

(2002) 12 CAL CK 0018
In the Calcutta High Court

Case No : A.O.P.T. 398 and 399 of 2002 A.C.O. 96 and 97 of 2002 and C.P. No's. 362 and 404 of 2001

Evergreen Plywood Industries (P.) Ltd.

APPELLANT

Vs

Circular Leasing and Resources (P.) Ltd.

RESPONDENT

Date of Decision : 11-12-2002

Acts Referred:

Companies Act, 1956 — Section 433, 433(1), 434, 434(1)

Citation : (2003) 43 SCL 385

Hon'ble Judges : Samaresh Banerjea, J;P.N. Sinha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Samaresh Banerjea, J.—Both the appeals have been heard analogously and will be governed by the same judgment.

The A.P.O.T. No. 399 of 2002 has been preferred by the appellant/ company against the judgment and order dated May 16, 2002 passed by the learned Company Court in C.P. No. 362 of 2001 admitting the winding up petition of the respondent/petitioning creditor and directing advertisements in default of payment made by the company to the petitioning creditor. The A.P.O.T. No. 398 of 2002 has been preferred against the judgment and order dated May 16, 2002 passed by the Company Court in C.P. No. 404 of 2001.

2. The respondent filed a winding up petition against the appellant on the ground that the respondents have lent and advanced the sum of Rs. 5 lacs to the appellant by A/c Payee Cheque which was repayable on demand after 3 months along with interest at the rate of 15% p.a.

3. It was alleged that the appellant/company acknowledged the sum of Rs. 5 lacs by granting receipt and also confirmed the said amount and the interest by confirmation of accounts as on 1st April, 1998 and also issued a certificate of reduction of tax at source on 30th June, 1998.

4. It was the further case of the petitioning creditor that although the company paid interest from time to time, last of such interest was paid on 10th of August, 2000 and thereafter has not paid any interest for the principal amount or any part thereof in spite of repeated demands.

5. It was contended that because of the reasons aforesaid there is now due and owing by the company to the petitioning creditor a sum of Rs. 6,20,000, Rs. 5,00,000 towards principal and Rs. 1,20,000 towards interest from 10th of August, 2000 to the date of filing of the winding up petition at the rate of 2496 p.a.

6. It was also pleaded in the winding up petition that the petitioning creditor made a demand of the aforesaid sum through a letter of his advocate dated 20th February, 2001 and sent it by registered post with A/D to the registered office of the company, but the same was returned unserved with endorsement "not known" and "left".

7. It was further pleaded that such a notice was also sent to the directors of the company and one of the directors received the notice but refused to accept.

8. The appellant-company in its affidavit-in-opposition, first of all, disputed the service of statutory notice in its registered office.

9. It also denied its liability to pay any amount to the petitioning creditor. It was, however, pleaded inter alia, that money was advanced by the petitioner to the company in lieu of diverse quantities of 4 mm to 19 mm sheets of plywood hereinafter referred to as the said goods) supplied by the company to M/s. Devi Plywood Corporation (hereinafter referred to as the "said firm") pursuant to requests made by the petitioner and verbal assurances made by the petitioner. Such goods were supplied by the company to the said firm only upon the petitioner specifically and unconditionally agreeing to pay and/or guaranteeing payment of all the bills drawn by the company upon the said firm particularly because the said firm was not at all known to the petitioner. The company has till date made payment of a sum of Rs. 2,01,233 on account of principal to the petitioner. The said firm defaulted in making payment to the company for goods sold, supplied and delivered to the said firm. It was specifically agreed that in the event the said firm defaulted in making the payment to the company, the petitioner would step in and make payment for the supplies made to the said firm on the promises and assurances made by the petitioner to the company. However, the petitioner failed and/or neglected to pay the balance sum of Rs. 80,169.36 on account of supplies made to the said firm in spite of repeated demands made by the company. Such payment was due from the petitioner to the company as the said firm had defaulted in repaying the dues of the company and inasmuch as the petitioner had specifically agreed to reimburse the price of the said goods sold and delivered to the said firm by the company in the event of the said firm failing to pay its dues. All the said supplies were as per the agreed specifications and were duly accepted by the said firm without raising any

objection whatsoever.

