
(1962) 05 CAL CK 0007
In the Calcutta High Court
Case No : A.F.O.O. No. 97 of 1961

Bangasri Ice and Cold Storage Ltd.

APPELLANT

Vs

Kali Charan Banerjee

RESPONDENT

Date of Decision : 29-05-1962

Acts Referred:

Companies Act, 1956 — Section 433, 434, 434(1)

Citation : AIR 1962 Cal 613

Hon'ble Judges : U.C. Law, J;D.N. Sinha, J

Bench : Division Bench

Advocate : Shanker Ghosh and Shanker Ghosh Jr, for the Appellant;D. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This is an appeal against an order passed by S. P. Mitra, J. dated 30th March 1961, whereby the learned Judge dismissed with costs an application by the Bangasri Ice and Cold Storage Ltd. (hereinafter called the "company") for an order inter alia that the petition for the winding up of the company presented by Kali Charan Banerjee (hereafter called the "petitioning creditor") be taken off the file or dismissed and that all proceedings thereunder be stayed and for other reliefs. The facts are shortly as follows: The company carries on business in the manufacturing of ice and in refrigeration. In January, 1957, the petitioning creditor joined the services of the company. On 14th January, 1957 he paid on account of security deposit, a sum of Rs. 1000/- to the company, without interest. On the same day he paid to the company a sum of Rs. 10,700/- on account of deposit carrying interest @ 8% p.a. refundable after 11/2 years. For both these two payments, the petitioning creditor holds receipts in writing copies whereof are to be found at pages 69 and 70 of the paper book. It is admitted that in the year ending 30th June, 1957, the company suffered a loss of Rs. 30550.15 nP. In the year ending 30th June, 1958 there was a loss of Rs. 175182.71 nP. On the 18th June, 1958 the petitioning creditor wrote a letter to

the managing Agents of the company, a copy whereof is included in Ex. A annexed to the affidavit-in-opposition, at page 30 of the paper book. In that letter he stated that the negotiations for the marriage of his daughter were well advanced and arrangement should be made for the payment of his deposit money. This letter was not replied to. On the 22nd November, 1958, a sum of Rs. 1000/- was paid to the petitioning creditor and on the 5th December, 1958 another sum of Rs. 1000/- was paid to him. On the 5th June, 1959 the petitioning creditor wrote a letter to the Managing Agents, a copy whereof is included in the said Ex. A at page 31 of the paper book. In this letter, the petitioning creditor tendered his resignation and asked for repayment of the deposit amount to meet the expenses of the marriage of his daughter which, he said, was going to take place very soon, and for the purpose of meeting other expenses. On the same day, the petitioning creditor was paid a sum of Rs. 1000/- by cheque signed by Shyamapada Choudhury, the Director Manager of the Company, who has affirmed an affidavit in support of the application. On the 20th/22nd April, 1960 the petitioning creditor wrote to the company a letter which is included in Ex. A, at page 32 of the paper book. In that letter he said that the sum of Rs. 10,700/- had been paid to the company as deposit Because at that time money was badly needed by the company. Owing to the impending marriage of his daughter and other purposes he required money urgently and asked for an early payment. He pointed out that the deposit money had become refundable long time ago. This letter was also not replied to. On the nth May, 1960 another letter of demand was sent by the petitioning creditor to the company, a copy whereof is included in Ex. A and appears at page 33 of the paper book. In this third letter of demand, the petitioning creditor pointed out that the marriage of his daughter had been fixed on 22-5-1960 and immediate refund of the deposit money was required. As before, there was no reply to the letter. On 22nd June, 1960 another letter of demand was sent by the petitioning creditor to the company, a copy whereof is included in Ex. A and appears at page 34 of the paper book. He complained that owing to the non-payment of the deposit money, the date of marriage of his daughter had to be postponed. He pointed out that owing to lack of money he could not even make his two ends meet, as regards the daily necessities of himself and his family. On the 9th August, 1960 the petitioning creditor, through his solicitor, served notice on the company u/s 434 of the Companies Act (hereinafter called the "said Act") demanding payment of the security money of Rs. 1000/- and the deposit money of Rs. 10,733.90 nP. with further interest, in default of which an application would be made to the Court for winding up of the company. On the 13th September 1960, a letter or note was written by Sunil Kumar Bhowmick, a Director of the company and a nephew of the said Shyamapada Choudhury, the Director Manager thereof, in the following terms:

"My Dear Kalida,

You must see me very soon. I have arranged with maternal uncle so that you get your money. He has said that he will pay the money. Immediately you come I

hope, I will be able to cause the payment. You will get me if you come during office hours. Please accept my Pranam.

