(2018) 08 MP CK 0015

In the Madhya Pradesh High Court

Case No : Company Appeal No.1 Of2018

Dr. Sunil Rajan APPELLANT

Vs

Saubhagya Hospital & Research Centre Pvt. Ltd RESPONDENT

Date of Decision : 02-08-2018

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 433(f), 434, 439, 483

Citation : (2018) 08 MP CK 0015

Hon'ble Judges : P.K. Jaiswal, J;S.K. Awasthi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

This company appeal under Section 483 of Companies Act, 1956 has been filed against the order dated 15/03/2018 by which the learned Company

Judge rejected the application filed by the appellant for winding up of respondent - Company under Section 433(e) and (f) read with Section 434 and

439 of the Companies Act(in short ... â??the Actâ??).

2. The appellant was having 482 shares which have been allotted in lieu of the professional fee and that the respondent-Company was incorporated

for the business of running hospital, nursing home, establishing medical stores and other matters connected therewith. The appellant was also working

in professional capacity as a doctor in the respondent-Company being a renowned orthopedic surgeon.

3. The case of the appellant is that, as per ledger account maintained with the respondent-Company the unpaid professional fee as on 1.4.2015 and

23.2.2016 was Rs.46,36,520/- and Rs.35,44,918/-. He has also not paid the professional fee for operating 94 patients between 5.11.2012 to 17.3.2016 amounting to Rs.34,50,000/-. On 23/06/2016, he had given the notice through the counsel under Section 433(e) & (f) of the Act. Thereafter, he filed

an application to wind up the respondent-company on account of the ongoing dispute between the groups of Directors and the business of the hospital

has been adversely affected.

4. Since the company has not paid the professional fee of the appellant, the charges for use of the navigation machine and other dues amounting to

Rs.89,94,918/- inspite of statutory notice, therefore, a case of winding up of the respondent-Company on the ground of inability to pay debt under

Section 433(e) of the Act is made out and prayed for winding up of respondent-Company.

5. The stand of the respondent â?" Company is that the amount as claimed by the appellant is not due and there is no document on record admitting

the liability, therefore, it is not a case of winding up under Section 433(e) of the Act. The respondent is running the hospital and the provisions of

Section 433 cannot be used to recover the disputed amount.

6. After filing of reply by the respondent, a rejoinder has been filed by the appellant raising the plea that the difference in the TDS deducted and the

amount paid to the appellant as reflected in the account support the plea of non-payment and that the company has not filed the annual return for 31.

3.2015 to 31.3.2016.

7. The learned writ court after appreciating the law laid down by the Apex Court in the matter of M/s. Madhusudan Gordhandas & Co. Vs. Madhu

Woolen Industries Pvt. Ltd. reported in AIR 1971 SC 2600, Mediquip Systems (P) Ltd. Vs. Proxima Medical System reported in (2005) 7 SCC 42,

IBA Health (India) Pvt. Ltd. Vs. Info-Drive Systems SDN. BHD. Reported in (2010) 10 SCC 553, order dated 12.11.2014 of this Court in the matter

of M/s. Alpha Packaging Ltd. Vs. M/s. Som Distelleries Ltd., passed in Company Petition No.15/1999, Resham Singh and Co. Ltd. Vs. Daewoo

Motors India Ltd. reported in 2013(Vol.116) Company Cases 529 has held that the liability as pointed out by the appellant has been disputed by the

respondent â?" Company.

8. The appellant was carrying out the operation with the aid of his own navigation machine or charge of the said navigation machine are recovered.

The amount which has been claimed by the appellant towards the professional fee, has also been denied and it has been stated that no such amount of

Rs.89,94,918/- is due and payable to the appellant. Not a single document has been filed before the learned Company Judge admitting the liability on

record. The said ledger account was not filed along with the company petition and was also not signed by any of the parties and is a disputed

document and, therefore, appellant is required to lead evidence and establish the debt and prayed for dismissal of the appeal. Para 9 to 11 of order

dated 15/03/2018, passed in Company Petition No.24/2016 are relevant which reads as under :-

9. The Supreme Court in the matter of M/s. Madhusudan Gordhandas & Co. Vs. Madhu Woolen Industries Pvt. Ltd. reported in AIR 1971 SC 2600

has held that the Company Court can refuse a petition for winding up of the Company when the claim of the petitioner is bonafide disputed by the

Company and that the principles on which the court acts are; first that the defence of the Company is in good faith and one of the substance, secondly

the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends. It has

further been held that the mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect

of it ever making a profit in the future and the court is reluctant to hold that it has no such prospect. In the matter of Mediquip Systems (P) Ltd. Vs.

Proxima Medical System reported in (2005) 7 SCC 42 while considering the scope of expression â??unable to pay its debtsâ? under Section 433(e) of

the Act, it has been held that the said expression is to be interpreted in commercial sense and machinery for winding up cannot be permitted to be

utilised merely as means for realising debts due from a company. Clarifying the position, the Honâ??ble Supreme Court held that if a debt is bonafide

disputed and the defence is a substantial one, court will not wind up the company. In the matter of IBA Health (India) Pvt. Ltd. Vs. Info-Drive

Systems SDN. BHD. reported in (2010) 10 SCC 553 the aforesaid position of law has been reiterated with further elaboration that the court should

act with circumspection and examine whether winding up petition is used as ploy to pressurise company to pay substantially disputed debt and that the

court has to ascertain whether refusal was due to reasonable cause or existence of bonafide dispute which can be adjudicated only by trial in civil court and if not so adjudicated, would cause serious prejudice to company. It has further been held that where dispute requires detailed investigation of

fact and evidence and interpretation of terms and conditions of agreement between parties, court will not proceed with the winding up proceedings and

that the court is not to hold the trial when dispute as to liability for payment of debt is bonafide substantial and not spurious, speculative, illusory or

misconceived. It has also been held that the Company Court always retains discretion but a party to a dispute should not be allowed to use the threat

of winding up petition as a means of forcing the company to pay a bona fide disputed debt and that the company court at the stage of a winding up

petition is not expected to hold a full trial of the matter. This Court also noting the above position in the matter of M/s. Alpha Packaging Ltd. Vs. M/s.

