(2012) 07 KAR CK 0005

In the Karnataka High Court

Case No : Co. Petition No. 219 of 2010 and Co. Application No''s. 977 of 2010 and 533 of 2012

A.M. Sudhakar APPELLANT

Vs

Magnus Health Care and Research Centre (P.) Ltd. RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:
Companies Act, 1956 — Section 100, 104, 433 (e), 433 (f), 439

Citation : (2012) 115 SCL 354

Hon'ble Judges : Ravi Malimath, J

Bench : Single Bench

Advocate : Sagi P. John, for the Appellant; Perikal K. Arjun and U. Abdul Khader, for the Respondent

Final Decision : Dismissed

Judgement

Ravi Malimath, J.—This Company Petition is filed u/s 433(e) and (f) along with section 439 of the Companies Act, 1956 seeking winding up of the respondent Company and the other consequential reliefs. The case of the petitioner is that he is one of the Promoters and Directors of the respondent Company and he resigned from the Board of Directors of the respondent Company with effect from 1.2.2010. A copy of the resignation dated 1.2.2010 along with the postal receipts and acknowledgements are produced as Annexures-C, D and E.

2. The contention of the petitioner is that an amount of Rs. 1,58,01,468/- is still lying to his credit in the Share Application Money Account in the respondent Company and a request was made by him not to issue or allot any shares in his name. In addition to this, he had also given Rs. 3,77,861/- to the respondent Company as an unsecured loan. The said amount is still continuing to be shown in the books of account. That the respondent Company was incorporated on 7th day of May, 2007. The Memorandum of Articles is produced as Annexure-A to the petition. The share capital of the Company in terms of the audited balance sheet for the year ending 31.3.2009 is Rs. 50 lakhs divided into 50,000 equity shares

of Rs. 100/- each. The issued, subscribed and paid up capital of the respondent Company is Rs. 2,10,000/- divided into 2,100 equity share of Rs. 100/- each. A copy of the balance sheet is produced at Annexure-B. In spite of repeated requests, the share application money was not refunded nor any reply was given to the petitioner by the respondent Company. Hence, the petitioner issued a legal notice, dated 1.3.2010 to the respondent Company demanding a sum of Rs. 1,61,79,239/- as detailed therein. Though the respondent Company received the said notice, has not replied to the same. A copy of the legal notice, postal receipt and postal acknowledgements are produced as Annexures-J, K and L. Since there was no reply to the legal notice, the present petition is filed.

3-4. On notice being served, the respondent Company has filed its statement of objections.

5. The learned Counsel for the respondent Company submits that the petition is not maintainable in law and is an abuse of the process of this Court. That the petitioner was one of the Promoters and Directors of the respondent Company along with 19 other share holders. Only to wriggle out of his obligations as a Promoter and Director, the present petition is filed on frivolous and untenable grounds. That the petition has been filed to withdraw his investments from the project of the respondent Company. That based on the credibility of the respondent Company, the financial institutions have sanctioned a loan of Rs. 25 crores to them. That in terms of the loan sanction letter, which the petitioner is very well aware of, all the monies infused by the Promoters and Directors are subordinate to the loan availed from the State Bank of India. Hence, on this ground itself, the demand made by the petitioner is unsustainable. It is his further case that the petitioner has represented to the Bank that he would be investing a further sum of Rs. 1.5 crores as his contribution to the respondent Company, but he has failed to do so and on his failure to do so, the present petition has been filed in view of his inability and his desire to withdraw the money. That shares have been allotted against the share application money to the petitioner as well to the other Promoters on 20.9.2010 and hence, the request for refunding the share application money does not arise for consideration. It is further contended that the share application money constitutes a part of the paid up capital of the Company and it cannot be returned without following the procedure as contemplated under Sections 100 to 104 of the Companies Act, 1956 viz., the same could be done only with the approval of the shareholders by means of a special resolution and its confirmation by this Court. It is the further case of the respondent Company that the petitioner by his letter, dated 4th September 2008, addressed to the HDFC Bank has undertaken that he will be fully involved in the day-to-day business of the respondent Company and that there will be no dereliction of duties on his part and in order to cover the same, the present petition is filed. Hence, it is pleaded that the petition be dismissed.

6. An affidavit has also been filed by the Secured Creditor, State Bank of India,

stating that a sum of Rs. 25 Crores was sanctioned out of which a sum of Rs. 10,39,58,274/- has been disbursed. That on 4.3.2011, the respondent sought permission to advertise to sell the mortgaged property. The Creditor viz., State Bank of India has given ''No Objection'' for sale subject to payment of dues.

7. Heard the learned Counsel for the petitioner.

8. No submissions are forthcoming on behalf of the respondent.

9. The plea of the petitioner is that the share application money paid by him to an extent of Rs. 1,58,01,468/- has not been repaid by the respondent and hence, it is a debt due. Secondly, that a sum of Rs. 3,77,861/- has been paid to the respondent as unsecured loans. The same is reflected in the balance-sheet and the same has remained unpaid. On a legal notice being issued, the debts have not been cleared and hence, the respondent Company requires to be wound up.

10. In support of the first submission, the learned Counsel for the petitioner relies on a judgment of the Delhi High Court in the case of Bhajan Singh Samra v. Wimpy International Ltd. (2012) 111 SCL 1 : (2011) 16 Tax.com 329 at para 21 of the order to contend that all monies received by a public limited company towards allotment of shares have to be deposited in a separate bank account and if the allotment is not made within the prescribed period, the said monies shall be refunded forthwith to the applicants. That the Scheme of the Act itself obligates the company crediting the money as Share Application Money to either forthwith issue shares or refund the monies at the earliest. Hence, it is pleaded that the said judgment is applicable to the case on hand.