Finish

Rabi"

2. On the 17th September, 1960 the petitioning creditor received another letter or note from Sushil Chandra Roy, the Manager and Principal Officer of the company in the following terms: "My dear Kali Babu,

There had been talks with Bara Babu about you. He has said that he will definitely pay your money. Please see at office as soon as possible. I hope you have received Rabi Babu's letter. Accept my Namaskar.

Finish

Rabi"

3. No money was, however, paid and on the 15th November, 1960 the solicitor for the petitioning creditor received a reply to the notice u/s 434 issued on the 9th August, 1960, a copy of this letter is included in Annexure "A" to the affidavit of Shyamapada Choudhury, and appears at page 17 of the paper book. In that letter, it was pointed out that on the 31st July, 1958 the then directors of Chaudhuri Commercial Corporation Private Limited who were the Managing Agents of the company, retired and in their place new directors of the Managing Agents were appointed, and the said new directors of the Managing Agents managed the affairs of the company till the 15th August 1960, when the managing agency was terminated. It was then stated that lately the company had become suspicious of the dealings of the past management and the accounts were being scrutinised. It was finally stated as follows:

"From the scrutiny of the accounts which is now being made it appears that the said past management in collusion and conspiracy with each other and some of the Officers of my clients fraudulently made various fictitious entries in the Books of my clients, with the ulterior motive of making wrongful gains. But prior thereto my clients in good faith made certain payments to your client. The matter has been placed in the hands of the Detective Department.

In the premises unless the scrutiny is completed my clients cannot accept any liability for payment of any amount to your clients."

4. No criminal complaint has yet been made against the petitioning creditor, nor any charges preferred. On the 24th January, 1961 the petitioning creditor moved an application for the winding up of the company. On that date, the winding up petition was admitted and directions were given for advertisement and for service of notice. Upon receipt of the notice for winding up on the 7th February, 1961 the company made an application for stay of the proceedings for winding up and an injunction restraining the petitioning creditor from advertising the petition. The application was supported by an affidavit of Shyamapada

Choudhury affirmed on the 6th February, 1961 which appears at pages 1 to 12 of the paper book. On the 7th February 1961, an interim order was made restraining the petitioning creditor for advertising the petition for winding up until the disposal of the said application, subject to certain conditions. This application came up for hearing before S.P. Mitra, J., on the 30th March, 1961 and was dismissed with cost. The judgment of the learned Judge is at pages 44 to 52 of the paper book. It is against this order that the present appeal has been preferred.

5. The two sections of the said Act which are relevant for our purposes are Sections 433 and 434, which are contained in Chapter II which relates to the winding up of companies by the Court. Section 433 deals with the circumstances in which a company may be wound up by the Court. We are only concerned with Sub-section (e), which provides that the company may be wound up by the Court if it is "unable to pay its debts". These word's have not been explained or defined in the section itself. But Section 434 provides that under certain circumstances a company should be presumed to be unable to pay its debts. We are concerned with Clause (a) of Sub-section (1) which provides that if a creditor to whom a company is indebted in a sum exceeding Rs. 500/- then due, has served on the company a demand for payment thereof and the company has for three weeks thereafter been unable to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, then a presumption will arise that the company is unable to pay its debts. The position is as follows: Under the provisions of Section 433(e), a company may be wound up if it is unable to pay its debts. The object of liquidation of the company is that the assets of the company should be realised and the debts paid in accordance with law and as expeditiously as possible. But before a company could be sent to liquidation, it must be "unable to pay its debts." This presupposes that there exists a debt and the company is unable to pay it. Prima facie this must relate to the solvency of the company. The word used is "unable" and not "unwilling" So far as the creditor is concerned, who cannot obtain payment of his debts, he is entitled, as between himself and the company *ex debito justitiae* to an order for winding up, if he brings his case within the Act. But he must first of all establish that there is a debt owing and secondly, must satisfy the court that the company is unable to pay the same. It has been said that he must show that the company is "commercially insolvent" i.e., when it is unable to meet its current payments and its assets are not such as to meet the existing liabilities. The expression "Commercially insolvent" has been defined by Sir Willam James V. C. in *European Life Assurance Society*, (1869) 9 Eq. 122 at p. 128, as--"not in any technical sense but plainly and commercially insolvent--that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain--as to make the Court feel satisfied--that the existing and probable assets would be insufficient to meet the existing liabilities". It is not always easy to establish to the satisfaction of the court about the insolvency of a company, although in this instant case, as I shall presently show, the position is rather obvious. It is for this

