

(1994) 07 BOM CK 0121

In the Bombay High Court

Case No : Company Petition No. 434 of 1992

Dabholkar Enterprises (Partnership Firm)

APPELLANT

Vs

Padma Alloy Castings Pvt. Ltd.

RESPONDENT

Date of Decision : 28-07-1994

Acts Referred:

Companies Act, 1956 — Section 434
Partnership Act, 1932 — Section 69, 69(2)

Citation : (1994) 07 BOM CK 0121

Hon'ble Judges : I.G. Shah, J

Bench : Single Bench

Advocate : P.K. Samdani, H.N. Thakore and Miss Soma Singh instructed by Thakore Jariwala and Associates, for the Appellant; M.P. Wamorkar, for the Respondent

Final Decision : Dismissed

Judgement

I.G. Shah, J.—The Petitioners have filed this petition seeking to wind up the Respondent Company on the ground that they are not in a position to pay their debts and that, as, in spite of the statutory notice given u/s 434 of the Companies Act, 1956, the Respondent Company has not paid the amounts demanded which were due to the Petitioners and since the said amount is more than Rs. 500/-, the Respondent Company must be deemed to be not in a position to pay their debts.

2. The Petitioners claim that between the period 14-8-1990 and 17-11-1990 the Respondent Company was supplied with goods worth Rs. 1,21,640.75 P. under its bills which are enumerated in Exhibit "A" annexed to the Company Petition. The Petitioners further claim that by letters which are at Exhibits "B" and "C", the Petitioners demanded the amounts due to them from the Respondent Company. As the Respondent Company did not respond to the said communications, statutory notice dated 3-8-1992 as required u/s 434 of the Companies Act was sent to the registered office of the Respondent-Company and to the said notice

also the Respondent-Company did not reply. The Petitioners, therefore, claim that the principal amount outstanding as on 1st December, 1990 due from the Respondent Company is Rs. 1,21,640.50 P. and interest thereon upto the date of the filing of the Petition is Rs. 44,703.00 and therefore the Respondent Company is indebted to the Petitioners to the tune of Rs. 1,66,232.50 P.

3. The Respondent Company filed their reply dated 4th January, 1994 denying the claim of the Petitioners and they contended that the Respondent Company had by their letter dated 15-11-1990 informed the Petitioners that the material supplied by them was defective and hence the same was required to be replaced. A copy of the said letter dated 15-11-1990. alleged to have been addressed by the Respondent Company to the Petitioners is annexed to the Affidavit in reply as Exhibit "A". In the said letter, it was also stated that the representative of the Petitioners had visited their factory and had inspected the material lying unused and that he had promised to replace the same but the same was not replaced till the date of the said letter i.e. 15-11-1990. The Petitioners have filed their Rejoinder affidavit and have denied to have received the letter dated 15-11-1990. It also appears that the Petitioners had called upon the Respondent Company to give inspection of document showing that the said letter dated 15-11-1990 was received by the Petitioners and in spite of that the Respondent Company did not produce any document in support of their contention for inspection of the Petitioners.

4. Apart from the said defence, the Respondent Company has raised a legal defence, and it is contended by them that the Petitioners are a partnership firm and the Petitioners being not a registered partnership firm, their remedy to recover the dues from third party by way of a suit is barred in view of section 69 of the Partnership Act and therefore when the remedy of the Petitioners is barred for recovery of the said amount due from the Respondent Company, there does not exist the debt which is recoverable by the Petitioners, and therefore, the presumption which would arise as a result of the notice u/s 434 of the Companies Act would stand rebutted. The Petitioners, on the other hand, have contended that they have applied for registration of the partnership firm in 1984 but they did not receive any communication from the Registrar of Firms raising any objection for grant of registration from the Registrar, and therefore they started making inquiries in respect of the same in April, 1994 and thereafter on 8th June, 1994 they have, for the first time received a communication from the Registrar of Firms raising certain objections and a Xerox copy of the said communication received from the Registrar of Firms is annexed as Exhibit "D" to the further Affidavit filed on behalf of the Petitioners. A copy of the application made for registration of the firm to the Registrar of Firms is also annexed as Exhibit "A". The said application, no doubt, appears to be dated 14th January, 1985 but there is no clear indication in that respect as the Xerox copy which is annexed to the said, affidavit as Exhibit "A" on the basis of which it could be concluded that the said application was actually filed with the Registrar of Firms on 14-1-1985. On behalf of the Petitioners an attempt is also made to produce

