

(1975) 02 BOM CK 0008
In the Bombay High Court
Case No : Letters Patent Appeal No. 1 of 1975

Associated Biscuit Co. P. Ltd.

APPELLANT

Vs

T.L. Nambiar

RESPONDENT

Date of Decision : 07-02-1975

Acts Referred:

Companies Act, 1956 — Section 433, 434, 483

Citation : (1978) 48 CompCas 481

Hon'ble Judges : L.M. Sharma, J;Deshmukh, J

Bench : Division Bench

Advocate : V.A. Bobde and S.J. Chawla, for the Appellant; A.K. Khanna and K.H. Deshpande, for the Respondent

Judgement

Deshmukh, J.—This is appeal has been filed by a private limited company against the order of the learned company judge dated January 8, 1975, by when which he allowed an application for amendment filed by the original petitioner, the present respondent. The respondent as a petitioner filed the Company Petition No. 1 of 1972, for winding up the appellant private limited company. According to the respondent, he was a creditor of this company to the extent of Rs. 31,000. He served a statutory notice dated February 9, 1972. Within two days after this statutory period, he received a telegram from the company that they do not admit the liability. He also received a full text of the defence on March 20, 1972. Not being satisfied with that, he presented the petition for a winding-up order on April 12, 1972.

2. When this petition came for first order on April 13, 1973, before the learned company judge, he issued a notice before admission returnable on April 29, 1972. An undertaking was taken from the petitioner not to give publicity to these proceedings in newspapers. After receiving such notice the company appeared and filed detailed reply after climbing several adjournments. The reply has been filed some time in March, 1973. Two defences seem to have been raised. One is that there is no dent of Rs. 31.000 at all. Before the formation of the present

private limited company, there was a partnership, in which the respondent had kept a deposit of Rs. 31,000. On the formation of the private limited company, it was agreed that a part of the deposit be converted into share capital. Accordingly, Rs. 20,000 were converted into share capital, partly in his name and partly in the names of his wife. A balance of Rs. 11,000 remained with the company as deposit. So far as this deposit of Rs. 11,000 is concerned, the further defence was raised that the respondent was himself a director of the private limited company, which had obtained loan from the State Industrial and Investment Corporation, Maharashtra (hereinafter referred to as "the SICOM"). One of the conditions for obtaining the loan was that private deposits with the company were not to be returned until the loan from SICOM is first redeemed. Since this was the condition to which the respondent himself as a director, it was said that the debt become non-payable until SICOM were fully paid off. There was, therefore, no debt due which was payable and, as such, the petition was not maintainable.

3. After such defence was filed, some adjournments were obtained by the parties and with the permission of the court detailed inspection of the records of the company was sought by the respondent. He obtained such detailed inspection. The petition was adjourned from time to time and there are orders which we are required to construe for the purposes of finding out whether the directions amount to admission of the petition and fixing it for hearing as an admitted petition under the Companies (Court) Rules. While the petition was so adjourned and after the respondent obtained a detailed inspection of the records of the company it was stated before the learned company judge that the petitioner wants to make an amendment of the petition. The petition then stood adjourned with the order of the court that the hearing of the petition will take place on the adjourned date when the application for amendment will also be considered. In this manner, ultimately, the petition came before the learned company judge on January 8, 1975, when he passed the impugned order. So far as the proposed amendment is concerned, the company opposed it on the ground that it seeks to change the entire nature of the original petition. Whereas the cause of action under the original petition was one falling under clause (e) of section 433 of the Companies Act, the grounds now sought to be added makes the petition one u/s 433(f) of the Companies Act. After two years, such an amendment changing the nature of the petition itself should not be permitted, as it will cause great prejudice to the right of the company. However, after hearing the learned counsel for both the sides, the learned company judge observed that, though now grounds were taken in the application for amendment, they were neither inconsistent with the original petition, nor would they prejudicially affect the right of the company. Being his view, he allowed the amendment application. Being aggrieved, the present appeal has been filed by the company.

4. Objection is being raised to the maintainability of the appeal. Two questions, therefore, arise for our consideration, namely, whether the appeal lies and if so, whether the order directing the amendment is justified? The question relating to

the maintainability of the appeal is against agitated on two different grounds. Mr. Khanna, the learned counsel for the respondent-original petitioner, argued that the original company petition is yet not admitted and it is still at the preliminary stage of being considered for admission. He disputed seriously the argument of the company's lawyer that by amending the petition new grounds were sought to be introduced so as to change the nature of the original petition. He argued that the cause of action is the same but grounds which were already present in the original petition are now being stated in detail in an enlarged manner after collection of information which follows from the inspection of records.