Som Distelleries Ltd. vide order dated 12.11.2014 had dismissed the Company Petition No.15/1999 since the amount due in that case was not

crystallized and there was a bonafide dispute with regard to liability of the respondent to pay the amount to the petitioner and the petitioner had failed

to prove that the condition of insolvency in the commercial sense in respect of respondent exists. Same is the position of law reiterated by the Delhi

High Court in the matter of Resham Singh and Co. Ltd. Vs. Daewoo Motors India Ltd. reported in 2013(Vol.116) Company Cases 529 with further

clarification that pendency of civil suit for realisation of amount does not oust jurisdiction of the Company Court.

10. On examining the present case in the light of the aforesaid position in law, it is noticed that the petitioner is claiming that there is unpaid

professional fee of Rs.46,36,520/- and 35,44,918/- as on 1.4.2015 and 23.2.2016 and an amount of Rs.34,50,000/- is due for operating 94 patients and

Rs.20 Lakhs towards the charges for carrying out the operation with the aid of his own navigation machine. Thus according to the petitioner a sum of

Rs.89,94,918/- is due and payable to the petitioner by the respondent-Company. This liability has been disputed by the respondent. The clear stand of

the respondent in the reply before this Court is that no such amount is due and the claim is false. It has been denied that the petitioner was carrying

out the operation with the aid of his own navigation machine or the charges for the said navigation machine are recoverable. The amount which has

been claimed by the petitioner towards the professional fee, has also been denied and it has been stated that no such amount of Rs.89,94,918/- is due and payable to the petitioner. There is no document of admitting the liability on record. Though the petitioner is placing reliance upon the alleged ledger

account for the period 1.4.2014 to 31.3.2015 and 1.4.2015 to 23.2.2016 (Annexure P/1) but the said ledger account is not signed by any of the parties

and is a disputed document, therefore, petitioner is required to lead evidence and establish the debt. In the present case the debt has been bonafidely

disputed by the respondent. That apart the respondent is a running hospital and there is no sufficient and cogent material on record to hold that the

substratum of the respondent-Company has eroded. The petitioner has also raised a plea in respect of discrepancy in the TDS amount and the

payment made but such disputed discrepancy alone is not sufficient to infer the debt or the inability to pay debt.

11. In absence of any document of admitted liability or any undisputed document reflecting the debt due, this Court is of the opinion that it would not

be proper in the facts of the present case to invoke the provisions of Section 433 of the Companies Act for winding up of the respondent-company.

Since the necessary ingredients as laid down and as discussed above in various judgments are not established in the present case, therefore, no case

for winding up of the respondent - company under Section 433(e) & (f) is made out.

9. Learned counsel for the appellant has drawn our attention to the TDS Certificate and Income Tax Returns and submitted that the TDS amount has

been shown as income and these are the corroborating evidence which has been filed along with the petition filed under Section 433(e) and (f) of the

Act.

10. The learned Company Judge committed an error in holding that these amounts are disputed amounts and appellant is required to lead evidence and

establish the debt. He lastly submitted that the ledger account were supported by the Bank statement of respondent â?" Company as well as TDS

Certificate and Income Tax returns of the appellant and, therefore the said ledger accounts was not disputed document and prayed that the impugned

order be set aside and this appeal be allowed.

11. Per Contra, Shri Vishal Baheti, learned counsel for the respondent has submitted that the documents which are on record does not show that the

amount is to be recovered from the respondent â?" company. The necessary ingredients of Section 433 of the Act are not established in the present

case and, therefore, the application for winding up be dismissed and prayed for dismissal of the appeal.

12. In various decisions of Supreme Court which has been discussed by the learned Company Judge in the judgment, the Apex Court has held that the

Company Court can refuse a petition for winding up of the Company when the claim of the appellant is bonafide disputed by the Company and that

the principles on which the court acts are; first that the defence of the Company is in good faith and one of the substance, secondly the defence is

likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends. The Apex Court in the

case of Mediquip Systems (P) Ltd. Vs. Proxima Medical System(supra) has held that the scope of expression â??unable to pay its debtsâ? is to be

interpreted in commercial sense and machinery for winding up cannot be permitted to be utilised merely as means for realising debts due from a

company. The Apex Court has held that if a debt is bonafide disputed and the defence is a substantial one, court will not wind up the company.

13. In the present case, the account/ledger has been disputed by the respondent â?" company. The stand of the respondent â?" company is that no

such amount is due and claim is false. In absence of any material the learned Company Judge has rightly held that there is no document admitting the

liability on record.

14. On due consideration of the reasoning assigned in Para 10 and 11 of impugned order, we are of the view that the learned Company Judge has

considered all the grounds which has been advanced by the learned counsel for the parties and came to the conclusion that the liability has been

disputed by the respondent â?" company and, therefore, it is not proper to invoke the provisions of Section 433 (e) and (f) of the Act. We are

completely agreed with the view taken by the learned Company Judge. No case to interfere with the well-reasoned order passed by the learned

Company Judge, as prayed is made out.

15. The Company Appeal No.1 of 2018 filed by the appellant has no merit and is, accordingly, dismissed. No costs.