10. It was further contended that there is a bona fide and serious disputes in the aforesaid matter and as such the said matter requires to be adjudicated in a properly instituted civil suit after recording evidence and as such, the winding up proceedings being in the nature of summary proceedings the said disputes cannot be decided.

11. In paragraph 7 of the affidavit-in-opposition the company furnished details of payment made by it to the petitioning creditor totalling the sum of Rs. 2,01,233.

12. In the affidavit it was also denied that the statutory notice was sought to be served in the registered office of the company.

13. It was also pleaded in paragraph 3(1) of the affidavit that due to change in the management of the company the erstwhile directors are no longer associated with the company and though the registered office of the company is situated in the Calcutta day to day affairs and general administration of the company is run by the present directors for the time being from Purnea in Bihar.

14. The learned Counsel for the appellant assailed the impugned order of the company court firstly on the ground that the learned Judge erred in law in holding that there was due service of the statutory notice upon the company.

15. It has been contended inter alia that admittedly the notice having been returned unserved with endorsement "not known" and "left" cannot amount to good service and service of such notice upon the directors of the company cannot be held to be a service of the statutory notice as under the law such service has to be effected upon the registered office of the company.

16. It has been submitted that the application for winding up made by the petitioning creditor is not maintainable in absence of service of such statutory notice upon the registered office of the company.

17. In fact, the self-same argument was advanced by the appellant-company before the trial court.

18. It is therefore first of all necessary to examine whether in view of the admitted fact that the statutory notice was returned unserved with endorsement "not known" and "left", the same can be said to be a good service.

19. The learned Judge although was of the view that the allegation necessary under Sections 433(1)(e) and 434(1)(c) of the Company Act are conspicuous by their absence in the winding up petition and the case of factual inability of the company to pay its debt was not even alleged far less proved and the case of the petitioning creditor was wholly based on the presumption under Sections 434(1)(a) and 434(1)(b) and therefore the court would have no option but to dismiss the application even if it is held that the statutory notice was not served, further held that the court is not entitled to dismiss the application as dismissing the application would amount to throwing out the petition based on wholly

meritorious claim on a technical plea which in the facts of the case should not be held to be available to the court.

20. We are, however, of the view that the aforesaid approach of the learned Judge to the problem is erroneous.

21. It is well-settled because of series of decisions that the company court is not the debt collecting agency and unless a petitioning creditor can satisfy the court within the preview of the provisions of the Companies Act that the respondent-company is unable to pay its debts, the court has no obligation to grant any relief to the petitioning creditor and the petitioning creditor can always enforce his claim in a civil suit.

22. The learned Judge proceeded on the footing that it was admitted by the company that the registered office of the company was removed from Calcutta to Purnea, Bihar and was relying on the inconsistency in the affidavit as to the address of the registered office of the company, ultimately held relying on a number of decisions that the statutory notice was served at the registered office of the company.

23. We are, however, unable to agree with the learned Judge on the said point.

Although the learned Judge relying on the expression used in Section 434 of the Companies Act, which requires the notice "to be delivered at its registered office", held that it was so delivered and the petitioning creditor cannot be blamed for non-acceptance of the same by the company as the registered office of the company was removed to Purnea, Bihar, there was no evidence before the court that the registered office of the company was so removed. In the affidavit-in-opposition it was merely pleaded by the company that although the registered office is in Calcutta, the directors of the company are mostly carrying on the business from Purnea at Bihar but it was never pleaded that the registered office has been removed to Purnea, Bihar or it was ceased to exist at Calcutta at its address.