5. Assuming for the time being, he says, that the respondent wants to add new grounds by amending the petition, the stage of the litigation is such that he could do so with impunity. If the original petition is yet to be admitted, it would make no difference whether one more grounds is being added to the already existing grounds on the basis of which the winding-up order is sought. In other words, he says that even if the original petition is construed as one u/s 433(e) of the Companies Act, 1956, and the amendment proposed to add ground u/s 433(f), it is not unlawful for an applicant to file a petition in which both these grounds are initially mentioned. If the respondent could do so while filing the original petition, namely, add two grounds before the state of admission, it should make no difference whether he added one ground initially and seeks to add the other ground later on. Mr. Bobde argued that on a construction of the order sheet, the original petition should be deemed to have been admitted, though no specific order is being found on the record. Even otherwise he argued that the principles on which amendments are allowed and rejected should operate at any stage of the proceedings, whether the petition is either admitted or is yet to be admitted.

6. We will first construe from the record whether the original company petition is expressly admitted or must be deemed to have been admitted in view of certain orders passed from time to time. In the matter of winding up, admission of a petition is an important stage. Once the petition for winding up is admitted, the procedure under the rules requires that the judge in chamber will fix up a date for final hearing and before that will also fix a date for the advertisement of the petition. This procedure of advertisement can lead, and many times does lead, to serious consequences affecting the business and the reputation of the company. That being so, admission of a petition is an important stage and the companies are normally heard before a winding-up petition is admitted. However, this stage of admission merely requires that the court is satisfied of a prima facie case requiring a detailed enquiry. The hearing for admission may be taken seriously by the parties, but unless satisfied that there is no substance in it, the court may ordinarily admit a petition for final hearing. The procedure that is adopted in the present case is that after the defences were filed, the respondent claimed inspection of records to satisfy himself about the correctness or otherwise of the allegations made in the defences. He wanted to verify whether in fact there was any board meeting on the particular date alleged and whether it was so resolved

to accept the loan from SICOM on certain terms and conditions. He also wanted to verify whether in any lawfully held meeting of the board of directors allotment of shares took place as pleaded. Not only a detailed inspection was directed and given but the petition was in the meanwhile directed to be put up for hearing.

7. In this respect, our pointed attention has been drawn to an order dated 29th March, 1974, passed by the company judge. The order is as follows :

"Put up for hearing the petition on 15th April, 1974. Application for production of documents will also be considered. Company to keep documents ready."

8. It appears that the petition again came before the same company judge on April 24, 1974, when he passed a further detailed order as follows :

"The list of document which the petitioner's counsel seeks to inspect personally has been discussed and settled in the open court. Mr. Bobde on behalf of the company undertakes to give the inspection tomorrow to Mr. Dharmadhikari. Mr. Dharmadhikari seeks time to argue the matter and as such this case cannot be treated as part heard. Put up after vacation. There would be liberty to the petitioner to give further particulars after the inspection of documents, particularly with respect to the minute book and the account books and the issue of shares. If such particulars are filed, the company to reply to those particulars within two weeks thereafter."

9. What precisely happened in between is not clear. It appears that time was consumed in the inspection of records and the matter again came up before the company judge on December 4, 1974. On that day the company judge again passed the following order :

"S.O. to 13-12-1974 for hearing application for amendment that will be filed by the petitioner."

10. On the 13th of December, 1974, there is a further order that the application was filed on that day and the matter stood adjourned beyond vacation for hearing. The further hearing of this amendment petition thus took place on 8th of January, 1975, when the impugned order name to be passed.

11. Mr. Khanna argued that the record does not indicate that the original petition has been admitted. It is true that there is no specific order admitting the petition, but the procedure adopted and the orders passed from time to time do indicate that without final hearing of the original petition documents were allowed to be inspected and directions for fixing the date of hearing were given from time to time. Having gone through the orders quoted, we are inclined to hold that the record may not be very clear but the stages subsequently followed indicate that the original petition is admitted and is now fixed for final hearing by the company judge. However, in the meanwhile, an amendment application came to be filed and the impugned order became necessary as that application for amendment was being considered in the first instance before final hearing of the original petition. This is not a case, therefore, where the original petition is yet to

be admitted, but, in our view, is an admitted petition. Before the final hearing could take place in that petition, an amendment is now sought.

