

(2012) 05 KAR CK 0031
In the Karnataka High Court
Case No : OSA No. 8 of 2010

Atalanta Pumps (P.) Ltd.

APPELLANT

Vs

Mrs. Kunda J. Majli

RESPONDENT

Date of Decision : 24-05-2012

Acts Referred:

Companies Act, 1956 — Section 433 (e), 433 (f), 439, 483

Citation : (2013) 176 CompCas 393 : (2013) 2 KarLJ 144 : (2012) 114 SCL 516

Hon'ble Judges : D.V. Shylendra Kumar, J;B. Sreenivase Gowda, J

Bench : Division Bench

Advocate : Saji P. John, for the Appellant; Chaitanya Hegde, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—A short order leading to long arguments based on innumerable authorities. The order under appeal is one under Sec. 483 of the Companies Act, 1956, read with Sec. 4 of the Karnataka High Court Act, 1961, dt. 10-2-2010 which reads as under:

Admit.

Advertisement deferred.

This is an order passed in a Company Petition filed by the respondent herein under the provisions of Sec. 433(e) and (f) of the Companies Act, 1956 (for short, the Act) for winding up of the respondent-Company on the premise that respondent-Company is unable to pay its admitted debts.

2. The Company Petition had been listed before the learned Company Judge on 3-2-2010, after issue of notice to the respondent-Company. The learned Company Judge had directed the matter to be listed for admission on 10-2-2010 and on 10-2-2010, the impugned order has come to be passed.

3. This small and cryptic order is appealed against by the respondent-Company complaining that it can have very serious repercussions on the respondent-

Company; that the admission of the Company Petition is one without considering the material on record placed by the respondent before the Company Court; that it is in ignorance of the serious and tenable defence raised in the objection statement filed on behalf of the Company; that the learned Company Judge has not taken into account the very sound financial position of the Company; that it is in ignorance of the fact that the company is a profit making, ongoing company; that the Company petitioner had no locus to present the petition under the provisions of Sec. 433(e) and (f) of the Act for the reason that Company was not even a debtor vis-a-vis the Company petitioner; that the very fact that amounts were claimed as remuneration and allowance payable to a Director after the company petitioner has seized to be a Director of the Company on and after 12-8-2005 by his own act of resignation has not at all been considered by the learned Company Judge; that the order suffers from the vice of being a non-speaking order, for not revealing the nature of examination undertaken and the view of the Court on such examination and therefore the impugned order is not sustainable in law.

4. Appearing on behalf of the appellant-Company, Mr.Saji P. John, learned Counsel, has elaborated this ground and has also placed considerable reliance on the Division Bench Judgment of this Court in the case of Airwings (P.) Ltd. v. Viktoria Air Cargo Gmbh (1995) 84 Comp. Cas. 688 (Kar.).

5. Drawing our specific attention to paras 7, 11 and 16 of this Judgment, submission of Sri. John is that, the law with regard to the need for passing a reasoned order even for the purpose of admitting a Company Petition presented under Sec. 432(e) and (f) of the Act is well established and laid down. More so, the Division Bench of this Court having followed and applied the ruling of the Supreme Court rendered in similar circumstances in the case of the Pradeshia Industrial & Investment Corpn. of U.P. v. North India Petro Chemical Ltd. (1994) 79 Comp. Cas. 835. Therefore submits that this appeal should be allowed, order of the learned Company Judge should be set aside and the company position should be examined afresh on the merits of the petition in the wake of the defence raised by the present appellant in terms of the statement of objections, and prays for dismissal of the Company petition.

