

(2002) 05 CAL CK 0057
In the Calcutta High Court
Case No : C.P. No. 362 of 2001

Evergreen Plywood Industries (P.) Ltd.	APPELLANT
Vs	
Circular Leasing and Resources (P.) Ltd.	RESPONDENT

Date of Decision : 16-05-2002

Acts Referred:

Companies Act, 1956 — Section 146, 433, 434, 434(1)

Citation : (2002) 256 ITR 754

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Advocate : P.C. Sen, U. Bose, S. Sen and S. Singhania, for the Appellant; D. Sharma, for the Respondent

Judgement

Girish Chandra Gupta, J.—This is a winding up petition made under Sections 433, 434 and 439 of the Companies Act, 1956 ("the Act") by a creditor alleging that the company is deemed to be commercially insolvent inasmuch as the company failed and neglected to pay or to secure or to compound to the reasonable satisfaction of the creditor a sum of Rs. 5 lakhs together with interest. The facts of the case briefly stated are as follows:

2. The petitioning creditor lent and advanced a sum of Rs. 5 lakhs to the company by an account-payee-cheque as and by way of a short-term loan repayable on demand after three months together with interest at the rate of 15 per cent per annum. The money was lent and advanced on 2-3-1998. For the financial year ended on 31 -3-1998 a sum of Rs. 6,164 became due and payable by the company to the petitioner on account of interest. The company issued a certificate of deduction of tax at source u/s 203 of the Income Tax Act, 1961 certifying that a sum of Rs. 1,233 had been deducted on account of tax and also signed a confirmation of accounts as on 1-4-1998 confirming that a sum of Rs. 5,04,931 remained due and payable by the company to the petitioner. The company thereafter is stated to have paid interest from time to time and last of such payment was made on 16-11-1998. The company thereafter did not make

any payment inspite of demand. In the premises, a statutory notice dated 20-2-2001 was caused to be issued by the petitioning creditor to the company. The statutory notice u/s 434 addressed to the registered office of the company came back with the endorsement "not known". A copy of the statutory notice addressed to another office of the company at No. 35, Vivekananda Road, Calcutta - 7 came back with the endorsement absent on 26-2-2001 and left on 27-2-2001. A copy of the statutory notice sent to Siris Poddar, one of the Directors came back with the endorsement "refused" on 22-2-2001. Another copy of the statutory notice was, however, served on Om Prakash Sharaf, another Director of the company on 26-2-2001. The company, however, did not reply to the statutory notice.

3. The company has field an affidavit-in-opposition. With regard to service of the statutory notice upon the director, the company has alleged as follows :

"I further state and submit that the said notice is illegal, invalid and without authority of law. I further say that service and/or non-service of the purported notice upon the directors of the company is irrelevant for the purpose of the present proceedings."

With regard to service of the statutory notice by the petitioner, the company has got to state as follows :--

"I deny that any statutory notice was served upon my company in accordance with law or otherwise claimed in annexure "C" to the said petition."

4. It is alleged by the company that pursuant to an oral guarantee of the petitioning creditor, goods worth Rs. 92,477.43 were supplied by the petitioning creditor to one M/s. Jai Hanuman Plywood for Rs. 92,477.43 which, according to the company, the said purchaser failed to pay and, therefore, the company is sought to be held liable for the aforesaid sum. A further sum of Rs. 15,000 is alleged to have been paid by the company to the petitioning creditor for payment to Haldiram Bhujawala for supply of confectioneries which, according to the company, was never supplied. In order to evidence such payment, a certificate issued by Bank of Baroda has been disclosed which does not, however, show that the alleged sum of Rs. 15,000 was paid to the petitioning creditor. No other or further payment is alleged to have been made by the company to the petitioning creditor.