12. Before we consider the merits of this appeal, let us understand the nature of the original petition, and the amendments that are sought. Mr. Khanna tried his best to tell us that the original petition is a composite petition on grounds contained in section 433(e) as well as in section 433(f) of the Companies Act, 1956. He took us through the recitals in the main petition starting with paragraph 12. Undoubtedly, there is some reference to the deliberate ousting of the respondent from the affairs of the company and allegation of some mismanagement thereof. He also says that the company is unable to meet the current demand. There is an allegation that some of the annual reports have not been properly prepared and filed. There is some reference to the allegation of the company regarding the allotment of shares also in paragraph 16. However, when all these paragraphs are read together along with the two concluding paragraphs 17 and 18, we are satisfied that the petitioner merely wanted to claim winding-up order because of the inability of the company to pay debts which is a separate and distinct cause of action provided by clause (e) of section 433 of the Companies Act. The various clauses of the Companies Act give distinct and different reasons why the compulsory winding up under the orders of the court can be done. There is no doubt that the grounds covered by clauses (e) and (f) could be combined by the petitioner while approaching the company court. However, having read the original petition as a whole, we do not find that the petitioner wanted to invoke the court's jurisdiction for winding up on the basis of what is known as just and equitable cause. If a company is unable to pay debts in the manner contemplated by clause (e) of section 433 and the circumstances mentioned in section 434 of the Companies Act are proved, ordinarily an order for winding up has to follow. That is not the case in the case of clause (f) which deals with the just and equitable circumstances when the court on evidence comes to the conclusion that winding up is in the interest of all concerned. We do not find even a whisper of that approach in the original petition. Paragraphs 17 and 18 of the original petition require to be quoted to understand why we come to the present conclusion. They are as follows :

"17. The petitioner thus continues to be the creditor of the respondent-company and the petitioner as already stated had applied to the company for payment of its debt by notice of demand dated and signed on 9-2-1972 served on the company as registered office on 12-2-1972 by registered post.

18. The petitioner respectfully submits that the company is thus unable to pay its debts within the meaning of section 433 of the Companies Act and for the reasons already stated is liable to be wound up."

13. Then the petitioner asked for order for winding up of the company.

14. The rest of the discussion is in the nature of pointing out how the company is unable to pay the debts and the inability is specifically highlighted in the above

two paragraphs though no specific reference to clause (e) of section 433 would be found in the whole of the petition. However, on construction of the contents of the original petition, we are satisfied that it was purely a petition u/s 433(e) and was not a petition where a relief of winding up was being based upon the ground covered by clause (f) of the said section.

15. What is now the nature of the amendment which is proposed ? The first important feature which is to be noted from the recitals in the application for amendment is that the entire cause of action described in the added paragraphs proposed by way of amendment has occurred subsequent to the filing of the original petition. Paragraph 3 of the application for amendment says that subsequent to the filing of the present petition, there has been considerable development in the matter in dispute in the present petition. There have been acts of mismanagement, misappropriation of company funds, misfeasance and falsification of the statutory records, account-books, etc., by T. R. Goenka, managing director, with active connivance, abetment and aid of directors, K. C. George and P. R. Maheshwari. After further allegations in the same vein, the paragraph concludes by saying that it was, therefore, necessary in the paragraph of justice to amend the petition for effective and proper adjudication of the dispute involved in the present petition. Thereafter, it is proposed that paragraphs 18 to 67 of the proposed amendment be allowed to be added to the original petition. They contain specific instances of that the petitioner calls misfeasance, malfeasance, misappropriation, falsification of accounts and records, etc. In other words, because of the several misdeeds which have crept into the management of this company, it appears to be now just and equitable that the company be wound up. The allegations in the amendment can fall squarely under clause (f) of section 433 and no other.

16. Undoubtedly, therefore, entirely new grounds are envisaged for the purposes of claiming the assistance of the court in obtaining winding-up order. Should such a petition have been allowed at the stage at which it is allowed ? In that behalf, it appears, the submission of the learned counsel for the appellant requires serious consideration. He says that, so far as the ground under clause (e) is concerned, the appellant has a valid defence and the company's contention was being partly heard when the respondent as original petitioner felt that he may not succeed in obtaining the winding-up order. If the respondent and a director was party to a contract for obtaining loan on condition that his own deposit is not to be returned until the loan of SICOM is to be repaid, it is a matter for the consideration of the company judge whether the alleged debt has really become due and payable or that the company has a valid defence for not paying the debt though statutory notice has been served. What is being argued is that realising the weakness of the original petition, an amendment application is given at a stage where it is likely to affect very prejudicially the rights of the company. It is this approach which gives a right of appeal and as such it is necessary to rectify the injustice which is being inflicted upon the company.

