

(1994) 01 BOM CK 0013
In the Bombay High Court
Case No : Company Petition No. 13-R of 1993

Deepa Anant Bandekar

APPELLANT

Vs

Rajaram Bandekar (Sirigao) Mines Pvt. Ltd.

RESPONDENT

Date of Decision : 25-01-1994

Acts Referred:

Companies Act, 1956 — Section 433, 434

Citation : (1994) 80 CompCas 491

Hon'ble Judges : G.D. Kamat, J

Bench : Single Bench

Advocate : J.E. Coelho Pereira, for the Appellant; M.S. Usgaohar, for the Respondent

Judgement

G.D. Kamat, J.—The petitioner prays for winding up of Rajaram Bandekar (Sirigao) Mines Pvt. Ltd., a private limited company, incorporated under the provisions of the Companies Act, 1956, for short "the company", under sections 433 and 434 of the Companies Act, 1956. The basis upon which the prayer for winding up is made is that the decretal amount of Rs. 8,86,197.27 is due and payable by the company, which the company is unable to pay. The genesis of the claim is that in a Company Appeal No. 3-R of 1990, consent terms were drawn up and based upon which the Company Application No. 13-R of 1990 was disposed of. At the same time, a civil suit also was pending between the parties which was also disposed of by consent decree on the same date on April 10, 1991. In terms of the consent decree made in the company appeal, the company had to pay a large amount of over Rs. 60,00,000 in instalments payable every month commencing from April 30, 1991, and falling due at the end of each and every seceding month thereafter. It is common ground between the parties that the second instalment of Rs. 4,50,000 due and payable on May 31, 1991, was not paid and the same was paid together with interest along with the last instalment due and payable on October 31, 1992. It is equally common ground that when the defaulted second instalment was paid on October 31, 1992, the company paid interest accrued thereon at the rate of 18 per cent. per annum.

2. The case of the petitioner is that soon as the default occurred in payment of the second instalment, the entire amount became due under the decree made in the special civil suit in which the consent decree had been made and since the same was thereafter paid in instalments as stipulated in the consent decree, the petitioner has lost interest accrued thereon, viz., Rs. 8,86,197.27.

3. The story of the matter is in so far as the consent decree obtained in Company Appeal No. 3-R of 1990, it was stipulated that on failure to pay any two instalments the company petition would stand admitted and advertisement to follow. According to the petitioner, in so far as the consent decree made in the suit is concerned, failure of payment of any one instalment would make the entire amount due and payable.

4. The petition has been vehemently opposed by counsel appearing for the respondent and shortly stated the case is that consent terms were filed on April 10, 1991, in both the company appeal as well as in the special civil suit. Scheduled I, annexed to the consent terms in the company appeal, was made the basis of payment of the decretal sum in the special civil suit. Therefore, a single default of payment of instalment does not make the entire amount due.

5. Mr. Coelho Pereira, learned counsel appearing for the petitioner, now says that the debt due under decree is clear and the same cannot be denied because it flows from the consent decree. Secondly, he says when the debt is indisputable there can be no question except to admit the petition for winding up the company and, lastly, he says that the company has not raised the dispute to the claim raised by the petitioner with bona fides. He, therefore, says that based upon the decision in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, this petition will have to be admitted.

6. I am unable to accept that the company has not raised a bona fide dispute in the present case. It must be in the first instance made clear that as stipulated in the schedule to the consent decree all instalments have been paid. There was indeed one default in paying the second instalment. But the fact remains that the second instalment due was paid along with interest when the last instalment due under the decree was paid. Prima facie, the company is right in saying that a single default does not give rise to any claim in so far as the petitioner is concerned and I will presently point out that in the consent decree made in the company appeal clause 13 stipulated as under :

"... appellant company committing default in making payment of any two instalments or in the payment of the last instalment or any part thereof, on or before the due dates mentioned in the Schedule company petition shall stand admitted without any further orders and the same shall be advertised..."

In so far as the consent decree in the civil suit is concerned, in clause 5 it states :

"It is further clarified that in the event of the first defendant company committing a default in payment as provided for in the consent terms filed in Company Appeal

No. 3-R of 1990 or in committing a breach of and/or failing to comply with the undertakings contained therein, then in that event, the present decree for the entire balance amounts shall become forthwith executable and/or enforceable..."

7. Mr. Coelho Pereira's contention is that the expression "a default", in the consent decree in the civil suit would mean a single default. In my view, prima facie the contention does not appear to be correct, as a default in the consent decree of the civil suit in clause 5 will have to be read with clause 13 of the consent decree obtained in the company appeal which speaks of two defaults.

8. I have refrained from interpreting the consent decree in the company appeal as well as in the civil suit and said that I have taken only a prima facie view only because in the event petitioner feels that she has any claim against the company she can do so in execution proceedings without getting influenced by the above observations. Taking any view of the matter, therefore, inasmuch as the petitioner has a remedy, it is difficult to accept the petitioner's case in a winding-up petition. On the facts and circumstances of this case, I would not admit this petition. The same is rejected.