5. At the hearing of this application, the learned advocate appearing for the company concentrated solely on the maintainability of this application. His submission was that no statutory notice has been served upon the company and, therefore, this application is not maintainable. In support of his submission Mr. Sharma, the learned advocate appearing for the company relied on the case of Vysya Bank Ltd. v. Randhir Steel & Alloys (P.) Ltd. [1993] 76 Comp Cas 244, wherein a learned Single Judge of the Bombay High Court took the view that in the absence of service of a notice u/s 434 at the registered office of the company, the deeming provision contained u/s 434 would not spring into

operation and, accordingly, he dismissed the petition for winding up. An identical view was taken in the case of Yuba Bharti Steels v. Progressive Construction P. Ltd. [1999] (2) C. LJ. 228 by a learned Single Judge of the Andhra Pradesh High Court. He also relied on a Division Bench judgment in the case of N.L. Mehta Cinema Enterprises (P.) Ltd. v. Pravinchandra P. Mehta [1991] 70 Comp. Cas. 31 (Bom.). In this case also the winding up petition was dismissed for lack of service of notice upon the registered office of the company. In this case, however, it was held that the petitioning creditor could have maintained the application on the alternative claim that the company is not only deemed to be unable to pay its debts but that in fact also it was unable to pay its debts. It was further held that there was not even sufficient pleadings for this alternative claim and, therefore, the application was dismissed with liberty to apply afresh after proper service of notice. Mr. Sharrna also relied on the case of Alliance Credit & Investment Ltd. v. Khaitan Hostombe Spinel Ltd. [1999] 95 Comp. Cas. 436, wherein it was held the service of statutory notice at a branch office of the company could not raise the presumption as regards inability of the company to pay its debts and, therefore, the petition was dismissed. He, therefore, invited this Court to dismiss the petition in limine with costs.

6. Mr. Bose, the learned advocate followed by Mr. P.C. Sen, the learned senior advocate relying on the case of Luxmi Industrial Gases (P.) Ltd. v. Punjab Chemi Plant International Ltd. [2001] 30 SCL 413 submitted that once a notice was received by the res pendent-company through its managing director, there was substantial compliance of the provisions of Section 434.

7. He then relied on the case of Bhartiya Gramin Vikas Vitta Nigam Ltd., In re [2000] 27 SCL 249 (All.) wherein a winding up petition was admitted without service of a notice u/s 434. This was a case where the company never appeared. The statutory notice was not served because the office was found closed. It was an ex pane order, no proposition was laid down in this case.

8. He then cited the case of Ramdas & Co. v. Kiti Steels Ltd. [2001] 103 Cornp. Cas. 199 wherein a learned Signal Judge of the Andhra Pradesh High Court took the view that if the petitioner had proved indebtedness of the company and its failure to pay, the question as to whether the company was unable to pay its debts could await, until the advertisement of the petition. He also relied on the case of Pandam Tea Co. Ltd. Vs. Darjeeling Commercial Co. Ltd., but this was a case where statutory notice had in fact been served. On the basis of the aforesaid authorities, Mr. Bose argued that there has been substantial compliance with the provisions of Section 434 and the Court should reject the contention with regard to maintainability of the petitioner.

9. In the alternative, he submitted that even assuming that there was no statutory notice u/s 434 he was still entitled to succeed on the ground that the company was actually unable to pay its debts. In support of this submission he relied on a Division Bench judgment of this Court in the case of Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI) and Another, wherein the Division

Bench held as follows :--

"The fact that a creditor cannot rely upon any statutory notice of demand merely means that no presumptive or constructive liability to pay the debts, as contemplated by Section 163(1)(i) of the Act, is available to the creditor. He is at liberty to prove still, in other ways that, in fact, the company is unable to pay its debts within the meaning of item (v) of Section 162." (p. 500)

10. Mr. Bose followed by Mr. Sen vehemently urged that his client is entitled to succeed on the ground that the company is actually unable to pay its debts and, therefore, I should pass an order admitting the winding up petition.

11. Let us now examine, the petition as to whether this application can succeed on the basis of the alternative submission made by the learned counsel appearing on behalf of the petitioning creditor. The petitioning creditor in paragraphs 1 to 5 of the petition has given the statutory details. Paragraphs 6 to 14 are devoted to narrating as to how and in what sum the company became and is indebted to the petitioning creditor. Paragraph 15 of the petition alleges that no part of the claim of the petitioning creditor is barred by limitation. Rest of the allegations contained in the petition, which may be considered to be material for our purpose are contained in paragraphs 16 and 17, wherein the petitioning creditor has alleged as follows :--

" 16. A period of more than three weeks has elapsed since receipt of the said statutory notice u/s 434 of the said Act but the Company has remained totally silent and has failed to pay, secure or compound to the reasonable satisfaction of the petitioner any part or portion of the said claim and in the circumstances a presumption of commercial insolvency of the company has arisen and the company is liable to be wound up by this Hon"ble Court Sections 433, 434 and 439 of the said Act,

17. Your petitioner submits that the company should be compulsorily wound up under the supervision of this Hon"ble Court. In the facts and circumstances of the case, it is also just and equitable that the company be wound up under the provisions of the Companies Act, 1956."

