
(2010) 02 MAD CK 0086
In the Madras High Court
Case No : C.P. No. 280 of 2009

B. Prabhu

APPELLANT

Vs

Basarass Biocon (India) Private Limited

RESPONDENT

Date of Decision : 12-02-2010

Acts Referred:

Companies Act, 1956 — Section 433, 434(1), 439(1)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2010) 155 CompCas 317 : (2011) 105 SCL 610

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : Bijesh Thomas, for the Appellant;

Judgement

Chitra Venkataraman, J.—This petition under Sections 433(e) and (f) read with Section 434(1)(a) and 1(c) and Section 439(1)(b) of the

Companies Act, 1956, has been filed for winding up of the respondent company.

2. The respondent herein is a private limited company. The petitioner herein was one of the Directors of the company, the others being O.R.

Murugadass and Jaishankar. Disputes arose among the shareholders of the company. It is stated that the petitioner was one of the Directors of the

respondent company along with one Murugadoss and Jaishankar. It is stated that disputes arose among the shareholders of the company as

regards the conduct of the affairs of the company, which resulted in a Memorandum of Understanding. Admittedly, certain borrowings were there

by the company from creditors arranged by the petitioner too. In terms of the minutes of the meeting dated 24.3.2009, the Memorandum of

Understanding was reduced to writing dated 8.4.2009 between the company and one of the Directors Murugadass on the one side and the

petitioner on the other side. The petitioner and Jaishankar agreed to transfer their entire shareholding in the company to the said Murugadass or to

any other company identified by the said person, after getting No Objection letter from the banking creditors of the company. To that end, it was

agreed that the petitioner and the said Jaishankar would be paid a sum of Rs. 10,00,000/- each and that the petitioner and Jaishankar would be

relieved of all the liabilities of the company. It was pointed out that the total loan from the various Banks was to tune of Rs. 72,15,250/- and from

the private parties to the directors at Rs. 60,05,000/-. It was agreed that the said Murugadass would reconstitute the Board of the respondent

company by persons of his choice and inform the Bank about the resignation of the petitioner as well as P. Jaishankar from their directorship. On

the resignation of the petitioner, two other persons by name A. Mohan and O.R. Suthandiradass were inducted as new directors. The

Memorandum of Understanding dated 8.4.2009 was drawn, whereby the said Murugadass agreed to pay Rs. 16 lakhs to the petitioner herein

towards refund of outside liabilities raised by the petitioner herein. The said amount should be paid within 90 days of the transfer of the shares,

failing which, the petitioner would be at liberty to claim interest at 18% per annum and that it was open to the petitioner to take legal action against

the company and the said Murugadass. Clause 13 of the agreement stated that on fulfilling the conditions, the petitioner herein shall transfer his

entire shareholding to the said Murugadass or any other person that the said Murugadass may identify.

3. The petitioner's contention is that based on the Memorandum of Understanding, a letter was issued to the petitioner herein by the said

Murugadass that he had issued cheques towards the unsecured loans raised by the petitioner for the development of the company to the tune of

Rs. 16 lakhs. However, due to poor liquidation of the recoveries, he could not honour the commitment on the scheduled date; that he was taking

steps to settle the dues at the earliest and hence, he requested the petitioner not to deposit the cheques till further confirmation and assured that the

dues would be settled before end of the month. This letter was followed by yet another letter dated 17.8.2009, informing the petitioner that they

were taking effective steps to settle the dues at the earliest and they also called upon the petitioner to revalidate the cheque or get a fresh post-

dated cheque. Since there was no indication in the letter dated 17.8.2009 as to the date of payment, on 01.09.2009, the petitioner issued a

statutory notice to the said Murugadass, calling upon him to pay a sum of Rs. 16 lakhs, failing which, appropriate action would be taken u/s 138 of

the Negotiable Instruments Act.

4. By letter dated 14.9.2009, the respondent, however, refuted the allegations calling upon the petitioner to comply with the commitments and

avoid unnecessary unpleasant situation and to transfer the entire shareholding of the company to one A. Mohan. It was further stated that since the

petitioner had finalised the debtors' list for the year 2007-08 with the Auditor and the balance sheet and as the audited books were not available in

the office, the said Murugadass could not recover the debts from the debtors.

5. On 23.9.2009, the petitioner issued a statutory notice referring to the Memorandum of Understanding and submitted that based on the said

Memorandum of Understanding, the company was liable to pay a sum of Rs. 16,39,200/-. This was replied to again on 5.10.2009 wherein, the

respondent pointed out that the respondent was willing to settle the dues, provided, the petitioner produced the debtor's list to the company. Since

the same was available with the petitioner, he called upon the petitioner to return the same to enable them recover a sum more than Rs. 77 lakhs.

The amount payable to the petitioner is a significantly lower amount; hence, having regard to the solvency of the company and that the Bank was

desisting from making payment only on account of the petitioner not complying with the terms of the agreement, the claim was refuted.

6. Learned Counsel for the petitioner submitted that having regard to the fact that the liability is an admitted one, winding up of the respondent

company has to be ordered.

