
(1976) 01 BOM CK 0004
In the Bombay High Court
Case No : Company Petition No. 60 of 1971

Central Bank of India

APPELLANT

Vs

Mckenzie's Ltd.

RESPONDENT

Date of Decision : 13-01-1976

Acts Referred:

Companies Act, 1956 — Section 433, 434(1), 441(2)

Citation : (1977) 47 CompCas 306

Hon'ble Judges : Aggarwal, J

Bench : Single Bench

Advocate : R.J. Bhatt, for the Appellant; N.G. Thakkar, for the Respondent

Judgement

Aggarwal, J.—The Central Bank of India has filed the present petition for winding up of the company named Mckenzie's Ltd. on the ground that the company is unable to pay the debt of Rs. 2,65,540.74 with interest thereon at the rate of 12 per cent. per annum, which appears to be due on the footing that the bank on the application of the company opened letters of credit and secured guarantees under French credit system for and on behalf of the company for the import of the company's goods. The bank at the request of the company arranged for the clearance of the company's goods and consignments. The bank, thereafter, delivered all the relevant documents to the company against the trust receipts executed by the company and duly transferred the relative bills in advance on account of the company and the said account was, therefore, duly debited. It is on the foot of this account that the alleged claim of the bank appears to be due from the company. The bank gave statutory notice dated 28th December, 1970, u/s 434(1)(a) of the Companies Act, and demanded the payment of Rs. 2,59,188.86 with interest thereon at the rate of 12 per cent. per annum. It appears that the said notice was not complied with and hence the petition for winding up.

2. The petition was accepted on 16th April, 1971, and was made returnable on 18th June, 1971. It appears that on the application of the petitioners, it was

adjourned for two weeks by an order dated 16th July, 1971. Thereafter, the matter did not appear on board until today. Thus, between 16th July, 1971, and 13th January, 1976, a petition for winding up was not prosecuted after its presentation on 16th April, 1971.

3. The intervening period of several years is explained by the large number of precepts filed by the company and consented to by the bank, whereby both the bank and the company by consent have obtained adjournments from time to time ranging for a period of two weeks to eight weeks mainly on two grounds referred to hereafter.

4. At today's hearing, an application is made on behalf of the company for adjournment on the ground that negotiations between the parties for settlement are afoot and the managing director of the company who is negotiating the settlement with the officers of the bank is out of Bombay. The learned counsel also stated that the company had paid to the bank Rs. 45,000 so far and also given security to the extent of Rs. 60,000 since the filing of the present petition. The learned counsel appearing on behalf of the bank did not oppose the application. However, looking to the fact that the present petition was accepted on 16th April, 1971, the company having chosen not to make any affidavit opposing the admission of the petition and that numerous adjournments in the past had been taken for finalising the negotiations, I refused to adjourn the matter. In these circumstances, the learned counsel for the company first stated that the petition be admitted and then stated that he would submit to the orders of the court and at the same time earnestly pleaded that the matter may be kept back till 2-45 p.m. to enable him to find out if there was any draft affidavit prepared to show cause or any draft of the consent terms arrived at between the parties of which reference was made in the consent precepts for adjournment. Since during the course of the hearing, I had asked the learned counsel for the company to show me any material in support of the statements and representations contained in the consent precepts for adjournment, I thought it fair to give him an opportunity to produce the relevant materials. In these circumstances, the matter was kept back till 2-45 p.m.

5. At the resumed hearing, the learned counsel for the company stated that there was no draft of the affidavit in reply with his attorneys nor any draft of paper showing the terms of proposed settlement. The learned counsel again renewed his application for adjournment which had been refused in the forenoon. He applied for adjournment on three grounds. Before dealing with his application for adjournment, it is necessary to examine the events from 16th April, 1971, onwards.