6. However, Sri. Chaitanya Hegde, learned Counsel for the respondent - the Company Petitioner, has raised a preliminary objection regarding maintainability of an appeal of this nature - i.e. an appeal under Sec. 4 of the Karnataka High Court Act, 1961, read with Sec. 483 of the Act; that an order of admission of an appeal is not an order appealable in terms of Sec. 483 of the Act; that admission is essentially a procedural aspect; that it is not in the true sense a judicial order which is capable of being appealed against under the provisions of Sec. 483 of the Act, that there is sufficient authority for this proposition in terms of the judgment of the Division Bench of this Court in Miland Exports (P.) Ltd. v. A. V. Venkatanarayana [1995] 83 Comp. Cas. 585 (Kar.). Submission is that, admission is essentially a matter for the Court, that in the present case also, the

Company Judge had considered the submissions made by the learned Counsel and elaborate arguments had been heard and it is only thereafter, being convinced about the desirability of admitting the Company Petition, an order for admission has been passed, but it is not followed by ordering for advertisement, that it is only when an order for advertisement is passed, it can affect the interest of the respondent-Company in the Company Petition and for such purposes, an enquiry is desirable and can be held also; and therefore, the appeal is not merely premature, but not tenable in law and has prayed for dismissing the appeal on the very preliminary objection.

7. Mr. Chaitanya Hegde, has also placed reliance on two other authorities, namely (head note "C") in the case of Marketing & Advertising Associates (P.) Ltd. v. Telerad (P.) Ltd. [1969] 39 Comp. Cas. 436 (Bom.) and in the case of Metro Malleable Mfg. (P.) Ltd. v. Canara Bank [1981] 51 Comp. Cas. 616 (Kar.) and also has drawn our attention to the judgment of the Supreme Court in Government of Karnataka v. Gowramma 2008 AIR SC 863 to submit that even the judgment of the Supreme Court is a precedent only for the ratio of the case and not for any and every observation made in the course of the judgment and therefore submission is that the judgment of the Supreme Court in the case of Pradeshia Industrial & Investment Corpn. of U.P. (supra), being not a judgment containing any clear ratio; that either an order for admission should be a speaking order or that appeal against such an order is tenable; and there is no direct authority to hold that an order for admitting a Company Petition should be a reasoned order and also that the proposition that even an order merely admitting a Company Petition under Sec. 432(e) and (f) can also be appealed against, but on the contrary, authority of the Division Bench of this Court in the case of Miland Exports (P.) Ltd.(supra) is to the contrary and therefore, has urged for dismissal of this appeal on the very preliminary objection.

8. However, Sri. Saji John for the appellant has submitted that the appeal is very much tenable; that in terms of the later Division Bench judgment of this Court in the case of Airwings (P.) Ltd. (supra) this position is made amply clear; that the observation of the Division Bench of this Court with reference to the judgment of the Supreme Court in the case of Pradeshia Industrial & Investment Corpn. of U.P. (supra) leaves one with no doubt or imagination that even an order merely admitting a Company Petition should not only be a speaking order supported by reasons, but can also be made subject matter of an appeal.

9. Sri. Saji John has drawn our specific attention to the fact that Supreme Court had interfered in a situation where the learned Company Judge of Allahabad High Court had merely admitted a Company Petition and a Division Bench declined to interfere in the matter, but when the matter was taken up before the Supreme Court, Supreme Court set aside the order of admission and therefore submits that the appeal has to be allowed, etc.

10. Though Mr. Chaitanya has contended that, that precisely is not the ratio in the judgment of the Supreme Court in Pradeshia Industrial & Investment Corpn.

of U.P. (supra), the question that was gone into by the Supreme Court in Pradeshia Industrial & Investment Corporation's case (supra) was one relating to what is a "debt" and who is a debtor", etc.; we are afraid that we cannot accept this submission that the judgment of the Supreme Court in Pradeshia Industrial & Investment Corpn. of U.P. (supra) cannot be an authority for the proposition that an order of admission of a Company Petition under sections 433(e), (f) and 439 of the Act, should be a reasoned order. In our opinion also even an order for admission requires to reveal the reasons for admitting the company petitions, as it can be made subject matter of an appeal under Sec. 483 of the Act, for the reason that the Division Bench of this Court has already understood the judgment of the Supreme Court in such a manner and it is not open for us nor is it proper to re-understand the judgment of the Supreme Court, as is canvassed by the learned Counsel for the respondent, in the wake of the earlier Judgment of the Division Bench of this Court.