7. On notice, the respondent has filed a counter affidavit before this Court wherein, it is stated that in spite of an intimation given by one of the

Directors Murugadass, the petitioner had gone ahead with presenting the cheque. They also stated that one of the investors, Mr. A. Mohan, had

paid Rs. 10,00,000/- to the petitioner herein as full consideration for the transfer of the shares that the payment of a sum of Rs. 16 lakhs was to be

made only for the transfer of shares. It is stated that the petitioner had not transferred the shares till date. It is further stated that except for the loan

borrowed from State Bank of India, the petitioner had not guaranteed any of the borrowings. Hence, there was no necessity of the respondent

getting the No Objection Certificate. There was also a doubt as regards the claim of loans taken from private creditors and they appeared to be

mere book entries and consequently, placing reliance on the conditions in the Memorandum of Understanding, the respondent took the stand that

the petitioner is not entitled to get the sum of Rs. 16 lakhs. In the background, learned Counsel appearing for the respondent submitted that this

petition has to be dismissed. The respondent also pointed out to the suit filed by the petitioner before the II Assistant City Civil Court in O.S. No.

9339 of 2009 and sought for an interim injunction against the respondent from giving effect to the Memorandum of Understanding. This was

dismissed by the learned Judge on the ground that the petitioner had not proved that the shares had been transferred by the petitioner. Hence,

having failed in its attempt before the City Civil Court, the attempt now is only a sheer case of harassment and hence, prayed for the dismissal of

the petition.

8. A perusal of the documents filed before this Court, particularly the Memorandum of Understanding dated 8.4.2009, clearly shows the obligation

of the petitioner as well as that of the respondent company and the Director Murugadass. Learned Counsel for the petitioner pointed out that

based on the Memorandum of Understanding, the petitioner came out from the Directorship of the respondent company; as such, when the

respondent undertook to make the payment of a sum of Rs. 16 lakhs to the petitioner as per Clause 3 of the agreement, the question of the

respondent denying the payment does not arise. He further pointed out that in the context of the admitted liabilities, which the company had

undertaken to discharge, particularly the loan taken through the petitioner, the claim of the petitioner has to be allowed. He pointed out to the terms

of the Memorandum of Understanding and the respondent's obligation to the petitioner and that of Murugadass as to the payment of the sum due

and payable to the petitioner.

9. Learned Counsel appearing for the petitioner relied on the decision reported in The Godhra Electricity Co. Ltd. and Another Vs. The State of

Gujarat and Another, , that when the document terms are clear and the conduct

of the parties subsequent to the execution of the instrument clearly showed the admitted liability, the claim of the petitioner being one based on the admission from the respondent company, the winding up petition has to be ordered, since the defence taken lacked in bona fides. He further referred to the decision of the Punjab and Haryana High Court reported in [2009] 95 SCL 14 (P&H) Sound Fibre v. B.K. Duplex Ltd., particularly to paragraph 14, wherein the Punjab and Haryana High Court pointed out that where a company forces a creditor to unviable ways of recovery of an admitted amount, the debtor company has no right to continue its operation and that winding up, in such cases, is the only answer. Having regard to the admitted liability, the respondent's defence lacked in bona fides and hence, has to be rejected.

10. There can be no doubt as regards the legal position as far as the grounds on which a winding up of a company could be ordered. The law declared by the Apex Court in the decision reported in [1972] 42 Comp Cas 125 Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd., which has been consistently followed till this date, clearly laid down the guidelines in considering the merits of a winding up petition. As far as the present case is concerned, the claim of the petitioner is based on the Memorandum of Understanding. The respondent has raised a serious dispute as regards the performance of the obligations therein. In the background of the dispute raised, which does not lack bona fide, it is not possible for this Court to accept the plea of the learned Counsel appearing for the petitioner that the refusal to pay as per the Memorandum of Understanding is unexceptionable and lacked in bona fides. The letter of the respondent dated nil asking the petitioner not to present the cheque, by itself, cannot be taken as one indicative of a defence not substantial and of an inability to make a payment and hence the company had to be wound up. The petitioner had admittedly gone before the civil Court as regards the claim arising under the Memorandum of Understanding. In the circumstances, with the petitioner approaching the civil Court for relief, I have no hesitation in rejecting the plea of the petitioner that the company petition for winding up has to be ordered.

11. As regards the reliance placed by the learned Counsel appearing for the petitioner on the decision reported in The Godhra Electricity Co. Ltd.

and Another Vs. The State of Gujarat and Another, , a reading of the said decision shows that by mutual agreement, the parties can make their own contract or remake them. The Court can get assistance from the conduct of the parties to ascertain the meaning that the parties give to the terms of the contract. The Apex Court pointed out that there is no good reason as to why the Court should not look into these further expressions by the parties ""in view of the fact that they still have the same freedom of contract that they had originally"". The Apex Court pointed out that the extensive evidence to determine the effect of an instrument is permissible when there is a doubt as to the true meaning of the terms of the agreement. The act done under it is a guide to the intention of the parties, more so when the acts are done shortly after the date of the instrument. The said decision does not, in any manner, advance the petitioner's case, particularly in the context of Section 433(e) and (f) read with Section 434(1)(a) and 1(c) and Section 439(1)(b) of the Companies Act, 1956 when the jurisdiction of this Court is, pure and simple, a summary one, that the winding up of a company is ordered only when there is material to show the inability of a company to pay the admitted liability and that the defence of a company in not making the payment is only a moonshine and hence lacked in bona fides. The decision of the Punjab & Haryana High Court reported in [2009] 95 SCL 14 (P&H) Sound Fibre v. B.K. Duplex Ltd., does not, in any manner, advance the case of the petitioner, particularly in the light of the defence taken disputing the claim of the petitioner. On facts, I do not find that the defence lack in bona fide to order winding up in this case.

12. In the circumstances, the Company Petition is dismissed. It is open to the petitioner to exhaust their remedy available to them in a normal way other than taking recourse to winding up proceedings.