

(1995) 12 AP CK 0055

In the Andhra Pradesh High Court

Case No : Company Petition No. 71 of 1988

D and H Secheron Electrodes (P.) Ltd.

APPELLANT

Vs

Voltare Electrodes (P.) Ltd.

RESPONDENT

Date of Decision : 29-12-1995

Acts Referred:

Companies (Court) Rules, 1959 — Rule 21
Companies Act, 1956 — Section 14, 26, 28, 291, 397

Citation : (1997) 89 CompCas 592

Hon'ble Judges : S. Dasaradharama Reddy, J

Bench : Single Bench

Advocate : Y. Ratnakar, for the Appellant; S. Ravi, for the Respondent

Judgement

S. Dasaradharama Reddy, J.—This is a creditor's petition seeking to wind up the respondent-company u/s 433(e) and (f) read with sections 439(1)(b) and 434(1) (a) of the Companies Act, 1956 (for short "the Act"). The ground on which the petitioner seeks the winding up is that the respondent-company has not paid Rs. 2,51,677 which are the outstanding arrears of royalty payable for the year ending with January 31, 1985, together with interest, in spite of statutory notice issued u/s 434 of the Act. According to the petitioner, it entered into an agreement with the respondent-company on March 17, 1980, whereunder it agreed to provide technical know-how for the manufacture of electrodes for which the respondent has to pay royalty amount for a period of 15 years at 5 per cent. of the sale value, which was later reduced to 3 per cent. The accounting year of the respondent-company ended with January 31, during that time. To the letter issued by the petitioner on December 10, 1986, demanding payment of Rs. 3,74,648 towards the amount or royalty payable up to January 31, 1985, the respondent-company replied on January 19, 1987, stating that after adjusting the amounts paid by it, the arrears of royalty payable up to January 31, 1985, are only Rs. 2,61,677. Later, on March 3, 1987, the respondent paid Rs. 10,000 leaving the admitted balance of Rs. 2,51,677. The respondent gave a cheque dated April 21, 1988, for Rs. 1,80,000, which was dishonoured when presented

to the bank.

2. The respondent-company has filed a counter disputing the debt and also stating that in any event there is a clause for arbitration in the agreement and, hence, the petitioner cannot avail of the remedy u/s 433 of the Act, and that even assuming that the respondent-company is liable to pay Rs. 2,51,677, it is subject to certain obligations to be performed by the petitioner, namely :

(a) To train the respondent-company's engineers, chemists;

(b) To provide secret formulae or processes inventions, formulae, etc., and the working rules with respect to specialised electrodes which are now being manufactured by the petitioner;

(c) To market and sell the products manufactured by the respondent, etc.,

and as these reliefs cannot be granted in the summary jurisdiction of the company court, the petition is liable to be dismissed. It is further stated that the cheque was not cleared by the bank because of "stop payment" instructions given by it.

3. From these pleadings, the following two questions arise for consideration :

(i) Whether the respondent-company is liable to pay Rs. 2,51,677 to the petitioner in respect of royalty arrears payable till January 31, 1985 ?

(ii) Whether the non-payment of the same constitutes a ground for winding up the respondent-company ?

4. During the pendency of the company petition, Rs. 25,000 was paid by the respondent on December 27, 1990, to the petitioner by cheque dated December 5, 1990. During the hearing of the arguments, the respondent-company raised a preliminary objection that the company petition is not maintainable under the proviso to rule 21 of the Companies (Court) Rules, 1959 (for short "the Rules"), as it is not filed by a validly constituted attorney and that Sri C.K. Padmanabhan, who verified the petition, is not authorised to file the company petition. As it is a pure question of law, I permitted the respondent-company to raise this plea even at that late stage. Thereupon the petitioner filed Company Application No. 153 of 1995, seeking leave of the court to permit Sri C.K. Padmanabhan, to sign the affidavit and to file this winding up petition. Hence, the third question for consideration is, whether the company petition filed by Sri C.K. Padmanabhan, on behalf of the respondent-company, is maintainable under rule 21 of the Rules.

5. Taking the third point first, under rule 21, where any petition is presented by a body corporate, the affidavit must be verified by a director, secretary or other principal officer thereof, provided that the judge or Registrar may, for sufficient reason, grant leave to any other person duly authorised by the company to make and file the affidavit. Admittedly, in this case, Sri C.K. Padmanabhan, who filed the company petition is neither a director nor a principal officer of the petitioner-company. He is the administrative officer and is described as a duly constituted

attorney. In fact, the office ought not to have numbered it, but posted the same for orders of the court. Thus, it is clear that the company petition as filed in 1988 is not in accordance with rule 21. Realising this defect, the petitioner filed Company Application No. 153 of 1995 seeking leave of the court under the proviso to rule 21 to permit Mr. C.K. Padmanabhan to make and file the affidavit in the company petition. Along with the affidavit, he filed a true copy of the resolution passed by the board of directors at its meeting at Indore, on September 6, 1988, authorising Sri C.K. Padmanabhan to sign and file the winding up petition against the respondent-company and to sign necessary papers as may be required for this purpose. It was also stated in the resolution that Sri C.K. Padmanabhan might be given power of attorney by the company. It is not clear whether any, power of attorney has been issued. No copy has been filed by the petitioner. Mr. Y. Ratnakar, learned counsel for the petitioner, contends that in view of this resolution of the board authorising Sri C.K. Padmanabhan, both to sign and file the company petition, leave may be granted by the court regularising the affidavit filed by Sri C.K. Padmanabhan. Mr. S. Ravi, learned counsel for the respondent, opposed this, contending that the petitioner has not filed the original resolution of the board or the power of attorney, if any, issued in favour of Sri C.K. Padmanabhan, and relied on the decisions in *Mohan Lal Mithal v. Universal Wires Ltd.*[1983] 53 Comp Cas 36 (Cal) and *Nibro Ltd. Vs. National Insurance Co. Ltd.,* .