17. At this stage it would be appropriate to consider whether the order is appealable at all from the other points of view which is urged by Mr. Khanna before us. If the original petition is an admitted petition, the result of the amendment being allowed is to make an application u/s 433(e) as one u/s 433(f) as well and also give it the status of an admitted petition. A fullfledged enquiry after advertisement will be under both the clauses of section 433. Order admitting a petition is itself an appealable order as it seriously affects the right of the company. If that be so, be factual position that develop in the present case is thus. The respondent poses as if he filed separate petition for winding up of the company u/s 433(f) after his first petition was admitted which was only u/s 433(e) of the Companies Act. The effect of the present order is that simply because the first petition is admitted, a second petition should automatically be admitted on record. In other words, the company's right to oppose admission and to satisfy the court that the petition may not be admitted at all is lost altogether. An important stage or step in the procedure is got rid of by indirect manner of amending a petition which is already admitted. This is not say that the amendment is not possible in a petition which is already admitted. Since the provisions of Order 6, rule 17, in its principles apply as far as they go to the pleadings before the company court, it could be logical to assume that the amendments would normally be allowed to bring out the real dispute between the parties, but where the amendment transgresses the original dispute and introduces a new cause of action altogether, even if the court has the right to do so, it will be slow to permit such an amendment if it adversely affects the right of the party concerned.

18. Whether the order allowing amendment is an appealable order by itself was another question raised by Mr. Khanna. According to him, the order of the company judge permitting the amendment is not a "judgment" with the meaning of that expression used in clause 15 of the Letters Patent. It is also not an order prejudicially affecting the right of the company and as such no appeal can lie. The present appeal, it must be pointed out, is one under the provisions of section 483 of the Companies Act. The language of section 483 is much wider than the language of clause 15 of the Letters Patent. Here appeals are provided from any order made or decision given in the matter of winding up of a company. What is required is that there should be decision or an order an or order and it must be in the matter of the winding-up of a company. This is not to suppose that any and every order irrespective of its nature is supposed to be appealable. For instance, merely an administrative order regulatory of the procedure could not be said to be an order appealable u/s 483, though it may be an order passed by a company judge in the matter of the winding up of a company.

19. The Supreme Court was called upon to consider this question in Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, , where a sale of property was confirmed by the company court and an appeal was raised disputing the order confirming the sale. An argument was raise that the confirmation of sale was mere administrative order and it was not a judicial order

which decided the rights of any party. Negating this argument, the Supreme Court held that merely because an order is passed in the course of the administration of the assets of the company and for realising those assets, it is not by itself sufficient to make it an administrative order, as distinguishing from a judicial order. The question ultimately depends upon the nature of the order that is passed. According to them, an order granting sanction to sell undoubtedly involved a discretion and it could not be said to be a merely ministerial order. This is particularly so when the confirmation is being opposed on the ground that the sale was not in accordance with the conditions on which the liquidator was permitted to dispose of the assets. Holding that an appeal lies against such an order, the Supreme Court made certain observations as to what constitutes a judicial as against an administrative order. On page 8 of the report, their Lordships observed as follows :

"It is perhaps not possible to formulate a definition which would satisfactorily distinguish, in this context, between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a court is not decisive of the question whether the act or decision is administrative or judicial. But we conceive that an administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the right of parties or confers or refuses to confer rights to property which are the subject of adjudication before the court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective, consideration, it would be a judicial decision."

20. The principle that must be remembered is thus clear. The first question that should be asked in such circumstances is whether the order impugned is judicial order and, if so, does it affect adversely or otherwise the rights of any party. If these queries are raised in the present litigation, we are of the view that the answer to them will be such that the order would become appealable. Undoubtedly, a company has a right to be heard and satisfy the court that a petition for winding up under clause (f) of section 433 be not admitted. In the present case, the respondent is making a number of allegations of mismanagement. The company on the contrary points out that the entire application is mala fide one. The respondent is interested in bringing pressure upon the company and make it pay his own deposit, though, to his own knowledge, he is not entitled to recover it at this stage. These being the rival contentions, a hearing is necessary before the company court admits the petition u/s 433(f). A petition under clause (e) of section 433 is already admitted and on the merits of the defence either the winding-up order may follow or the court may reject the application. However, without giving an opportunity of being heard if a petition under clause (f) of section 433 has been automatically admitted, by this indirect method of allowing amendment of an admitted petition, it is a serious inroad upon the right of the company and it is deprived of

an earlier hearing and an opportunity to satisfy the court that such a petition be not admitted at all. The order of the company judge is clear enough. He has never applied his mind to the question whether the petition with the allegations contained in the proposed amendment should or should not be independently admitted for the purpose of final hearing. He had merely indicated that there may be new grounds and the amendment may make the present petition under clause (e) also a petition under clause (f). But, according to the learned judge, no prejudice is being caused to the rights of the company. In our view, to admit a petition without hearing the company would itself prejudicially affect the company.

