(1997) 08 KL CK 0027

In the High Court Of Kerala

Case No : Company Application No. 96 of 1996 in C.P. No. 8 of 1990

Coffee Board APPELLANT

Vs

Perfect Gunny Stores and Others RESPONDENT

Date of Decision : 01-08-1997

Acts Referred:

Companies (Court) Rules, 1959 — Rule 101
Companies Act, 1956 — Section 433, 434

Citation : (1999) 96 CompCas 579 : (1998) 1 ILR (Ker) 275

Hon'ble Judges : C.S. Rajan, J

Bench : Single Bench

Advocate : A.A. Abdul Hasan, Receiver in C.P. No. 8 of 1990, V. Bhaskara Menon, for the Appellant; George C.P. Tharakan, M.C. Sen, for respondents Nos. 1 and 2, S. Subramani, for respondent No. 3, E. R. Venkateswaran, for respondent No. 4, K. Moni, for respondent No. 5, Prabha R. Menon, for respondents Nos. 3 to 17, M.P. Govindan Nair and George Poonthottam for respondents Nos. 18 to 21, M. Rajasekharan Nair, for respondent No. 23, K. Balachandran, P.V. Kunhikrishnan, for the Respondent

Judgement

C.S. Rajan, J.—This is a petition filed by the applicant who is the 22nd respondent in the company petition to substitute it as petitioner in the company petition. The circumstances which compelled the 22nd respondent to file this petition are as follows : The applicant is the Coffee Board. The ex-managing director of the company under liquidation filed applications for recording payments of amounts due to the creditors including secured creditors and prayed to this court to hand over possession of the company''s properties from the liquidator and to dismiss the company petition. The applicant has detailed the background of the filing of this company petition which, according to the applicant, throws a cloud on the bona fides of the company. The company petition was filed on March 29, 1990. Without any stiff opposition from the company a provisional liquidator was appointed on April 4, 1990. Coming to know of these developments the Coffee Board got themselves impleaded in the company petition so as to enable them to remove coffee kept in the godown of the company. The removal of the coffee was objected to by the workers of the company. Therefore an Advocate-Commissioner was appointed for supervising the curing operation. When the Advocate-Commissioner inspected the godown it was revealed that 17 tonnes of coffee kept in the godown of the company worth Rs. 43,52,977.64 have been stolen. Thereafter the Coffee Board filed a claim statement showing the adjustment of the amounts due to the company from the Coffee Board and the balance amount due to the Coffee Board which, according to the applicant, comes to Rs. 61,84,049.24. The real amount could be ascertained only after the final settlement of the accounts.

2. There were several revival schemes put forward by several persons. This court explored the viability of those schemes. But finally this court could not approve any scheme for various reasons. In the meanwhile, the official liquidator and the Coffee Board filed petition for a direction to the C. B. I. to conduct an investigation regarding the pilferage of coffee in the godown of the company. The C. B. 1. investigated the crime and filed a charge-sheet before the Magistrate''s court.

3. At some point of time the company paid the amount due to the applicant in the company petition. Therefore, he walked away with the amount and thereafter he was not interested in pursuing the company petition. At the same time, the provisional liquidator filed a statement before this court along with the list of creditors praying for appointment of an auditor to look into the accounts of the company. The official liquidator also wanted to advertise the matter inviting claims from the various creditors.

4. This court in another order dated October 1, 1996, appointed an auditor to assess the amount due to the Coffee Board and also the amount said to be due from the Coffee Board. Shri Balasubrahmanian, chartered accountant, of Surya and Company, Calicut, was appointed for audit and other purpose. This court also directed the chartered accountant to assess the claims of the Coffee Board. This court further ordered to consider the above report and the liability would be assessed. The company was not agreeable to the above course and, therefore, the company took the matter in appeal which is still pending. It was submitted at the Bar that the auditor has submitted a report before the Division Bench wherein the appeal is pending.

5. Though it was argued before me that in earlier orders this court found that the Coffee Board is not a creditor, the above argument was not pursued later when it was found out that the Division Bench has left open the above question. Therefore, the question whether the Coffee Board is a creditor or not is still at large.