11. Perusal of the observations and findings of the Division Bench as contained in para 16, leaves us with no doubt or any ambiguity to decide as to whether this can be an authority or not, as in the earlier judgment, the Division Bench of this Court has understood the judgment of the Supreme Court in Pradeshia Industrial and Investment Corpn. of U.P. (supra) as an authority as indicated in Para 16 of the Judgment which reads as under:

16. The latest Judgment of the Supreme Court to which our attention was invited by the Learned Counsel for the Parties is rendered in the case of the Pradeshia Industrial & Investment Corporation of U.P. v. North India Petro Chemical Ltd. & Another. In that case, the Supreme Court was concerned with the winding up Petition u/s 433(e). In that case, the first respondent before the Supreme Court had issued notice u/s 434 to the appellant Company. Under promoters agreement, a sum of Rs. 72.50 lakhs was payable by the Company to the promoter, petitioning creditor. On that ground it was alleged that the appellant Company was indebted in a sum of Rs. 72.50 lakhs as on 30/11/1991 and as it was not paid, Petition was moved before the Allahabad High Court. The learned Company Judge issued show-cause notice to the Company before admitting the Petition. After considering the evidence led by the Company, the learned Judge took the view that Petition deserves to be admitted as prima facie case was made out for admission. However, advertisement was suspended till further orders. Against such an order of admission, the Company preferred Appeal to the Division Bench, which was dismissed. It is thereafter, that the appellant Company preferred Appeal by Special Leave before the Supreme Court. Examining the material on record at that stage, it was held by the Supreme Court that it was not a case for admission or advertisement of the Petition and on the contrary, as basic requirements of the relevant provisions of the Act for supporting the Petition u/s 433(e) were absent, Petition was liable to be dismissed. That is how, even at admission stage of the Petition, the Supreme Court interfered and dismissed the Petition. While doing so, the Supreme Court in paragraphs 26 to 33 went into the question as to what was the requirement to be established even

prima facie before getting Petition u/s 433(e) admitted and advertised. In para 26 it was observed that defence of the appellant Company in relation to nonpayment was a bona fide one. After referring to Section 433(e), it was observed that in such Petition, there must be a debt and Company must be unable to pay the same. In para 29 it is observed that debt under this Section is a definite amount payable immediately or at a future date. Then Court considered at para 30 the scope and ambit of the words "unable to pay its dues"(sick debts). Taking a clue from a Europe Life Insurance Society (1869) O Eq. 122 and other Decisions, it was observed that for being plainly and commercially insolvent, it has to be shown the assets of the Company are such and make it reasonably certain, and from which Court feels satisfied that the existing and probable assets would be insufficient to meet the existing liabilities. Reliance was then placed on the observations of the Supreme Court in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., supra and then the following pertinent observations were made in paragraph 32: "it is beyond dispute that the machinery for winding-up will not be allowed to be utilized merely as a means for realising its debts due from a Company", In para 33 reasons are given by the Supreme Court for not approving the order or the High court admitting the Petition. It was noted by the Supreme Court that the Petitioning creditor was not a creditor. The appellant was not a debtor because it was a financial institution for an amount which is agreed to be subscribed. Neither the learned Single Judge nor the Division Bench had decided this important question whether there is a debt and the company has either neglected or was unable to pay. It was also observed that there was no definiteness of the debt as the matter was pending adjudication in arbitration. In view of all these, there was prima facie dispute as to the debt and then followed the observations in sub-para (5) of para 33 as under:

(5) The defence raised is substantial one and not mere moonshine. We find it difficult to appreciate the reasoning of the learned Single Judge when he holds that there are arguable issues and, therefore, the winding up petition has to be admitted. On this aspect the courts below failed to note that the admission of the winding up petition is fraught with serious consequences as far as the appellant is concerned.