6. The petition for winding up was declared on 6th April, 1971. It was, accepted on 16th April, 1971, and served on the company in July, 1971. The company entered appearance through their attorneys on record on 28th July, 1971. By a consent precept dated July 28, 1971, the company's attorneys with the consent of the bank's attorneys wrote to the learned prothonotary and senior master of

this court "to adjourn the hearing of the petition dated 6th April, 1971, from 30th July, 1971, to 13th August, 1971, as the respondents (company) want time to put in their affidavit in reply". This request was granted. A second consent precept was filed on or about 19th August, 1971, for adjournment till 3rd September, 1971, on the earlier ground, namely, "to put in their affidavit-in-reply". This too was granted. Thereafter, on the same ground of putting in the company's affidavit-in-reply, the company's attorneys with the consent of the bank's attorneys obtained adjournments from the learned prothonotary and senior master from 10th September, 1971, to 18th September, 1971, from 24th September, 1971, to 8th October, 1971, from 8th October, 1971, to 12th November, 1971, from 12th November, 1971 to 26th November, 1971, from 26th November, 1971, to 10th December, 1971, from 10th December, 1971, to 14th January, 1972, from 14th January, 1972, to 28th January, 1972, from 28th January, 1972, to 11th February, 1972, and lastly, from 11th February, 1972, to 25th February, 1972.

7. The other stage of adjournments is from 25th February, 1972, to 19th June, 1972, on the same pattern of consent precepts written by the company's attorneys and consented to by the bank's attorneys requesting the learned prothonotary and senior master to adjourn the hearing of the petition. During this period the ground advanced was as follows :

"..... as the respondents (company) require time to put in their affidavit in reply. The respondents have not filed their affidavit in reply as negotiations for settlement of the matter between the parties without prejudice to the rights and contentions is pending and it will take some time before the negotiations for settlement are finalised."

8. Six such consent precepts were filed containing the aforesaid statement and on those basis adjournments were obtained.

9. The next stage for adjournments by mutual consent covers the period from 19th June, 1972, to 12th January, 1976. Since the ground for adjournment is in identical terms, it is convenient to reproduce the first consent precept :

"HIGH COURT O.O.C.J. Company Petition No. 60 of 1971.

Central Bank of India Petitioners. Versus Mckenzie Ltd.
Respondents.

To,

The Prothonotary & Senior Master, High Court, Bombay.

Sir,

Upon consent of the attorneys for the petitioners hereunder written be pleased to adjourn the hearing of the petition from 19th June, 1972, to 3rd July, 1972, as the parties require time to finalise the "without prejudice" consent terms arrived at herein between them.

Dated this 15th day of June, 1972.

10. With this background obtainable from the record, I will now examine the application for adjournment on behalf of the company.

11. The first ground for adjournment is that the consent precipe of the attorneys to the bank and the company dated 9th January, 1976, was filed in the office on 9th January, 1976, requesting for an adjournment from 13th January, 1976, to 23rd February, 1976, but the office was not inclined to adjourn the matter on precipe and directed that the application be made to the court. The relevant portion of the consent precipe is merely copied from the model consent precipe reproduced above. However, to show that the 1976 consent precipe is on the lines of 1972 model relevant contents are reproduced at the costs of repetition :

"Upon consent of the attorneys for the petitioners hereunder written be pleased to adjourn the hearing of the petition from 13th January, 1976, to 23rd February, 1976, as the parties require time to finalise the "without prejudice" consent terms arrived at herein between them."

12. Mr. Thakkar, the learned counsel for the company, was unable to show any document of any draft of the "consent terms" which are supposed to have been "arrived at" between the parties or their attorneys which "require time to finalise". Apart from the bald statement contained in the precipe, there is nothing to show that between the bank and the company, anything has been worked out which can truly and sincerely be described as "consistent terms" for which an adjournment was sought in order to enable the parties to "finalise" the same.