now before the Court a receipt bearing No. 0001580 issued by the Registrar of Firms in favour of Maganlal Jivraj and Co., of receipt of fees for registration of the firm being Rs. 54/-. On the top of the said Xerox copy "Dabholkar Sons" also appears to have been written and the said wordings are in English while the other part of the entire receipt is in vernacular. It is tried to be contended on behalf of the Petitioners across the Bar that Maganlal Jivraj and Co. are the chartered accountants of the Petitioners. Unfortunately for the Petitioners there is nothing in the affidavits which are produced in support of their petition explaining the said receipt in the name of Maganlal Jivraj and Co., Chartered Accountants, and that they have received the said receipt in respect of filing of the application of the present Petitioners for registration of the firm. In the absence of any such statement, there is no link established to show that the said receipt is in respect of the application of the Petitioners' firm. In Exhibit "B" which is a reply raising certain objections sent by the Registrar of Firms to the Petitioners, on the other hand, there is a mention that the application for registration of firm dated 5-4-1994 was received by them and they were raising objections stated thereunder in the said letter. Therefore, the contention tried to be raised that the Registrar of Firms slept over the application of the Petitioners for registration of firm from 1984 till 1994 does not get any support. The said document exhibit "B" produced by the Petitioners themselves makes it doubtful as to whether the application for registration of firms was in fact made in 1985 as claimed by the Petitioners. No attempt is made to explain the said statement made in Exhibit "B" that the application for registration was made on 5-4-1994. In the absence of any such attempt and any material produced before the Court, it is difficult to accept the contention that the application for registration of the firm was in fact made in 1985. In any event, the fact remains that on the date of the filing of the petition, the firm of the Petitioners was not registered under the Partnership Act, and therefore, on the date the petition was filed the remedy by way of a suit for recovery of the dues of the Petitioners' firm was barred by Section 69 of the Partnership Act and therefore, the said alleged debt was not recoverable by the Petitioners from the Respondent-Company. Even for a petition for winding up on the basis that the Respondent Company has not paid the debt of the Petitioners in spite of the notice u/s 434 of the Companies Act and therefore the Respondent Company is unable to pay its debts, the Petitioners must establish that the debt alleged against the Respondent Company is the debt which is legally recoverable. Even in respect of the debts which are barred by limitations if the petition for winding up is filed the debt being not recoverable due to bar of limitation, the proceedings for winding up of a company on the basis of such debt is not maintainable. Similar would be the position in respect of a debt which is barred from being recovered or being recoverable due to bar of any other statute. An attempt was made to contend, relying on the decision reported in AIR 1939 Mad. 145, Sreemannarayanarmtrthy vs. Arjanadu, wherein in the petition for adjudication of a debtor as an insolvent, it was held that such a proceeding is not to enforce a right arising from a contract and the right which the creditor who files the insolvency petition against his debtor is seeking to

exercise is the right of a creditor who finds his debtor in insolvent circumstances to have the assets of the debtor administered in insolvency and distributed for the benefit of the creditors as a body, and this is a right which is conferred upon the creditors by statute and is not a right arising out of a particular contract of loan between a petitioning creditor and a debtor, and the mere fact that the petitioning creditors constitute a firm and the debt is due to the firm in which the petitioners are partners and they cannot file a suit to recover the amount due to them unless the firm is registered, does not deprive the petitioners of their right to file a petition in insolvency. As a matter of fact, the said view, with most respect, I must say, does not appear to have taken into consideration the fact that being a debtor even under the Insolvency Act the debt must be legally recoverable, and therefore, if the remedy of the creditor is barred by any other law like the Limitation Act or even section 69 of the Partnership Act would make or render the debt unrecoverable, and therefore, cannot be considered as a debt for the purposes of the Company Petition for winding up under the Insolvency Act or u/s 434 of the Companies Act. Reliance is also tried to be placed on a decision reported in Kerala Arecanut Stores Vs. Ramkishore and Sons and Another, , wherein it was held that the right of action available to an indorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions contained in the Negotiable Instruments Act the right to sue the maker of the cheque and also the indorser, and that the right sought to be enforced does not arise from a contract and therefore the bar u/s 69(2) will not operate in such a case. The case, it appears, which was before the learned Judges of the Kerala High Court was in respect of a cheque which was endorsed to a third party and therefore, the said view was taken and which, I must say and agree is the acceptable view. But, in the present case when it is tried to be contended before me that the Respondent Company had also issued a cheque which bounced and therefore the liability of the Respondent Company does not arise from the contract as emphasised u/s 69 of the Partnership Act and it arises under the provisions of the Negotiable Instruments Act. The liability in respect of an indorsee of a cheque no doubt clearly would arise out of a statute of Negotiable Instruments Act and there is no privity of a contract between the indorsee and the indorser of the cheque at all. In the present case, the cheque was issued by the Respondent Company in favour of the Petitioners and that bounced. The said cheque was issued in lieu of the contractual obligations between the Petitioners and the Respondent Company and therefore, it cannot be said that the said cheque was not issued under the contract between the parties and it was under the statute of Negotiable Instruments Act. Apart from this, the Petitioners in the present case have not claimed that the liability of the Respondent Company arises out of a transaction of sale and purchase and therefore arises out of a contract between the parties. Incidentally a cheque was given for payment of the amounts due under the said contract and the said cheque bounced. Therefore, the Petitioners have themselves come with the case not based on the cheque alone but they have come with a case of a contractual liability arising out of an agreement of sale and purchase between the parties.

The fact of bouncing of the cheque is stated only by way of evidence to show that the said amount was accepted by the Respondent Company as payable to the petitioners at some point of time when the cheque was tendered. In view of this, the ratio of the decisions quoted above has no application to the facts of the present case.

5. On the facts as have come on record, the alleged debt of the Respondent Company is not recoverable prima facie from the Respondent Company in view of the bar of section 69 of the Partnership Act, and therefore cannot be considered as a debt for the purposes of the provisions of winding up of a company.

6. In the result, the Petition will have to be dismissed. Hence order :

The Petition stands dismissed. Certified copy expedited.