12. It would appear that the allegations necessary under Sections 433(e) and 434(1)(c) are conspicuous by their absence. The case of factual inability of the company to pay its debts has not even been alleged far less proved. The case of the petitioning creditor is wholly based on the presumption u/s 434(1)(a) and 434(1)(b). Therefore, going by this submission of Mr. Bose and Mr. Sen, I would have no option but to dismiss this application.

13. I am, however, not inclined to dismiss this application for reasons which I shall presently state. In my view, dismissing this application would amount to throwing out a petition based on a wholly meritorious claim on a technical plea which in the facts of this case should not be held to be available to the company.

14. The company in its affidavit has not disputed that the statutory notice was

served upon one of its directors which I have already noticed hereinabove. The company in its affidavit has stated as follows with regard to its registered office :--

"Further though the registered office of the company is situated in Calcutta, the day to day affairs and the general administration of the company is run by the present directors for the time being from Purnea in Bihar."

15. This is an admission on the part of the company that the registered office has been removed from the city of Calcutta to Purnea in Bihar. This would further be evident from the fact that Sib Shankar Saha the deponent of the affidavit on behalf of the company is stated to be working at 9, Vidyasagar Street whereas the registered office of the company was situate at 19/1, Vidyasagar Street. There is no indication in the affidavit as to whether any special resolution for this purpose of removal of the registered office has been adopted as mandatorily required u/s 146 of the Act nor is there any indication as to whether any intimation of the change has been given to the registrar. In the absence of a special resolution, registered office of the company cannot be shifted outside the local limits of the city and doing so is a punishable offence under the aforesaid section of the Act.

16. I have no doubt in my mind that the registered office of the company has been removed from the city of Calcutta in order to sabotage any proceeding, which may be initiated against the company for its winding up. The importance of the registered office is that the register of members, register of directors, account books, register of charges, instruments creating charges are mandatorily required to be kept at the registered office. Inspection of documents and registers can only be taken at the registered office of the company. The registered office is in the nature of a principal office of the company. If the principal office of the company has admittedly become defunct or has ceased to exist can it still be insisted that the statutory notice must be served at the registered office of the company ?

17. At least I have been able to find out one authority where a contrary view was taken. In the case of Fortune Copper Mining Co. [1870] 10 L.R. E C 390 services at an office other than the registered office was held sufficient. In that case, the solicitor of the petitioning creditor filed an affidavit stating that "he had an interview with the secretary of the company, who told him that the company had for past twelve months ceased to carry on business; that they were deeply involved in debt; that money was required to meet claim, but that the company had no money and no means having expended their capital, and having attempted to raise further capital and failed. It was further deposed that the company's registered place of business had been demolished in the course of some alterations; that its business was now being carried on at an office at No. 2, Broad Street; which had not been registered; and that the secretary and two directors had been served under Rule 3, with a copy of the petition at No. 2, Broad Street. The Vice-Chancellor considered the evidence sufficient, and held

the service to be sufficient and made the order";

18. In the case of Luxmi Industrial Gases noticed above service of the statutory notice upon the Managing Director was held sufficient.

19. Order 29, rule 2 of the CPC provides as follows for the purpose of service of process, etc., upon a corporation :--

"Order 29, Rule 2 Service on corporation.--Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served-

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation carried on business."