13. When one looks back at these consent precepts filed from 15th June, 1972, to 9th January, 1976, the same phraseology has come into existence on the identical ground. Having regard to the volume of the number of precepts filed on the same ground, it is patent that both the bank and the company have succeeded in obtaining adjournments on a ground which could not be substantiated before me. I requested Mr. Bhatt to show me if there is any document in the possession of the bank or his attorneys to support the statement "consent terms arrived at" appearing in these precepts. Mr. Bhatt frankly stated that there was nothing to show that any consent terms were arrived at between the parties. He stated that he could not say which officer of the bank if particular acted in this matter as the respondents (company) had contacted various officers from time to time and, therefore, he is unable to name any one of them. However, during the course of my dictating the order, Mr. Bhatt produced from the file of his attorneys a draft of consent terms dated September, 1973. When questioned, he stated that there was no forwarding letter accompanying this draft showing that the draft was sent either to the company's attorneys or to the company. On taking instructions, he stated that a copy of the draft was just handed over to the company. Mr. Bhatt pointed that the changes in ink in the draft were carried out during the course of the day but the typed draft was the one which was prepared in September, 1973. The draft in its original

form reads as follows :

"Consent terms

(1) The respondents-company through their director Shri admits and acknowledges that a sum of Rs. with interest at 12% per annu, is due and payable by the respondent-company to the petitioner. The respondent-company through their aforesaid director agrees and undertakes to pay the aforesaid sums as follows (please state the terms of repayments in this connection. Your attention is drawn to the letter dated 17th February, 1972, addressed to you by Mckenzie's Ltd.).

(2) In default of payment of any one installment mentioned in the clause a winding up petition be admitted and advertised and consequential orders to follow.

(3) In the event of the payment of the amount as per clause 2 above the petition to stand dismissed.

(4) The respondent company through their said director agrees and undertakes to pay the petitioner's costs.

..... Dated this day of 1973."

14. At the highest, it can be said that the company addressed a letter dated 7th February, 1972, to the bank (which is not produced by either side) and thereafter, after the lapse of over 18 months, a draft was prepared and sent to the company. The fate of this draft is not known. The surrounding circumstances show that both the parties did not choose to do anything and allowed time to pass and on the basis of the statements and representations contained in the consent precepts they were able to keep a winding-up petition for admission in abeyance from June, 1972, till date. There is another aspect of the consent precepts which cannot be overlooked. That is the use of the expression "without prejudice". The words "without prejudice" mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted : See *Walker v. Wilsher* [1889] 23 QBD 335 . A letter written "without prejudice" is inadmissible so long as it relates to a negotiation; when the negotiation is closed by an agreement, the privilege ceases. Halsbury's Laws of England, volume 15, 3rd edition, page 407, contains the following statement :

"Letters written and oral communications made during a dispute or negotiation between the parties, and expressed or otherwise proved to have been made "without prejudice" cannot generally be admitted in evidence." Again it says :

"The rule, however, is strictly confined to cases where there is a dispute or negotiation, and suggestions are made for the settlement thereof."

15. It is manifestly clear from the consent precepts that by using the words "without prejudice" the company has protected itself. By these privileged negotiations, the company retained to itself a privileged position. The manner in

which the things have been allowed to drift from week to week and year to year by the bank requires no comments as the facts are eloquent.

16. I do not find any substance in the first ground for adjournment. The mere fact that the bank's attorneys have consented to the adjournment does not make any difference in refusing the application when the matter appears before the court. In any event, about 30 adjournment have been obtained in the last four years on the same ground apart from other adjournments on another ground, and, therefore, it cannot be said, in the circumstances of this case, that I would be harsh on the company, if I were to refuse adjournment. It is also well-known that parties have to bear the consequences if consent precepts are not accepted by the office.