11. Reliance is also place on para-23 of the judgment supra wherein it is held that even after the petitioner issued a winding up notice, the respondent Company did not issue any shares. In the reply affidavit, it was also not stated that the respondent-company is willing to issue shares to the petitioner. It is only for the first time in the written submissions recently filed by the respondent company that the respondent has stated that it is now willing to issue shares. But, in the opinion of the Court, once a winding up notice is issued, it is not open to the respondent to state that it is now willing to issue shares.

12. In the judgment relied upon, the petitioner gave a loan for a period of 2 years along with interest at 22% per annum. Upon the petitioner''s request for redemption of his loan with interest, the respondent Company instead of redeeming the loan, offered to convert it into equity shares in the petitioner''s favour and also agreed to appoint the petitioner as an Executive Director. That in spite of repeated requests neither the shares were issued by the respondent Company nor the petitioner was made a Director. Criminal proceedings were also initiated against the respondent Company. Under these circumstances, the petitioner filed for winding up of the respondent Company. In this background, the Court was of the view, that in terms of the written statement, there is a willingness to issue the shares but no shares had actually been allotted in terms

of para 23 of the judgment. In para 21 of the judgment as relied upon by the petitioner, what the Court had to say was that when the allotment of shares is not made within the prescribed period, money has to be refunded to the applicants.

13. In the instant case, the specific plea of the respondent is that the shares were allotted to the petitioner on 20.9.2010 and that it is not just the petitioner but all the other Promoters and Directors were also issued shares. Hence, the said judgment would not be applicable to the case on hand.

14. It is not the case here that the share application, was not refunded or shares were not allotted. The shares were allotted on 20.9.2010. The present petition has been filed on 29th September, 2010 much after the issuance of the shares. Hence, the said judgment is not applicable to the case on hand.

15. The case of the petitioner is that he demanded the return of the share application money with a request not to allot the shares. He contends that, it therefore, amounts to a debt, which he is entitled to claim. However, the facts are different. The case of the respondent is that only because a return of the share application money has been made, it cannot be returned. The return has to be in terms of the procedure contemplated under Sections 100 to 104 of the Companies Act and on an approval by this Court. Merely because a refund has been asked, neither is it a debt nor is the Company liable to pay the same. That the shares were allotted on 20th September, 2010 and hence, even that plea is not available to the petitioner. That the present petition has been filed only on 29th September, 2010. Therefore, even before the petition was filed, the shares have been allotted.

16. The second contention is that a sum of Rs. 3,77,861/- has been paid as an unsecured loan to the Company in respect of which it is pleaded that even in the statement of objections, there is no denial about the said amount and that the respondent has only stated that the said amount is not due for payment. Reliance is placed on the balance sheet to show that under the heading ''Unsecured Loans'' from Directors and Relatives an extent of Rs. 24,70,167/- is shown as on 31.3.2009. It is, therefore, contended that this amount includes the amount paid by the petitioner to the respondent. The contention of the petitioner is solely based on para-11 of the statement of objections, which reads as follows:

11. The Respondent Company states that the loan amount of Rs. 3,77,861/- claimed by the Petitioner issued to the Respondent is not due for payment.

Hence, it is pleaded that since the respondent does not deny that the amount is due, the debt is admitted. As could be seen from para-11 of the statement of objections, they have stated that the amount claimed by the petitioner is not due for payment. They have not stated that the amount is due now. Hence, the date of repayment is not established. There is no material to show as to when the amount actually becomes due. It is not a debt at present. It may be a debt in future. Under these circumstances, to place reliance on para-11 in support of the petitioner''s case, is unacceptable. Hence, the said contention of the petitioners cannot be accepted.

17. That even if the Statement of Objections is to be accepted, the same would not be a debt due as on the date of filing of the petition. This Court in the case of P.K. Varghese v. J.T.V. Metal Finishers (P) Ltd. (1988) 63 Comp. Cas. 644 (Kar.) while placing reliance on the judgment of the Hon''ble Supreme Court in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., as follows:-

4. .. .. ..

The tenability of the defence depends on the evidence led by the parties. If in this regard, no evidence is led to support the assertion that there was no agreement reached on June 4, 1986, in regard to the repayment in the manner indicated, then, it is likely that the respondent company would succeed in postponing its liability even if a suit was filed having regard to the fact that the present petition must be construed by this court as a petition filed to coerce the repayment of the amount which is not immediately due to be paid to the petitioner, as laid down by the Supreme Court in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., Section 433 cannot be made use of to coerce a company to make payments (not immediately due) even though the liability is admitted. This is the position in England as well.

.. .. ..

18. Therefore, even though the liability has been admitted, the petitioner cannot coerce the company to make the said payment especially in view of the fact that the payments are not immediately due. Hence, the contention of the petitioner based on Para 11 of the Statement of Objections is misconceived.

19. It is the further contention of the respondent that the balance sheet discloses loans and credits from the Directors and Promoters and that part of the amount shown therein is the amount, which has been given as a loan by the petitioner to the respondent. I'' am unable to accept the said contention. Undoubtedly, the loans and credits from the Directors and Promoters have been shown. It has been shown as a whole. There is no break up as to who has paid the amount and to what extent. Therefore, the reference to the category of loans and credits from the Directors and Promoters to include the amount paid by the petitioners to the respondent can neither be inferred nor can such a contention be accepted. For the aforesaid reasons, the petitioner has failed to make out a case. The petition being devoid of merits is dismissed. All the pending applications are consequently rejected.

