
(1998) 08 AHC CK 0153
In the Allahabad High Court
Case No : Company Petition No. 43 of 1997

Fortis Financial Services Ltd.	Vs	APPELLANT
K.H.S.L. Industries Ltd.		RESPONDENT

Date of Decision : 25-08-1998

Acts Referred:

Companies Act, 1956 — Section 433
Limitation Act, 1963 — Section 18

Citation : (1999) 95 CompCas 622

Hon'ble Judges : A.K. Banerji, J

Bench : Single Bench

Advocate : R.P. Dubey, for the Appellant; R.P. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

A.K. Banerji, J.—By means of the aforesaid petition filed under Sections 433(e) and 434 of the Companies Act, 1956 ("the Act" in short), Fortis Financial Services Limited ("the petitioner" in short) has sought the winding up of the company, K.H.S..L. Industries Limited, having its registered office at Somdutt Plaza, The Mall, Kanpur (respondent-company) on the ground that the said respondent is indebted to the petitioner and having failed to pay the dues of the petitioner despite receipt of the statutory notice, shall be deemed to be unable to pay its debts and, consequently, wound up.

2. On April 22, 1997, this court issued notice to the respondent-company to show cause why this petition may not be admitted and advertised. In response to the said notice, the respondent-company entered appearance and filed a counter-affidavit (A-7). It has also filed an application stating that the winding up petition be dismissed in view of the preliminary objection raised by the respondent. A rejoinder has been filed by the petitioner to the said counter-affidavit denying and controverting the allegations made therein.

3. I have heard Shri R. P. Dubey, advocate, on behalf of the petitioner and Shri

R. P. Agrawal, learned counsel for the respondent on the question whether this petition should be admitted and advertised. I have also perused the affidavit filed by the parties.

4. Briefly stated the case of the petitioner as set out in the petition is that the petitioner which, inter alia, carries business of giving financial loans and assistance gave an intercorporate deposit of Rs. 20 lakhs to the respondent-company for a period of 90 days on September 23, 1993, and the rate of interest was 28 per cent, per annum. The petitioner got the said deposit renewed for a further period of 90 days with effect from December 23, 1993, to March 23, 1994. The deposit was not renewed thereafter and the respondent issued a cheque dated March 23, 1994, for repayment of the said intercorporate deposit. On presentation of the said cheque, the same was dishonoured. This fact was conveyed to the respondent, vide letter dated March 26, 1994, with a request to make immediate payment of the said deposit. Despite several requests some payments were made from time to time between the period May 30, 1994, to November 16, 1994, and after giving credit for the amounts paid, " the total amount due towards the principal was Rs. 2,96,680 and the total amount of interest as calculated by the petitioner which remained unpaid was calculated at Rs. 2,67,705. 43. The total outstanding, according to the petitioner, as on March 20, 1996, was Rs. 5,64,385.43. As despite repeated reminders and requests, the respondent failed and neglected to pay the said sum along with interest claimed at 32 per cent, per annum, the petitioner sent several letters to the respondent on different dates. The respondent-company acknowledged its liability, vide letter dated July 26, 1995, and promised to pay as and when long-term finance was available to it. The petitioner was, therefore, constrained to give a notice dated March 20, 1996, which was served on the registered office of the company on April 2, 1996. As there was no response to the said notice, the petitioner filed a winding up petition No. 17 of 1996, before this court. However, the said petition was got withdrawn as the respondent-company raised a preliminary objection therein that the registered office of the company was not at the place where the statutory notice was served but had been changed to its present address at Somdutt Plaza, The Mall, Kanpur. The petitioner, thereafter, served a fresh statutory notice dated November 19, 1996, at the present registered address of the company at Somdutt Plaza (11th floor), room No. 2, The Mall, Kanpur, claiming a sum of Rs. 6,27,850. 56, as due to the petitioner as on November 19, 1996. Despite the receipt of the said statutory notice, the respondent-company failed and neglected to pay the amount. Therefore, the petitioner has filed the present petition as already noted above.