6. In this connection it is advantageous to look into relevant provisions in the Companies (Court) Rules. Rule 101 deals with the substitution of creditor or contributory for the original petitioner. The above rule reads as follows ;

"101. Substitution of creditor or contributory for original petitioner.--Where a petitioner,--

(1) is not entitled to present a petition, or,

(2) fails to advertise his petition within the time prescribed by these rules or by order of court or such extended time as the court may allow, or,

(3) consents to withdraw the petition, or to allow it to be dismissed, or the hearing to be adjourned, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned, or,

(4) if appearing, does not apply for an order in terms of the prayer of his petition, or,

where in the opinion of the court there is other sufficient cause for an order being made under this rule,

the court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who, in the opinion of the court, would have a right to present a petition, and who is desirous of prosecuting the petition."

7. E, R. Venkiteswaran, learned counsel for the company, opposed the substitution on the ground that the Coffee Board is neither a creditor nor a contributor so as to invoke Rule 101. According to him, it is necessary to look into the provisions contained in the Companies Act which deal with winding up petitions. Section 433 of the Companies Act deals with the circumstances under which a company may be wound up by court. Section 433 reads as follows :

"433. A company may be wound up by the court,--

(a) if the company has, by special resolution, resolved that the company be wound up by the court ;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting ;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two ;

(e) if the company is unable to pay its debts ;

(f) if the court is of opinion that it is just and equitable that the company should be wound up."

8. Therefore, it was further stressed by learned counsel that the company must be unable to pay the debts of the Coffee Board in order to enable the Coffee Board to become a petitioner in the company petition. This was further elaborated by learned counsel by referring to Section 434 which deals with the

circumstances wherein the inability to pay the debts is presumed. Section 434(1) reads as follows :

"434(1) A company shall be deemed to be unable to pay its debts.-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor ;

(b) if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part ; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

9. Thus, according to learned counsel, unless the Coffee Board issues a registered notice demanding the payment of the debt due to them and the company neglects to pay the same within three weeks, the Coffee Board cannot maintain a petition u/s 433(e) of the Companies Act. Unless the Coffee Board satisfies the requirements of Sections 433 and 434 it cannot step into the shoes of the original petitioner.

10. In order to impress upon us the above argument learned counsel relied on a number of decisions of various High Courts and the Supreme Court. This court in the ruling reported in Krishna Iyer Sons v. New Era M. Co. (1965] KLT 198 has considered the grounds on which the company is to be wound up. Justice Raman Nayar (as he then was) has succinctly dealt with the above aspects in the following manner :

"I shall now consider the two grounds on which the petitioners would have the company wound up and the allegations made in support of these grounds. The first ground, that the company is unable to pay its debts, both in the sense that it is actually unable to pay debts presently due and demanded, and in the sense that it has reached a stage where, in the language of Sir William James, V. C. in European Life Assurance Society, In re [1869] L.R. 9 Eq. 122, 128, it is ''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'', language which seems to be the origin of the phrase, ''commercially insolvent'' as of Clause (c) of sub-section (1) of Section 434 of the Companies Act, 1956. This sub-section, I might observe now covers the whole range of inability to pay debts, Clauses (a) and (b) covering inability to meet current demands, and Clause (c) covering what formerly used to be brought under the ''just and equitable'' Clause (Clause (f) of Section 433) under the name, ''commercial insolvency'', so that every kind of inability to pay debts falls within Clause (e) of Section 453 and resort to Clause (f) is unnecessary. (See Buckley, thirteenth edition, page 458 under the head, ''Insolvency'' and page 460 under the head, ''Other insolvency'' and Palmer''s Company Precedents, Part 2, seventeenth edition, page 26 under the head, ''as to para (d) of Section 223'')."

11. The Supreme Court had occasion to consider the circumstances under which a company can be wound up in the ruling reported in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . According to the Supreme Court, the two well settled rules are : (1) the debt is bona fide disputed ; and (2) the defence is a substantial one. If the two grounds are satisfied the court will not wind up a company. In the above case the claims of the creditors were disputed in fact and in law and the company had given prima facie evidence that the creditors are not entitled to any claim for the work they have alleged to have executed for the company. Learned counsel also has cited the following rulings : Registrar of Companies v. Atlas Transport Ltd. [1974] 44 Comp Cas 496 (Punj), Registrar of Companies, Gujarat Vs. Kavita Benefit Pvt. Ltd., P. G. Bhatia and Co. v. Softsule Pvt. Ltd. [1977] 47 Comp Cas 438 (Bom), Supply Co. India v. Rafiullah Tea and Industries P. Ltd. [1978] 48 Comp Cas 796 (Gau), G. R. S. Constructions v. Synergetics Ltd. [19841 56 Comp Cas 457 (AP) and B. Viswanathan Vs. Seshasayee Paper and Boards Ltd., In all these cases various High Courts took the view that when there is a bona fide dispute regarding the debt then the company court normally will not order the winding up of the company.