6. *Mohan Lal Mithal v. Universal Wires Ltd.* [1983] 53 Comp Cas 36 (Cal) was a case of filing of an application under sections 397 and 398 of the Act on behalf of a company holding shares in another company and the letter of consent annexed to the petition was not backed by a resolution of the board of directors but was signed by the secretary of the company who claimed that he was directed to do so by a director of the company. It may be seen here that under rule 88 of the Rules in the case of petitions filed u/s 397, the letter of consent signed by the members authorising the petitioner to present the petition on their behalf must be annexed to the petition. Interpreting this rule, the single judge of the Calcutta High Court held that as the letter of consent was not backed by the resolution of the board of directors, but was only signed by the secretary of the company, the petition was not maintainable. This decision does not help the respondent-company as we are concerned here with rule 21.

7. The next decision is *Nibro Ltd. Vs. National Insurance Co. Ltd.,* in which a suit was filed by a director without the necessary resolution in that behalf by the board. The contention of the company was that under Order 29, rule 1 of the Civil Procedure Code, in suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any other director or other principal officer of the corporation who is able to depose to the facts of the case. The Delhi High Court rejected the contention of the company and held that the suit is not maintainable u/s 291 of the Act read with sections 14, 26 and 28 and Schedule I, Table A. The court held that Order 29, rule 1 of the CPC does not I authorise the person mentioned therein to institute suits on

behalf of the corporation but only authorises them to sign and verify the pleadings on behalf of the corporation. This decision is also not applicable to the facts of the case.

8. In *Mehta Steel Syndicate* [1993] 3 SCC 565 (sic), an objection was taken that the affidavit filed in support of the winding up petition is defective. The High Court had dismissed the petition on that ground. The Supreme Court held that there was no defect and even assuming that there was defect or irregularity, the party must be given opportunity to rectify the same. In the instant case, no doubt, the petition as filed was defective in the absence of obtaining leave of this court to accept the affidavit of Padmanabhan. But the same has been rectified now by filing the affidavit accompanied by a true copy of the resolution of the board. The proviso to rule 21 does not require any power of attorney to be filed. There is no reason to doubt the true copy of the resolution of the board and to throw out the company petition on the technical ground, that too, after seven years after filing the same. I accordingly, overrule the objection raised by the respondent and allow Company Application No. 153 of 1995.

9. Coming to the merits, in exhibit A-3, dated January 19, 1987, the letter written by the respondent-company to the petitioner, it is admitted by the respondent-company that there are arrears of Rs. 2,51,677 in respect of royalty payable up to January 31, 1985, which was then the accounting year of the company. The respondent also assured the petitioner in exhibit A-4 (exhibit B-9) that it will positively clear the dues of Rs. 2,61,677 during the current year of operation, i.e., 1987-88. It paid Rs. 10,000 in March, 1987. No doubt, in respect of royalty due for the period subsequent to February 1, 1985, there were disputes between the petitioner and the respondent which were referred to the arbitrator. The arbitrator gave the award, exhibit A-12, on March 9, 1991, for Rs. 3,20,000 to be paid in eight equal quarterly instalments of Rs. 40,000 from April, 1991, to March, 1993. In the award there is a statement that the respondent has paid royalty up to March, 1985. Thereupon on the application of the petitioner it was rectified on January 16, 1992, deleting that sentence (exhibit A-13). It is also significant to note that the respondent has issued a cheque for Rs. 1,80,000 on May 3, 1988, which was not honoured by the bank with the endorsement "exceeds arrangement", which is clear from exhibit A-14. Thus, the contention of Mr. Ravi, counsel for the respondent, that there is bona fide dispute about the liability to pay Rs. 2,51,677 cannot be accepted.

10. In the result, the company petition is allowed. The registry is to intimate the official liquidator in Form No. 50. The official liquidator shall forthwith take into his custody or under his control all the properties, effects, books and papers of the company. The order for winding up shall be drawn up in Form No. 52 and two certified copies thereof shall be sent to the official liquidator. The petitioner shall advertise the petition within fourteen days in two newspapers, Indian Express and Eenadu, in Form No. 53. The petitioner shall deposit Rs. 2,000 (rupees two thousand only) with the official liquidator for initial expenses within four weeks

from today, which shall be reimbursed to it in accordance with section 530 of the Act. No costs.

11. After delivering the judgment, counsel for the respondent-company requested that the operation of the judgment may be stayed for four weeks as the respondent-company is a running concern. The request is granted and the order is kept in abeyance for four weeks from today. Post the company petition on January 29, 1996, for further direction regarding advertisement in the newspapers.