20. In the case of Shalimar Rope Works Ltd. Vs. Abdul Hussain H.M. Hasanbhai Rassiwalla and Others, , their Lordships were considering whether mere service of the summons at the registered office of the company was sufficient. In that case, the summons had been served at the registered office of the company and the summons were accepted by one of the employees of the company who, it was alleged was not authorised to accept summons. In that background, their Lordships held that there was no sufficient service and that in order to be valid it must have been served upon a director of the company. Their lordships opined as follows :

". . . Sending summons to a corporation by post addressed to it at its registered office may be a good mode of service either by itself, or preferably, by way of an additional mode of service. But leaving the summons at the registered office of the corporation if it is literally interpreted to say that the summons can be left anywhere uncared for in the registered office of the company, then it will lead to anomalous and absurd results. It has to be read in the background of the provision contained in Order 5, Rule 17 of the Code. In other words, if the serving peon or bailiff is not able to serve the summons on the Secretary or any Director or any other Principal Officer of the Corporation because either he refuses to sign the summons or is not to be found by the serving person even after due diligence, then he can leave the summons at the registered office of the company and make a report to that effect. In the instant case nothing of the kind was done. It was not the case of the respondent in its rejoinder filed in the miscellaneous case that the service of the summons was effected in accordance with the first part of Clause (b) of rule 2 of order 29 of the code...." (p. 1165)

21. In the present case, we are faced with a situation where service of the statutory notice on the director is an admitted fact. But the objection is that it had not been served at the registered office of the company which has admittedly been closed and/or removed to an unknown place in Bihar.

22. In the case of M/s. Madan and Co. Vs. Wazir Jaivir Chand, , the question arose as to whether service of notice u/s 11 of the Jammu & Kashmir Houses and Shops Rent Control Act, 1966 could be said to have been complied with where the registered cover came back with the endorsement "left without address, return to sender". The relevant provisions u/s 11 provide as follows :--

"Provided that no such amount shall be deemed to be in arrears unless the landlord on the rent becoming due serves a notice in writing through post office under a registered cover on the tenant to pay or deposit the arrears within a period of fifteen days from the date of the receipt of such notice and the tenant fails to pay or deposit the said arrears within the specified period." (p. 632)

23. In this case their lordships held that the word "served" is equivalent to "sent by post" and the word "receipt" is equivalent to "lender of the letter by the postal peon". The relevant observations of their Lordships were as follows :--

"We are of opinion that the conclusion arrived at by the Courts below is correct and should be upheld. It is true that the proviso to Clause (i) of Section 11(1) and the proviso to Section 12(3) are intended for the protection of the tenant. Nevertheless, it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through post. AH that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgement due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee u/s 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In eithercase, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practiceis for thepostman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a Court under Order V of the C.P.C. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret the provision as requiring that the letter must have been actually

delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also as addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found", "not in station", "addressee has left" and so on. It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone, or to deliver them to some other person authorised by him. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "served" 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 at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant." (p. 633)

24. Section 434 requires the notice "to be delivered at its registered office, by registered post or otherwise". In my view, the word "served" is stronger than the word "delivered" and in any event has to be treated as a cognate. In the present case, the registered cover has admittedly been sent by registered post at the registered office but it has come back because registered office ceased to be there and has been shifted to an unknown place. Therefore, no fault can be found with regard to service of the statutory notice. I therefore hold that the notice in this case was duly served.

25. Now coming back to the merits of the matter, I hold that there is even no semblance of a dispute with regard to the claim of the petitioning creditor. The alleged oral guarantee and the alleged payment of the 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. Therefore, I hold that the so-called dispute is wholly illusory and that the claim of the petitioning creditor is wholly undisputed. The petitioner is entitled to recover a sum of Rs. 5 lakhs together with interest at the rate of 15 per cent per annum from November 1998 until the date of realisation, which the company has failed and/or neglected to pay and/or to secure and/or to compound to the reasonable satisfaction of the creditor and that the company is in the circumstances deemed to be unable to pay its debts u/s 134(1)(3). The petition is, therefore, admitted. The petitioning creditor shall advertise once in

the Statesman and once in Pratidin within 8 weeks from date. Publication in the official gazette is dispensed with. The petition is made returnable 10 weeks hence.

26. The petitioning creditor shall not take any step to advertise the petition within 4 weeks from date in order to enable the company to pay its aforesaid debts. In the event, the company pays the aforesaid sum, this petition shall remain permanently stayed. In the event the company does not pay the aforesaid sum, the petitioning creditor shall go ahead with the advertisement. In the event the company chooses to pay, the company shall also pay a sum of Rs. 10,000 on account of costs. Otherwise the question of costs shall be decided at the final hearing of the application.