reason that Section 434 provides that where notice is given and the company after the requisite period neglects to pay a debt, then there arises a presumption of inability to pay. But here again, the words used are "Neglects to pay". In either case, that is to say, u/s 433 or Section 434, if the debt is disputed bona fide, then in that case there is neither inability nor negligence to pay. The meaning is quite clear. It will not do for a creditor merely to put forward a claim. The company may not accept it or may dispute either its factum or validity. Where there is a genuine dispute of this description, it cannot be resolved by having recourse to winding up proceedings. But, just as it will not do for a creditor merely to put forward a claim, it will not do for the company to deny a claim recklessly. If the denial of the dispute is neither bona fide nor reasonable, then the Court does not lose its power of granting relief by passing a winding up order. The position in law With regard to disputed debts is, by no means, an easy one. It has however been admirably summed up in Palmer's "Companies Precedence" 17th Edn. Part II at page 27. It is stated as follows:

"The mere omission of a company to comply with a notice requiring payment of a debt, served pursuant to the above para, is not "neglect" within the meaning of that paragraph if there is reasonable cause for the omission, and the fact that the debt in question is bona fide disputed is a reasonable cause. It is now well settled that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the court, and should be dismissed with costs.

But, of course, if it is shown that the alleged dispute is not a bona fide one, the objection to the petition fails. Thus, it is not uncommon for a company, after again and again begging for time for payment of a debt, to spring on the petitioner, at the last moment, the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion, and meets with no favour from the court"

6-7. That being the law on the subject, let us apply it to the facts of the present case. The petitioning creditor has advanced his claim upon two headings, namely, Rs. 1000/- paid as security deposit without interest and a sum of Rs. 10,700/-paid as deposit carrying interest at 8 per cent per annum refundable after 11/2 years. Both the sums were paid on 14th January, 1957, and are covered by written receipts. In fact, the receipt of the money is not disputed before us. It is said that the debt is disputed because the company has a claim against the petitioning creditor. Now, under certain circumstances, a counter claim may also amount to a bona fide dispute. See *Company v. Rameswar Singh* 23 Cal WN 844: (AIR 1920 Cal 1004). Sanderson, C. J. observed that "negligence" is a term which is well-known to the law. Negligence in paying a debt on demand is omitting to pay without reasonable excuse. In that case, the company had instituted a suit against the petitioning creditor for recovery of a large sum of money for negligence as an ex director of the company. The respondent then instituted a suit against the company for the recovery of an

admitted deposit, and later on presented a petition for winding up of the company. The Court of Appeal ordered a stay of the winding up proceedings until the determination of the two suits. (Also see *In re Bharat Vegetable Products Ltd.*, 56 Cal WN 29). The so called counter claim in this case as propounded before us may be divided under three headings: (His Lordship considered the evidence and proceeded.)

8. In my opinion, neither of these three headings amount to a counter claim against the petitioning creditor. It is true that at this stage these matters are not to be conclusively decided. But as stated above, the Court is entitled to investigate the question as to whether a dispute has been manufactured in order to delay and defeat the realisation of the dues of the petitioning creditor and is merely a cloak for the inability of the company to pay its just debts. That this is so appears to be convincingly clear from the two letters dated 13th September, 1960 and 17th September, 1960 wherein the claim of the petitioning creditor has been virtually admitted. (His Lordship considered these letters and proceeded.) The result is that for the reasons mentioned above, we find that the disputes that have been raised by the company are not at all bona fide disputes but consist of certain unmarshalled conglomeration of facts which have been put forward to take the semblance of a dispute, but which on close scrutiny amount to nothing. The fact is that the company has been putting off the payment of the claim of the petitioning creditor from time to time and having agreed to make the payment, has suddenly gone back upon it, simply to delay payment, not being in a position to do so.

9. Apart from these facts, we have had placed before us the balance-sheet and the Profit and Loss account of the company for the year ending 30th June, 1957-58 and 1959. It is obvious from these balance-sheets and Profit and Loss accounts, that the company is not commercially solvent but that it is unable to pay its debts in every sense of the term. (His Lordship after considering the Balance Sheet concluded.)

10. For these various reasons, we think that the court below was correct in coming to the conclusion that the application should be dismissed with costs, and we see no reason to interfere with this finding. The result is that this appeal is dismissed with costs. Certified for two Counsel. Interim orders are vacated.

Law, J.

11. I agree.