
(2014) 06 CAL CK 0081
In the Calcutta High Court
Case No : C.P. No. 48 of 2010

Birla Corporation Ltd.

APPELLANT

Vs

Mahabir Prasad Sharma

RESPONDENT

Date of Decision : 18-06-2014

Acts Referred:

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

Citation : (2014) 185 CompCas 43 : (2014) 4 CoMPLJ 315

Hon'ble Judges : N. Patherya, J

Bench : Single Bench

Advocate : Ratnanko Banerjee, Mr. D.N. Sharma and Mr. Pratik Mukhopadhyay, Advocate for the Appellant; Abhrajit Mitra, Ms. Manju Bhutoria and Mr. Sambhik Chowdhury, Advocate for the Respondent

Judgement

Patherya, J.—In this winding up petition the claim arises on account of pension payable by the Company to the petitioner on and from the date of resignation, i.e., 1st January, 2005 till August 2009.

2. The case of the petitioning creditor is that, he was employed as the Secretary to the Chairperson of the Company till 31st December, 1997 and in spite of reaching superannuation continued to discharge his functions till 1st January, 2005 during which time he was in the service of the Company. On 17th December, 1999 the petitioning creditor opted for the pension scheme instead of the superannuation fund scheme. Therefore, he became entitled to payment of pension on his leaving the service of the Company and a request was made by him to make payment of his pension dues. The Company called upon him to submit his claim on account of pension scheme by filing proper application to enable processing thereof. Accordingly, a pension application form was forwarded by the petitioning creditor to the Company which has been received by it. In spite thereof, no payment was made and statutory notice u/s 434 of the Companies Act, 1956 has been issued and a reply given thereto. In the said reply the Company has set out various reasons for non-payment of the said pension

amount. One of them is filing of a money suit by the Company in the City Civil Court in 2007. The point of limitation has also been taken which is misdirected. Therefore, the only reason for non-payment of pension is filing of money suit being Money Suit No. 581 of 2007 for damages. Damage is an unliquidated claim and cannot be used as a set off for a pension claim. Therefore, orders be passed as sought.

3. In opposing the said application, Counsel for the Company submits that the petition filed u/s 434 of the 1956 Act is motivated and not a genuine application filed by the petitioning creditor. By virtue of this application, the petitioning creditor is not seeking to air his personal grievance. A money suit is pending for adjudication and in view of the Company being solvent so, also the claim barred by limitation, this application merits no orders. It is an admitted position that the petitioning creditor resigned from the Company in November 2004 and the statutory notice was issued in 2009. This has been done with a slanted motive. The pension application form was submitted in 2008, i.e., after the filing of the 2007 suit. Therefore, the defence taken in the letter dated 3rd November, 2005 is bona fide. The statutory notice is issued u/s 434(1)(a) of the Companies Act, 1956 to which a reply has also been given. In proceedings before the Company Law Board the petitioning creditor gave evidence for the Birlas against Lodhas. The petitioning creditor caused disappearance of files in his possession and vacated the flat only in August 2005. The petition is barred by laws of limitation and the only claim which can be made is for the period February 2007 to August 2009. The Company is ready and willing to secure the claim of the petitioning creditor. As the defence raises a bona fide dispute no order be passed on this petition.

4. In reply, Counsel for the petitioning creditor submits that the suit filed by the Company is on account of damages which is an unascertained sum of money. The said cannot be set off against an ascertained sum as damages needs to be quantified. Although security is sought to be offered by the Company, it is for the Court to exercise its discretion and to consider whether a bona fide dispute has been raised in respect of the claim. When the dues is admitted even if security is offered, discretion is not to be exercised. The claim is on account of pension which is an admitted amount payable to the petitioning creditor. The defence is dependent on collateral proceeding and does not consider the advanced age of the petitioning creditor. In view of the recurring cause of action limitation will not apply. In view of Peerless General Finance and Investment Company Limited and Others Vs. Jitendra Kumar Khan and Others, the claim survives.

5. In reply Counsel for the Company submits that the petition is not only motivated but also barred by limitation. Peerless General Finance and Investment Company Limited and Others Vs. Jitendra Kumar Khan and Others, is distinguishable and in view of the readiness and willingness to secure the claim of the petitioning creditor no order need be passed.

6. Having considered the submission of the parties it is true that a money suit

has been filed in 2007 by the Company against the petitioning creditor, but, prior thereto in 2005 the petitioning creditor sought for payment of pension. Therefore, this winding up petition cannot be construed as a counter-blast to the suit filed. In 1999 December the petitioning creditor had opted for the pension scheme and while considering his representation dated 22nd August, 2005 the Company by its letter dated 3rd November, 2005 did not dispute his entitlement to payment of pension. On the contrary the Company called upon him to submit an application. Such application was filed in 2008 but no step taken for disbursement. The statutory notice is dated 11th September, 2009 and the application filed in March 2010, therefore, the petitioning creditor will be entitled to sums on account of pension from February 2007, i.e., three years prior to the filing of the winding up application. This, however, will not prevent the petitioning creditor from claiming set off if so entitled in accordance with law. The defence taken by the company is not bona fide as an employee is entitled to pension on resignation or retirement. No sums on account of pension can be withheld unless the rules and regulations of the Company or the articles of association or its memorandum provides for the same. In the instant case no such article has been brought to the notice of the Court and the only reason for withholding pension is the filing of a suit in 2007. The claim though made in 2005, proceedings were filed in 2010, therefore, C.P. 48 of 2010 is admitted for the sums payable on account of pension on and from February 2007 to August 2009 which aggregates to Rs. 1,70,500/- alongwith interest at the rate of 8% per annum on and from the date of issuance of statutory notice till realisation. An opportunity is given to the Company to make payment of the said sum in three equal monthly installments. The first of such installment be paid by 5th July 2014 and the 5th day of each succeeding month. In default of payment of anyone installment the petitioning creditor will be at liberty to advertise once in Sambad Pratidin and The Statesman (English Edition). Matter is made returnable 8 weeks hence.

7. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.