

(2008) 11 GAU CK 0054
In the Gauhati High Court

California Pacific Trading Corporation	Vs	APPELLANT
Kitply Industries Ltd.		RESPONDENT

Date of Decision : 19-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
COMPANIES ACT, 1956 — Section 433, 434
Contract Act, 1872 — Section 73

Citation : (2009) 148 CompCas 345 : (2009) 4 GLR 373 : (2009) 1 GLT 107 :
(2009) 91 SCL 258

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Judgement

Ranjan Gogoi, J.—This company petition, already advertised after a lively debate recorded in the order dated November 18, 2003 (California Pacific Trading Corporation v. Kitply Industries Ltd. [2004] 118 Comp Cas 580 (Gau), is founded on the alleged failure of the respondent to pay its debts within the meaning of Section 433(e) of the Companies Act, 1956. The debt in question is claimed to be due under a decree dated April 12, 2001, passed by the district court for the middle district of North Carolina in the United States of America. By the aforesaid decree the claim of the petitioner, as the plaintiff, against the respondent, as the defendant, has been decreed for a sum of U.S. \$ 2,257,147.58 along with interest thereon at the statutory rate. It will be required to be noticed at this stage that the aforesaid decree is an ex parte decree and though appealable, the defendant, i.e., the respondent herein has chosen not to file any such appeal. It will also be required to be noticed, at this stage, that the petitioner instead of taking steps for execution of the aforesaid decree has chosen to file this company petition for winding up.

2. It will be necessary to recollect that the advertisement of the company petition was sought to be resisted by the respondent-company by contending that as the petitioner had not taken steps for execution of the decree the present company petition for winding up is an attempt to recover the money under the

decree and, therefore, is not maintainable. The respondent-company had also contended that the U.S. court had no jurisdiction to pass the decree in question and further that the decree was an ex parte decree and had not been passed on consideration of the merits of the case. It was further contended that compensation has been awarded for damages which are remote and not contemplated u/s 73 of the Indian Contract Act, 1872. The aforesaid objections were dealt with by the court in its order dated November 18, 2003, by recording findings, necessarily prima facie in nature, that the objections raised did not merit the closure of the company petition without advertisement. Accordingly, the company petition was ordered to be advertised. Due advertisement of the company petition in question did not bring any additional claim either in support or against the winding up prayed for though the respondent-company has filed a more detailed affidavit dated February 5, 2008. By the said affidavit facts and events have been laid by the respondent, which in its comprehension made it clear that the U. S. court lacked jurisdiction to adjudicate the claim of the petitioner/plaintiff and to decree the same, as has been done.

3. Against the aforesaid order dated November 18, 2003, the respondent-company had filed an appeal, i.e., Company Appeal No. 4 of 2004 in this Court. The said appeal was disposed of by an order dated August 23, 2006 (*Kitply Industries Ltd. v. California Pacific Trading Corporation* [2008] 142 Comp Cas 286), by taking the view that the amount due under a decree is a debt within the meaning of Section 433(e) of the Companies Act. The appellate Bench took the further view that the remedy of execution of the decree and a petition for winding up for failure to pay the amount due under a decree are two alternate remedies open to an aggrieved litigant. Accordingly, the company petition was held to be maintainable. On the other issues raised in the appeal the appellate Bench thought it appropriate to take the view that as the company petition was at a nascent stage it would not be appropriate for the appellate Bench to record any findings on the issues raised and instead the matter should be adjudicated by the company court in accordance with law and without being influenced by the findings recorded in the order dated November 18, 2003.

4. Sri K. N. Choudhury, learned senior counsel appearing for the petitioner, has argued that the issue relating to maintainability of the company petition on the ground raised, i.e., that the decree was not put to execution, does not survive for consideration of the court any further. This, according to Sri Choudhury, is on account of the fact that it is no longer res integra that the two remedies are alternate and optional and either can be exercised by an aggrieved party. Sri Choudhury has further argued that the aforesaid question of maintainability is, also, no longer open in view of the Division Bench order dated August 22, 2006, wherein it has been clearly recorded that the company petition is maintainable. Sri Choudhury has argued that the decree being for a specified amount, the debt arising therefrom is for a definite sum of money payable by the respondent to the petitioner. Relying on two decisions of the apex court in *Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd.* and