This latest Decision of the Supreme Court puts the controversy beyond any pale of doubt that in case of Company which is a going concern and which is actually functioning, even as order of admission of a Company Petition u/s 433(e) may prove disastrous even leaving aside the advertisement order which would be still more pernicious for even at that stage after hearing the Company it has to be decided whether the petitioning creditor, is a creditor of the company, whether any definite amount of debt is due to him from the Company whether the defence of the Company in this connection is valid and not a mere moonshine and whether it is prima facie shown that the Company is plainly commercially insolvent or in other words its existing and probable assets would be insufficient to meet the existing liability. It is not possible to agree with the contention of Sri.

Raghavan and Sri. Jayaram that the aforesaid Decision of the Supreme Court has not laid down the ratio that even at the stage of admission of such Petition u/s 433(e) any prima facie finding has to be reached in connection with the alleged commercial insolvency of the Company. If that were so, there would have been no occasion for the Supreme Court to dilate on this aspect in para 30 of the Report. In fact in para 34 of the Report, the Supreme Court went into this question on the basis of the material on record and took the view that the Company was a profit making financial corporation and it was paying dividend as seen from the balance sheet for the year 1991-92. The assets of the appellant-Corporation and the reserves are so much, there was no justification whatsoever for admitting the winding up Petition. Meaning thereby this exercise about the prima facie finding on financial condition of the Company and for prima facie concluding whether the Company was commercially solvent or not has to be undertaken even prior to admission of such winding-up Petition u/s 433(e) of the Act. That very exercise was undertaken by the Supreme Court on the material on record and it was found that as the Company was not in such a financial doldrums, it was not a fit case for admission of winding up Petition against such Company u/s 433(e) of the Act. It must, therefore, be held that such consideration on admission stage of the Petition is not only not foreign to the scope of such enquiry but also, it is a part and parcel of such enquiry as authoritatively ruled by the Supreme Court in this Decision.

12. It is therefore, we have to not only accept the view as reflected and understood by an earlier Division Bench of this Court in the case of *Airwings (P.) Ltd.* (supra) for the purpose of understanding the judgment of the Supreme Court in *Pradeshia Industrial & Investment Corpn. of U.P.* (supra), but are also compelled to take the view that in the wake of this understanding about the judgment of the Supreme Court, the view taken by this Court in the case of *Miland Exports (P.) Ltd.* (supra), cannot be considered as an authority to bind us, but on the other hand, we have to say that it is no more good law in terms of the judgment of the Supreme Court in the *Pradeshia's Industrial & Investment Corpn. of U.P.* (supra) case as understood by a later judgment of this Court.

13. In fact, we are also independently of the opinion that even an order for merely admitting a Company Petition under Sec. 432(e) and (f) of the Act also should be a speaking order supported by reasons as it definitely can affect the interest of the respondent-Company to a considerable extent, as observed by the Division Bench of this Court in *Airwings (P.) Ltd.* case (supra)

14. In fact, the appellant-Company having raised the question that it was not even a debtor and Company Petitioner was not even a creditor, it could directly have a bearing on the question of admitting the Company Petition or otherwise and even assuming, the learned Company Judge had understood this aspect, reflecting the same in the order for admission is desirable.

15. We also reject the preliminary objection for another reason, namely if an order to be passed in such a situation can be made subject matter of an appeal,

but if it is not a reasoned order, by making the order cryptic and for reasons not mentioning, we have to only lean in favour of holding that the order should necessarily be a reasoned order and not to accept the argument that an appeal can be avoided if the order can be a non-speaking order or an order not containing reasons or not supported with reasons.

16. In understanding the provisions of Sec. 483 of the Act, which is a provision enabling the filing of an appeal, any understanding and interpretation should only be to pave way to maintain an appeal and not to interpret in such a manner as to curtail the scope of the provision or to prevent an appeal being preferred on other technicalities, etc. It is for this reason, we are not merely over-ruling the preliminary objection, but are compelled to allow this appeal and set aside the order of the learned Company Judge and remand the matter to the learned Company Judge to consider the matter afresh and pass orders and of course as is the law as understood by an earlier Division Bench of this Court in the case of *Airwings (P.) Ltd.*(supra) by means of a reasoned order-the order should be reasoned and one conforming to the requirements of a speaking order.

Appeal allowed

No order as to costs