12. In this connection it is pertinent to point out the various statements made in the counter-affidavit filed on behalf of the company to the application filed by the Coffee Board, which read as follows :

"However, this respondent submits that the amount shown in item No. 21 is substantially true. However, this respondent reserves its right to dispute the same as and when books of account are made available to this respondent-company. This respondent understands that the books of account have been taken by the Coffee Board and, therefore, this amount could not be verified. However, the alleged interest claimed on various accounts are not payable. This respondent-company have incorporated interest when enforcement of bank guarantee executed by the Indian Bank and this amount is not payable. The said amount has been taken on account of the amount alleged to be due to the Coffee Board. This respondent denies the amount shown as item No. 24. The difference in interest charged on Rs. 16,59,000 from May 20, 1990 to August 31, 1991, has to be deducted. There is a double claim of interest by the Coffee Board on Rs. 22,00,000 from February 1, 1990, to February 22, 1990. This has been shown as item No. 23 in the statement filed by the Coffee Board. In respect of items Nos. 22, 25, and 26 this respondent does not admit the liability to pay the interest as the terms of contract does not provide so. On the other hand this respondent is entitled to claim large amounts for which bills have been submitted during 1982-83, 1983-84 and 1984-85, by various debit notes. This respondent is also entitled to claim interest on the transportation charges for which various debit bills have been submitted. Apart from that this respondent is entitled to coffee pool dividend in respect of coffee pooled from the Arimula Estate for the season commencing from 1985-86 onwards. This respondent-company is also entitled to interest to the outstanding dues. This respondent further submits that the value of the gunny bags which has been damaged is also liable to be paid by the Coffee Board. This respondent gives below a statement showing the amounts due from the Coffee Board :

Amount dues by way of remuneration :

(Rupees)

(Rupees)

(a)

Debit Bills Nos. 49 to 57 relates to 82-83, 83-84 and 84-85 and 1-2-1988 season for collecting agency commission D Note Nos. 1/85-86 dt. 23-9-86, 136/65-86 dated 21-4-86, 126/034/280/83-84 dated 24-4-85, 14-10-85 and 21-8-84, respectively pending payment to be received bills duly verified and attested by Coffee Board officials attached to the works.

3,336-70

(b)

Debit Bills Nos. 42, 43 and 57 to 62 of 89-30 dated 9-1-1990 in respect of curing charges and special messenger fees 6, 7, 8 and 13/89-90 relating to bill charges, collecting agency com-mission, arrears remuneration, mon-sooning charges duly verified and attested by the Coffee Board officials attached to the works.

3,87,988-10

(c)

Debit Bill No.1 to 5/88-89 dt. 22-9-88 and 22/88-89 dt. 31-10-88 fur FOL charges on coffee transferred to various Coffee Board depots at Salem, Mettupalayam, bills duly verified and attested pending payments

1,85,609-10

5,76,934-00

Anticipated coffee pool dividends for Arimula Estate :

Relating to season 85-86 to 87-88 @ 0.50 per point - total 91660 point

45,830-00

For 88-89 and 89-90 seasons pool payment initial advances upto IIIrd payment were only given and for the anticipated payment ? 3.60/point

2,44,645-00

2,90,475-00

Interest on the above amount due @ 21.5 per cent. from the date of submission of bills to 31-8-1991, pending payments -vide statement

2,60,061-36

Difference in interest-charged on Rs. 16.59.000 from 20-5-1990 to 31-8-91 to be deducted by giving credit @ 21.5 per cent. (Item No.24 refers to Coffee Board claim)

4,59,184-37

Double claim of interest by Coffee Board on Rs. 22,00,000 from 1-2-90 to 22-2-90 (21 days) @ 21.5 per cent. (Item No.23 refers to Coffee Board claim)