24. That apart the learned Judge completely overlooked that in view of the specific denial of the company in its affidavit-in-opposition that there was service of statutory notice in the registered office of the company, the mere endorsement "not known" and "left" ipso facto does not amount to good service. Since there was specific denial that service of notice was effected in the registered office and in view of such endorsement as aforesaid it was for the petitioning creditor to examine the postal peon for the purpose of proving before the court that the registered statutory notice was not only correctly addressed and posted but such notice was also tendered by the peon or delivered at the registered office of the company.

25. The learned Judge coming to the aforesaid finding also relied on a number of decisions, none of which, however, in our view, has any application in the present case. Relying on the decisions of the Supreme Court in the case of Shalimar Rope

Works Ltd. Vs. Abdul Hussain H.M. Hasanbhai Rassiwalla and Others, , the learned Judge held that the statutory notice was served as it was admittedly served upon a director of the company. But in the said case of Shalimar Rope Works Ltd. (supra), the Supreme Court was considering entirely a different situation and the provisions of Order 29 Rule 2 of the CPC which deals with the provisions relating to service of summons against a corporation. In the said case admittedly the summons was served at the registered office of the company and was accepted by one of the employees of the company and the question which arose for consideration whether such employee was authorised to accept the summons.

26. u/s 434 of the Companies Act a presumption is created that the company is unable to pay its debt, if within the stipulated period after service of the statutory notice upon the registered office of the company, it fails to pay that admitted amount.

Such presumption, in our view, would not be available to the petitioning creditor unless the statutory notice is served in the registered office of the company.

27. The decision of the Supreme Court in the case of M/s. Madan and Co. Vs. Wazir Jaivir Chand, , referred to by the learned Judge, has also no application in the present case.

In the said case the Supreme Court was considering the question whether the service of notice u/s 11 of the J & K Houses and Shops Rent Control Act, 1966 can be said to have been complied with as the registered cover came back with the endorsement left without address returned to sender". It will appear from the said judgment itself, a portion of which is quoted by the learned Judge in the judgment, that the Supreme Court after discussing the practical difficulties in the matter of making endorsement by the postal peon under the facts and circumstances of that particular case held on reasonable interpretation of the aforesaid provision of the said Act the word "served" can be read as "sent by post" correctly and properly addressed to the tenant and the word "receipt" as the tender of the letter by the postal peon. In the instant case in spite of specific denial of service it was not proved by the petitioning creditor that the letter was tendered at the registered office.

28. The decision in the case of Fortune Copper Mining Co. [1870] 10 CLR 390 referred to by the learned Judge is also not the authority for proposition that the presumption contemplated u/s 434 of the Companies Act will be available even in absence of service of statutory notice in the registered office of the company.

29. The decision reported in the case of Luxmi International Gases (P.) Ltd. v. Punjab Chemi Plant International Ltd. (30) SEBI & Corporate Laws Reports 413 has also no manner of application in the present case and in the said case the notice was received by the respondent-company through its Managing Director which was held to be substantial compliance of Section 434. In the instant case it was not even proved that notice was served upon the Managing Director.

30. We are therefore unable to agree with the learned Judge that the statutory notice was served at the registered office of the company.

31. At the same time we are also unable to accept the submission of the learned Counsel appearing on behalf of the appellant that the winding up petition is not maintainable as the statutory notice was not served at the registered office of the company.

32. It has rightly been contended by Mr. P.K. Sen, Senior Counsel appearing on behalf of the respondent that the failure of a company to pay its debt within the stipulated period after service of the statutory notice in the registered office of the company, merely creates a presumption that the company is unable to pay its debt; but there is nothing in any provisions of the Companies Act including sections 433 and 434 which prevents a petitioning creditor to prove before the company court independent of such presumption that the company is unable to pay its debt.

33. On the contrary a combined reading of sections 433 and 434 of the Companies Act would clearly indicate that independent of such presumption the creditor is entitled to prove by other evidence that the company is unable to pay its debt.