17. The second ground for adjournment is that the managing director of the company has going to Itkal, where the company has undertaken work of construction of a dam. He is expected to return after 3 to 4 days. The third and the last ground is that today the company proposes to pay "with prejudice" to the bank its dues in a period of 9 months from today. This means admission of liability by the company and shows the bona fides of the company. It was further submitted that some goods of the company are pledged with the bank and, therefore, the company requires time to put this on recorded by affidavit. The managing director who is away is the only person who can make this affidavit. In my opinion, these grounds also do not show sufficient cause for adjourning a winding-up petition pending for admission since 1971. Now, merely because the managing director is away to Itkal is no reason to grant adjournment at this distance of time. The petition has been pending since 1971. From 30th July, 1971, to 25th February, 1972, the company obtained adjournments to put in their affidavit-in-reply. Thus, for nearly eight months, time was obtained to file an affidavit opposing the admission of the winding-up petition. In order to satisfy myself of the bona fides of these adjournments, I called upon the company's counsel to show the affidavit or draft of the affidavit or any other paper showing that such an affidavit was undertaken or any instructions were given by the company in this connection. The learned counsel, after taking instructions from the attorney instructing him in court, stated that no such affidavit or paper was in their file. This was in the forenoon. Even at the resumed hearing at 2-45 p.m., nothing was shown to prove the truth of the statements made in the precepts for adjournments for the purpose of filing the affidavit-in-reply. Again, from 25th February, 1972, to 19th June, 1972, adjournments were obtained on the ground that the company had not filed the affidavit-in-reply as the negotiation for settlement was spending. This suggests that as if the affidavit was ready but it was not being filed, lest it might mar the negotiations. As noticed above, this statement was also with the rider "without prejudice". In these circumstances, it appears that on excuses the matter has been sidetracked and kept in abeyance, obviously with the agreement of the bank. Again, because the company now chooses to offer to pay "with prejudice" the dues to the bank in a period of nine months is, in my view, not a sufficient reason to grant adjournment. It is well

settled that long unconditional adjournments may do great harm in a winding-up petition because, if a winding-up order is ultimately made, it relates back to the presentation of the petition and invalidates intermediate transactions. Section 441(2) of the Companies Act, 1956, provides that the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for winding up.

18. In Company Petition No. 42 of 1968 of this court in the matter between Ramesh Premchand Shah and Another Vs. Engineers' Enterprises Pvt. Ltd. and Others, , decided on 21st/22nd December, 1971, by my esteemed and noble brother, Kantawala, J. (as he then was), it is observed (page 300) :

"Unfortunately, an undesirable practice has cropped up in the proceedings of this court where matters relating to adjudication of persons as insolvents and petitions for winding up of limited companies are indefinitely postponed from time to time before they are even admitted or before even they are heard and finally disposed of."

19. It is further observed (page 300) :

"In my opinion, the practice of adjourning the winding-up petition from time to time before it comes up for admission is not to be encouraged as, under the law relating to winding up of limited companies, if ultimately a petition is allowed and the company is ordered to be wound up, the order for winding up will relate back to an earlier date."

20. The need of disposing of winding-up petitions expeditiously is, therefore, significant. In the present case, there has been a colossal delay. On the facts and circumstances of the case, I am satisfied that no good and sufficient cause had been shown which calls for granting the application for adjournment.

21. The instant case is an alarming example as to how a matter can be kept on the file of the court by the active and passive co-operation of the parties. It cannot be forgotten that the bank is a nationalised bank from 19th July, 1969. The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, was passed in order to serve better the needs of development of the economy in conformity with national policy and objectives and yet the bank has been merrily and mechanically agreeing and consenting to the adjournment of a winding-up petition involving a debt of Rs. 2,65,540.74. The interest has been mounting in the meantime. The rate of interest has become stale. There is complete absence of vigil and diligence on the part of the bank. The carriage of the proceedings is in the hands of the petitioner-bank. The fact that all the 45 or so consent precepts originated from the side of the company shows as if the reins were in their hands. The coming into force of the emergency and the economic policies initiated by the Government seem to have brought no change in the attitude of the bank in the instant case.

22. The application for adjournment is, therefore, refused. The petition is

admitted by a separate order.