27,213-70

Loss incurred due to damage of empty gunnies in godown with coffee stored due to improper storage during mon-soon months. Reason being the coffee has not been lifted by Coffee Board incoffee (entire empty gunnies stocks was sold by liquidator only for Rs. 80,000)

7,25,000-00

Total

23,44,868-48

Less : Alleged interest on various cash balance delayed refund, retention of pool balances etc. Items Nos. 22 to 26 of the Coffee Board claim

13,06,008-35

Pool cash balance in the pool cash book

22,00,000-00

-balance held (Item No.21 of the Coffee Board claim)

35,06,008-35

Less : Amount due of pool payment relating to Arimula Estate

2,81,028-00

Amount realised under bank guarantee from Indian Bank by Coffee Board

1,65,000-00

19,40,028-00

15,65,980-35

Claim on Coffee Board

7,78,888-13.

Therefore, after deducting the admitted claim of the Coffee Board the respondent-company would be entitled to get more than Rs, 7,78,888.13. The respondent-company is also entitled to get 21.5 per cent, interest on the aforesaid amount."

13. Thus, it can be seen that the company has accepted certain claims of the Coffee Board and in turn has made certain counter claims against the Coffee Board, Perhaps that may be the reason why this court in the order dated October 1, 1996, appointed an auditor to verify the accounts and to find out the liability of the company as well as the amounts due to the company from the Coffee Board. Unfortunately, the company was not able to pursue the above direction because the company took up the matter in appeal. Therefore, it is not possible to come to the conclusion that the claims of the company are still in a fluid stage. The pleadings in this case both on the part of the Coffee Board and of the company will go to show that various amounts are due from the company to the Coffee Board as well as from the Coffee Board to the company, Therefore, it is not a case where there is a dispute regarding the liability to pay the amount or regarding the quantum of amount to be paid. It is a question of actual assessment of the amounts due from and to the company/Coffee Board. Therefore, it cannot be said that this is a case where the Coffee Board is not to be considered as a creditor which comes within the purview of Section 434 of the Companies Act.

14. The further argument that the Coffee Board did not serve a notice on the company and the company neglected to pay the amount thereafter and, therefore, the inability to pay the amount cannot be presumed is not correct. The filing of the company petition and the appointment of the provisional liquidator came to the notice of the Coffee Board and then only the Coffee Board was alerted regarding their claims against the company. The transposition contemplated under Rule 101 of the Companies (Court) Rules cannot postulate a situation where a person who has issued a notice and is waiting for filing company petition is to be transposed as an original petitioner, Such a petitioner need not come as a petitioner by way of transposition. He has got every right to file a petition. The transposition comes into play only in a situation where the original applicant disappears from the scene for some reason or other and there are other parties to the petition who have got similar interest in the prosecution of the petition. Therefore, it is only to be noticed whether the Coffee Board is really a creditor of the company or not, Only in that sense the word "creditor" in Rule 101 is to be interpreted. Otherwise as indicated earlier there is no scope for a creditor who satisfies the ingredients of Sections 433 and 434 to seek permission for transposition.

15. Considering this matter in the above perspective I am of the view that the

Coffee Board satisfies the ingredients of Rule 101 for transposition in the original petition in order to prosecute the petition.

16. There is yet another circumstance which this court has to take into consideration in the larger public interest. As the report of the official liquidator indicates there are other creditors who have come forward claiming amounts from the company. According to the official liquidator, a public notice is necessary in order to ascertain whether there are more claimants against the company. At this juncture learned counsel for the company disputes the above fact which has to be decided by this court. The workers of the estate belonging to the company as well as coffee curing factory have staked their claims. u/s 529A of the Companies Act the claims of the workers stand pari passu with those of the secured creditors. Therefore, it would not be appropriate for this court now to close this company petition and to discharge the provisional liquidator by handing over the assets of the company. Therefore, in view of the disappearance of the original petitioner from the scene, the company petition has to be prosecuted before this court in order to do justice to a large number of creditors who have staked their claims. For that ground also it is only just and proper to allow the Coffee Board to get itself transposed as the original petitioner. Therefore, the Coffee Board is allowed to be substituted as the original petitioner. The petition is adjourned for a month and in the meanwhile, the Coffee Board is directed to effect necessary amendments to the petition as are necessary to make this order effective.

17. Post on August 20, 1997.