As held in the case of *In Re: Indian Companies Act VII of 1913*. that invalidity of notice u/s 434 will only prevent the petitioner from getting the benefit of presumption as to the company's inability to pay its debt but the petitioner may prove such inability as a fact aliunde. Following the said decision, a Division Bench of this Court in the case of *Pandam Tea Co. Ltd. v. Darjeeling Commercial Co. Ltd.* [1977] 47 Comp. Cas. 15 held that a creditor apart from notice u/s 434, which even if treated as non-existent, is entitled to prove by other evidence that the company is unable to pay its debt.

Such being the position of law it cannot be held that the winding up petition is not maintainable in view of the invalidity of the statutory notice u/s 434.

34. The learned Counsel appearing on behalf of the appellant has relied on the decision of the Allahabad High Court in the case of *Alliance Credit & Investment Ltd. v. Khaitan Hostombe Spinel Ltd.* [1999] 95 Comp. Cas. 436; a Division Bench judgement of the Bombay High Court in the case of *N.L. Mehta Cinema Enterprises (P.) Ltd. v. Pravinchandra P. Mehta* [1991] 70 Comp. Cas. 31; in the case of *Yuba Bharati Steels v. Progressive Construction (P.) Ltd.* 1999 (2) C L J 228; in the case of *Vysya Bank Ltd. Vs. Randhir Steel and Alloys (P.) Ltd.*, .

While we agree with such judgments to the extent that service of such statutory notice in the registered office of the company is mandatory, we are unable to agree with the view that in case it is found that such statutory notice was invalid not having been served in the registered office of the company the winding up petition has to be dismissed as not maintainable.

35. The learned Counsel appearing for the respondent has submitted that no

interference should be made with the order of the company court, inasmuch as, even if the decision of the trial court that the notice was duly served may not be accepted, the court has held on merit that the petitioning creditor has been able to prove that the company is unable to pay its debt.

36. We are unable to agree. After considering the entire judgment and order, it appears to us that the finding of the court on merit cannot be sustained as there has been no proper consideration by the trial court of the merit of the case.

37. It appears to us from the very beginning the learned Judge himself was of the view that the case of factual inability of the company to pay its debt has not even been alleged by the petitioning creditor in the application and even the allegation necessary under Sections 433(1)(e) and 434(1)(c) of the Companies Act are conspicuous by their absence and the whole case of the petitioning creditor is based on the presumption under Sections 434(1)(a) and 434(1)(b).

38. After taking such view of the matter it is not therefore understood how the learned Judge back on merit held that the petitioning creditor is entitled to recover an entire sum of Rs. 5 lacs with interest at the rate of 15% p.a. and as the company is unable to pay its debt.

39. It appears to us that the decision of the learned Judge on merit is inconsistent and there has been no proper consideration on the question whether on fact the company is unable to pay its debt.

40. The learned Judge has merely held that there is no semblance of dispute and the alleged payment of sum of Rs. 15,000 without anything more is not likely to succeed in a suit either on the point of fact or on the point of law. But it has not even been decided by the learned Judge whether the dispute raised by the company as to the claim of the petitioning creditor is a bona fide one.

41. In the result both the appeals succeed and the same are hereby allowed. The impugned judgment and orders of the learned Judge are hereby set aside. The matter is now sent back to the trial court for hearing of the winding up petitions afresh on merit.

42. It is made clear that at such fresh consideration of the application the court has to examine even in absence of service of the statutory notice in the registered office of the company, whether the petitioning creditor on the existing pleadings before the court has been able to make out a proper case for winding up and has been able to plead and prove that the company is unable to pay its debt and the dispute raised by the company relating to the alleged claim of the petitioning creditor is bona fide.

There will be no order as to costs.

After delivery of the judgment, our attention was drawn by our Court Officer that only one of the appeals, namely, A.P.O.T. No. 399 of 2002 is appearing in the list and the other Appeal being A.P.O.T. No. 398 of 2002 is not appearing.

Let A.P.O.T. No. 398 of 2002 be also treated as on day's list.