21. It may appear in the circumstances of the present case that while hearing the petition u/s 433(e) an advertisement may be necessary unless the company makes an independent application and obtains specific orders thereon not to advertise the petition. If, therefore, an advertisement is already contemplated by the procedure adopted so far, how can the company be adversely affected by adding some more matter to the advertisement. We will point out that an advertisement under clause (e) stands on a different footing than an advertisement under clause (f). If the persons interested in the company know that a particular loan claimed under a winding-up petition under clause (e) is not payable, they will just ignore the advertisement and may not appear before the company court. However, an advertisement under clause (f) is likely to cause confusion and may not give clear information to the persons interested in the company. Not only the business, but the stability of the company, is likely to be seriously affected by an advertisement of this kind. We are thus of the view that, by allowing the amendment, the right of the company to be heard before the amendment is prejudicially affected. Undoubtedly, that is an order in which judicial considerations had to be given and the learned company judge undoubtedly had the judicial discretion either to accept or to refuse the amendment. The impugned order thus, according to us, falls squarely under the provisions of section 483 of the Companies Act and, as such, it is appealable.

22. Mr. Khanna for the respondent referred us to the judgment of the Supreme Court in *Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York*, . The Supreme Court was considering in that case clause 15 of the Letters Patent, for purposes of finding out whether an order allowing amendment amounted to "judgment" within the meaning of that clause, so as to make the order appealable. We might at once point out that the language of section 483 of the Companies Act which is relevant for our purpose being different from the language of clause 15, the decision of the Supreme Court pointing out what is a "judgment" within the meaning of that expression used in clause 15 if the Letters Patent may not be relevant for the present purpose. However, even then the general observations of the Supreme Court may be of some relevance, as the broader principles governing the amendments they would not be much different. Their Lordships observed that if an amendment merely allows a plaintiff to state a new cause of action or to ask a new relief or to include a new ground relief all

that happens is that it is possible for the plaintiff to raise further contentions in the suit, but it is not decided whether the contentions are right. Having made these observations so far as the facts of that case are concerned, their Lordships at once pointed out that by the impugned amendment before them a claim which was time-barred became alive as the amendment relates back to the date of the institution of the original suit. They, therefore, pointed out that the defendant had already obtained invulnerable right of defeating the claim on raising the defence of limitation. Though the court may have power and in a fit case the court may ignore the question of limitation, ordinarily where a valid defence is available and has become invulnerable by passage of time, the court will be slow to allow an amendment because it adversely affects the rights of the party concerned.

23. If this is the principle on which even under the provisions of Order 6, rule 17, Civil Procedure Code, the amendments are allowed or disallowed, in our view the principle will operate with greater force where the mere admission of company-petitioner leading to advertisement and hearing will have the normal consequence of adversely affecting the suitability of business of a company. We are thus satisfied that the order is undoubtedly appealable and the appeal lies.

24. Even when this question was considered the judgment of the Supreme Court, quoted above, has thus pointed out why the amendments should be allowed and should not be allowed. Here is a case where each clause of section 433 is a distinct cause of action and though there is no prohibition to the combination of clauses (e) and (f), it is open to anyone to file successive and different company petitions. In the present case, and admitted petition is being opposed on merits and the company hopes to point out a valid defence. If the amendment is now to be allowed and the matter is to be heard together, there is likelihood of some prejudice being caused to the company because the matters which are strictly not relevant under clause (e) might affect the psychology of the judge who may be considering the other petition. It would be advisable, therefore, that even if a separate petition could also be filed under clause (f) it may be heard and disposed of on its own merits without mixing up the matter with the earlier petition under clause (e) of section 433.

25. We are thus clear that the effect of the order is to admit the petition without giving an opportunity to the company to oppose this admission. This affects a valuable right of the company and introduces an element of prejudice against it. On the contrary, if the respondent were to file a separate petition, he is not affected in any manner whatsoever. There is no prohibition to file separate or successive petitions under different clauses of section 433 since they constitute separate and independent reasons for which the company is to be wound up. It would not be fair in the circumstances of the case to amend the petition by adding the grounds which fall admittedly under clause (f) in a petition which has been originally drafted as one under clause (e).

26. In the circumstances, we are of the view that the amendment could not have

been allowed. We thus allow this appeal and set aside the order dated 8th January, 1975, allowing the amendment of the original petition. The petition will now go back to the learned company judge for further disposal according to law on the basis that the original petition has been admitted and is to be finally heard on the merits. The appellant-company will be entitled to its costs in this court. The costs before the company judge will be costs in the cause and in the discretion of the company judge.