Another, and in *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, , Sri Choudhury has argued that the dispute raised by the respondent-company in the present case is neither a bona fide dispute nor can be said to have raised a substantial defence to enable the company court to act on the basis of the stand taken by the respondent. Sri Choudhury has further submitted that the objections to the decree as raised by the respondent-company are wholly untenable in law. According to Sri Choudhury, a reading of the order of the U.S. court would go to show that the said court had assumed jurisdiction after recording the existence of certain facts which, according to Sri Choudhury, gave rise to a cause of action, even though partial, within the jurisdiction of the U.S. court. It is further argued that the decree was passed not merely on the failure of the respondent-company to contest the proceedings but the same was recorded after due consideration of the evidence and materials produced by the petitioner as the plaintiff. Sri Choudhury has further argued that the damages awarded were all proximate to the loss of business suffered by the petitioner-company. In any event, according to Sri Choudhury, the objections with regard to the decree being without jurisdiction and/or being an ex parte decree and not on the merits of the case can be raised u/s 13 of the CPC in an execution proceeding and not in the instant company petition.

5. Controverting the submissions advanced on behalf of the petitioner, Mrs. M. Hazarika, learned senior counsel appearing for the respondent-company, has emphatically reiterated what was argued before the court at the time of consideration of the question of advertisement of the company petition. Specifically, learned Counsel for the respondent has contended, by referring to the contents of the additional affidavit dated February 5, 2008, that the contract in question was concluded in the head office of the respondent-company at Kolkata and no part of the cause of action arose within the jurisdiction of the U.S. court. In this regard, Mrs. Hazarika has pointed out the averments made in the additional affidavit dated February 5, 2008 to the effect that the officers of the company, i.e., Sri Gupta and Sri Banka had visited the United States of America in connection with other business deals. It is therefore submitted that jurisdiction has been wrongly assumed on the basis of such visits. Mrs. Hazarika, learned Counsel for the respondent-company, has further submitted that the decree in question was not passed on consideration of the merits of the case and damages contrary to Section 73 has been awarded. On these facts it is the contention of Mrs. Hazarika, learned Counsel for the respondent, that the debt claimed to be due by the petitioner-company is seriously disputed and the dispute being bona fide and of substance the instant company petition for winding up is liable to be rejected.

6. Without prejudice to the above, Mrs. Hazarika, learned Counsel for the respondent, has also contended that u/s 434(1) of the Companies Act a company shall be deemed to be unable to pay its debts arising under a decree only if upon execution, the decree, either in whole or in part, remains unsatisfied. Pointing out the specific provisions of Section 434(1) of the Act, learned Counsel has

argued that the deeming provisions contained in Sub-clauses (a) and (b) are not in the alternative in the absence of the word "or" as in the case of the deeming provisions contained in Sub-clauses (b) and (c). Therefore, according to learned Counsel, the deeming provisions contained in Section 434(1)(b) will operate in case of a debt due under a decree only once the decree is put to execution. In the present case the decree dated April 12, 2001, not having been put to execution the deeming provision cannot operate to give rise to a situation where the respondent can be said to be unable to pay its debts.

7. The rival submissions advanced on behalf of the contesting parties have been duly considered. The maintainability of the company petition on the ground that the petitioner had not taken steps for execution of the decree as well as the fact that the amount covered by a decree would be a debt u/s 433(e), perhaps, would require no further consideration or elaboration in view of the settled position in law. The only question that will, therefore, survive for consideration is whether the defences offered by the respondent-company can be said to give rise to a bona fide dispute with regard to the debt in question? The said defences, as already noticed, are founded on the lack of jurisdiction of the U.S. court to pass the decree; the decree not being on merits and being for damages which are remote.

8. In *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, the apex court after due consideration of the provisions of Section 433(e) of the Companies Act had laid down the following principles that should guide the court while considering a claim for winding up and the defences that may be offered (page 842):

28. While dealing with the scope of Section 433(e), this Court had occasion to hold the following (at page 131 in *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd.* [1972] 42 Comp Cas 125, the case relied on by learned Solicitor General) : Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding-up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed.

