitation Act specifically. But, in my opinion, in the circumstances of this case, the remuneration appears to be clearly salary. It is payable month after month and the payment does not depend upon the actual service rendered. It is then urged that even assuming the remuneration is salary, it cannot be treated as wages so as to attract Article 102 of the Limitation Act. But this question has been concluded against the petitioner by *Punjab Province v. Pandit Tarachand*, AIR 1947 FC 23, in which it was held that the word 'wages' in the article would cover also salary.

7. Since on the date of the application for winding up, the petitioner's claim would thus seem to have been barred, his petition based on the notice of demand for payment and failure to comply with it, cannot be sustained.

8. It is true that as found in the affidavit of the Registrar, the liabilities of the company far exceed its assets as in 1962. But it does not necessarily follow from it that the company is unable to pay its debts. A company may have liabilities more than its assets; but still may have, in particular circumstances, the capacity to meet the demands from its creditors. No evidence has been placed before me beyond the affidavit of the Registrar that the company is really unable to pay its debts. The second ground for a winding up order is, therefore, not made out.

9. The petition is, therefore, dismissed with costs.