5. Learned counsel for the petitioner has contended that the intercorporate deposit of Rs. 20 lakhs was given to the respondent by Empire Finance Company Limited, which has merged with the present petitioner in accordance with the scheme of amalgamation presented by the transferor-company, Empire Finance Company Limited at Mumbai, before the Mumbai High Court and the transferee-company before the Delhi High Court. The scheme has been approved by the

respective High Courts and the transferor-company has been merged with the present petitioner and under the provisions of the scheme is entitled to recover the debts which were due to the transferor-company. It has also been contended that the respondent was not denying that it had received a sum of Rs. 20 lakhs as corporate deposit and though they were disputing the amount of interest they had at least admitted in the counter-affidavit that a sum of about Rs. 38,000 was due against them which they have not paid despite receipt of statutory notice. Hence, under the provisions of Section 434 of the Act, they will be deemed to be unable to pay their debts. Consequently, this petition should deserve to be admitted and advertised.

6. Learned counsel for the respondent has, however, contended, firstly, that the petitioner has no locus standi to file the present petition inasmuch as it is not a creditor of the respondent-company. It has been further contended that even in accordance with the scheme of amalgamation as the provisions of Clause 2.1(c) of the said scheme have not been complied with yet, the petitioner has not stepped into the shoes of the merged company, and is not entitled to claim the dues of the transferor-company, namely, Empire Finance Company Limited. Secondly, it has been contended that the alleged dues of the company have become time barred. Thirdly, it has been contended that the petitioner has no right to claim any interest after March 23, 1994, when the period had expired and the deposit was not renewed. It has also been contended that the petition was not maintainable as it was not filed in accordance with Rule 21 of the Companies (Court) Rules, 1959.

7. So far as the first submission made by learned counsel for the respondent is concerned, prima facie I am unable to agree with the submission that the petitioner had no locus standi to present the petition as it was not a creditor. The scheme of amalgamation between the transferor-company, namely, Empire Finance Company Limited, with the transferee-company, which is the present petitioner, Fortis Financial Services Limited, has been filed along with the petition with the copy of the order passed by the Bombay High Court in Company Petition No. 69 of 1996. The portion which is relevant for the purposes of this submission is extracted from the said order of the Bombay High Court dated March 29, 1996, and is quoted below :

"THIS COURT DOTH FURTHER order that with effect from the appointed date all the debts, liabilities, duties and obligations of the transferor-company may be transferred without further act or deed to the transferee-company and accordingly the same shall pursuant to Section 394(2) of the Companies Act, 1956, become the debts liabilities, duties and obligations of the transferee-company and THIS COURT DOTH FURTHER order that all legal proceedings pending by or against the petitioner-company be continued by or against the transferee-company . . ."

8. In view of the above, it is evident that the dues of the transferor-company against the respondent by virtue of the said order passed on the amalgamation

petition stood transferred to the transferee company and, consequently, the said company had every right to recover the said debts and to take legal proceedings in connection therewith. It is also noteworthy that a similar order was passed on the petition filed by the transferee-company before the Delhi High Court. The copy of the said order is annexed as annexure-1 to the rejoinder affidavit which shows that in Company Petition No. 33 of 1996, the Delhi High Court by its order dated March 26, 1996, allowed the petition for amalgamation filed by the transferee-company with effect from July 1, 1995. Learned counsel for the respondent has, however, contended that according to Clause 2.1(c)(i), the transferee-company was required to give notice after the scheme was sanctioned, to the debtors intimating that the said transferee-company was entitled to recover the loan or advance paid by the transferor-company and the right of the said transferor-company to recover and realise the said debts stands extinguished. Similarly, under Sub-clause (c)(ii), the transferor-company was also required to give a notice to the debtors. Prima facie I am not able to agree with the submission made by learned counsel. Sub- Clause (c)(i) on which learned counsel has placed reliance only mentions the modus operandi to be followed in respect of the debts which are due to the transferor-company and which the transferee-company will be able to realise. It also says that the transferee-company shall give notice in such form as it may deem fit and proper. Undoubtedly, before filing the winding up petition, the transferee-company has given a notice to the respondent claiming the amount due. In any case, as apparent from the extract of the order of the Bombay High Court passed in Amalgamation Petition No. 69 of 1996 as quoted above, it is apparent that with effect from the appointed date all the debts, liabilities and obligations, etc., of the transferor-company stands transferred to the transferee-company. Consequently, it becomes the creditor of the respondent-company and has locus standi to recover its dues in whatever manner deemed proper. Learned counsel has, however, referred to the decision of the Supreme Court in the case of Marshall Sons and Co. (India) Ltd. Vs. Income Tax Officer, . I have perused the said decision but I am prima facie of the view that the same has no application to the facts of the present case and, therefore, of no help to learned counsel. The question in the present case at hand is different.