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding-up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the

company adduces prima facie proof of the facts on which the defence depends.

(emphasis is mine)

9. The above principles find reiteration in *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, . In the present case, the defence of the respondent-company having already been noticed the application of the above principles laid down by the apex court must now receive the court's consideration.

10. Where the debt claimed to be due arises under a decree objections to the legality of the decree cannot be considered by the company court by going behind the decree as such a course of action may have the effect of converting the company court as an appellate forum against the decree. Such objections, therefore, must appear on the face of the decree and the same must go to the root of the matter and vitiate the decree. In the present case a reading of the order of the U.S. court amply discloses that facts have been recorded which according to the U.S. court clothed it with necessary jurisdiction to entertain the matter. The respondent-company in the additional affidavit dated February 5, 2008, has placed contrary materials to show that the contract was concluded in Kolkota and no part of the cause of action arose within the jurisdiction of the U.S. court. Furthermore, it is contended in the said additional affidavit that the primary facts on the basis of which jurisdiction was assumed by the U.S. court, i.e., visit of Sri Banka and Sri Gupta to U.S.A., were in connection with some other business and not with regard to the business giving rise to the claim and the decree. The facts pointed out in the additional affidavit of the respondent-company would necessarily require a determination which exercise will neither be feasible nor permissible to the company court to undertake. The plea taken up by the respondent-company in the affidavit, ideally, are matters which can be resolved either in an appeal against the decree or even in the course of the proceedings in execution of the decree by virtue of the provisions contained in Section 13 of the Code of Civil Procedure, 1908. In a situation where the U.S. court had recorded existence of certain facts conferring jurisdiction on it and the contrary facts cannot be tested in the present proceedings, this Court cannot hold that the objection of the respondent-company as to the lack of jurisdiction of the U.S. court should be sustained.

11. Insofar as the objection of the respondent-company that the decree was not on the merits of the case, it will suffice to say that a reading of the order of the U. S. court clearly shows that the claim of the petitioner/plaintiff was not decreed merely on the failure of the defendant (respondent-company) to offer its defence. The evidence and materials adduced by the petitioner, as the plaintiff, were duly considered and it is only thereafter that the decree was passed. A decree passed in the aforesaid manner cannot be said to be unconnected with the merits of the case.

12. In so far as the issue of proximity of the damages awarded by the decree is concerned, a reading of the order of the U. S. court would go to show that the

damages suffered by the plaintiff/petitioner were found to be proximate and, therefore, ordered to be paid by the respondent-company. In such circumstances it would be wholly inappropriate for the company court to embark upon any further scrutiny of the said aspect of the matter.

13. The discussions above makes it amply clear that the defence offered by the respondent-company cannot be said to be one of any real substance which is likely to succeed as held by the apex court in *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, . This Court, therefore, cannot hold that the dispute raised by the respondent with regard to the debt due is a bona fide dispute so as to warrant refusal of the prayer for winding up.

14. Before parting with the record, the submission of learned Counsel for the respondent with regard to the applicability of the deeming provision contained in Section 434(1) in case of a debt under a decree has to be addressed. The punctuations contained in Section 434(1), particularly after each Sub-clause, i.e., (a), (b) and (c) and the use of a semicolon at the end of Sub-clause (a) and before beginning of Sub-clause (b), in the considered view of the court, would sufficiently indicate that all the three Sub-clauses, i.e., (a), (b) and (c) are in the alternative and upon existence of any one of the same, a company can be deemed to be unable to pay its debts. Sub-clause (b) of Section 434(1), therefore, contemplates a situation of an unsuccessful attempt at execution of a decree. However, the said Sub-clause (b) cannot be understood to be indicative of any mandatory requirement to put the decree to execution before a company can be deemed to be unable to pay its debts arising from such a decree.

15. For the aforesaid reasons this company petition has to succeed. It is therefore allowed. However, having regard to the stand taken that the respondent-company is a going concern and is presently engaged in business, the court is of the view that the order for winding up of the respondent-company should follow only after its failure to pay the amount due to the petitioner within a period of three months from today or in accordance with such instalment plans as may be agreed upon by and between the parties. It is ordered accordingly.

16. Inform the official liquidator.