9. So far as the second submission is concerned, prima facie I am also unable to agree that the dues of the transferor-company have become time barred. As annexure-11 to the petition, the petitioner has filed a copy of the letter dated August 4, 1995, addressed to the transferor-company by the Assistant Vice-President (Finance) of the respondent-company, in which it has been admitted that the account will be cleared very shortly. This letter was in reply to the letter dated July 26, 1995 (annexure-8), written by the transferor-company to the respondent. It has been clearly mentioned in this letter that the intercorporate deposit was due for repayment on March 23, 1994, and despite several reminders the amount has not been paid back. Therefore, the same should be paid immediately and. in case the payment is not received by August 2, 1995,

the matter will be referred to the solicitors for future course of action. In the aforesaid reply, annexure-11, the respondent has not denied its liability to refund the amount of intercorporate deposit as claimed. On the contrary, an assurance has been given that the account will be cleared. Learned counsel has, however, contended that Explanation (b) to Section 18 of the Limitation Act requires that acknowledgment must be signed either personally by the party against whom such right is claimed or by an agent duly authorised in this behalf. He has contended that in the present case, nothing has been shown that the person who has signed the letter dated August 4, 1995, was either the agent or duly authorised by the respondent-company. Prima facie I am of the view that this contention cannot be accepted. Photocopy of the letter which is annexed as annexure-11 to the petition shows that it was on the letter head of the respondent-company and had been signed by one Deb Kumar Gupta, Assistant Vice-President (Finance). I am unable to accept the submission that the said officer who has signed the letter was not authorised to acknowledge the debt on behalf of the company. I am also not able to accept the allegation made in the counter-affidavit that Deb Kumar Gupta is a lower level officer in the respondent-company. It can be taken notice of that no lower level officer in a public limited company would be given the designation of Assistant Vice-President, who must be a very senior executive of the respondent-company. Prima facie I am of the view that this allegation has only been made to get over the acknowledgment made by the respondent in its letter dated August 4, 1995.

10. It was next contended that the respondent-company is not liable to pay any interest after the period of the inter corporate deposit was over. It has also been contended that a claim to interest is not a debt unless the interest is adjudicated. Learned counsel for the respondent-company has sought to support his argument by certain decisions. However, it is not necessary to refer to the said decisions at this stage as this court is not hearing this petition finally but the scope of hearing of this case is to find out prima facie whether a case for admission of the petition and for advertising the same under Rule 24 of the Companies (Court) Rules, 1959 is made out. Having heard learned counsel for the parties and having given my anxious consideration to this matter, I am prima facie of the view that a case for admitting this petition and for advertising the same is made out. It has not been denied by the respondent-company that the petitioner had given an intercorporate deposit of Rs. 20 lakhs to the said respondent for a period of 90 days along with interest at 28 per cent, per annum. The said deposit was renewed for a further period of 90 days which expired on March 23, 1994. According to the petitioner, the respondent-company has during the period May 30, 1994, to November 16, 1994, paid a sum of Rs. 17,03,320 and a principal amount of Rs. 2,96,680 was due, apart from the amount of interest. In the counter-affidavit, the respondent-company has admitted that it was liable to pay the principal amount of Rs. 20 lakhs and the interest for 90 days was Rs. 1,06,323. Consequently, the total amount payable was Rs. 21,06,323 out of which a sum of Rs. 20,18,023 has been paid and the balance

which remained to be paid was Rs. 88,310. The respondent, however, has not filed any documents or extract of account or given any details as to how and in which mode, the amount claimed was paid to the petitioner. However, the fact remains that the respondent was admitting a sum of Rs. 88,310 as due to the petitioner which they have not paid despite the service of statutory notice. As the court was prima facie of the view that the recovery of the dues was not time barred in view of the acknowledgment and has even admitted that the amount which was due, was not paid despite the service of statutory notice, a case for admitting this petition and for advertising the same was made out. However, for a running company the advertisement will have serious repercussions, it is hereby ordered that the petition shall not be advertised for a period of two months from today provided the respondent-company deposits with the court a bank draft of Rs. 88,310, in the name of the petitioner-company within six weeks from today. However, in case the said amount is not deposited as mentioned above, this order will become operative and the petition shall be advertised.

List this case for further orders after six weeks.

11. A copy of this order shall be given to learned counsel for the parties on payment of usual charges within a week.