
(1976) 02 BOM CK 0014

In the Bombay High Court

Case No : Company Petition No. 541 of 1975

G. Claridge and Company Ltd.

APPELLANT

Vs

Nav Bharat Investments Ltd.

RESPONDENT

Date of Decision : 27-02-1976

Acts Referred:

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

Citation : (1977) 47 CompCas 428

Hon'ble Judges : Aggarwal, J

Bench : Single Bench

Advocate : H.K. Shah, for the Appellant; S. Powle, for the Respondent

Judgement

Aggarwal, J.—This winding-up petition against the company named Messrs. Nav Bharat Investments Ltd. is for admission on the ground that the company is unable to pay its debts. The petitioners claim from the company a balance of Rs. 58,262.30 being the amount due in respect of the orders executed by the petitioners at the request of the company as per particulars given in the five bills (exhibits A collectively to the petition). The company made part payment aggregating to Rs. 9,500 and, according to the petitioners, it failed and neglected to pay the balance of Rs. 58,262.30. In respect circumstances, the petitioners, by their advocate's letter, dated 27th September, 1975, gave statutory notice u/s 434(1)(a) of the Companies Act, 1956, calling upon the company to pay the said balance within three weeks.

2. In its reply dated 4th October, 1975, the company pointed out that by their letter, dated 29th August, 1973, they had given complete details of the dispute with a request that the petitioners should make the arrangements for a meeting, so that the dispute about the bills might be settled with them. It was also contended that the petitioners had agreed to this suggestion and their representative came with a promise that a meeting would be arranged between the two parties for settlement and that the petitioners were avoiding to have a meeting for the last two years. It was also stated that the company started

making payment by installments of Rs. 500 per month on the basis of an agreement between the petitioners and the company, that this was a provisional arrangement, and that the final arrangement would be made at the earliest possible time, but pending such final arrangement, the company of its own agreed to make a provisional payment of Rs. 500 per month which was agreed by the petitioners. The company also denied that it had admitted the liability of the amount of Rs. 62,762.30. Reference was also made to a letter, dated 29th August, 1973, in which it was pointed out that a sum of Rs. 5,000 paid to the petitioner had not been included in the statement of account. The company, however, admitted that the petitioners' representative, Mr. Billimoria, was calling on them from time to time and that the company had been making payments to him during that period. The company denied that it was unable to meet its liability and stated that they had shown eagerness to make settlement as stated in the previous correspondence and that they were ready to settle the matter amicably.

3. In the affidavit-in-reply, it is contended that although the petitioners agreed to give delivery was not effected and the printing work was stopped. The company's clients were Tudors and their agents were Vision Advertising. One Mr. Prabhakar, a representative of the petitioners, put a proposal to Vision Advertising, the agents for Tudors, that they should pay the petitioners' bill directly, so that they may get considerable rebate and would also give copies of the bills. As the company undertakes the work on some margin, naturally there is some difference between the company's quotations to their clients and the petitioners' quotations to the company and, therefore, if the petitioners bills are given directly to the clients or if the arrangement between the company and the petitioners is disclosed to the company's clients, the company would be deprived of all the margin and the company will not be benefited, but the company will also lose its clients. Though the said Prabhakar had assured that he would not reveal the rates to the company's clients, yet he did reveal them to their clients. It was further contended by the company that the company informed the petitioners by their letter dated 10th February, 1973, which was replied by the petitioners' letter dated 13th February, 1973, in which the petitioners apologised to the company for an misunderstanding or irritation caused to the company by the said Prabhakar. It was further alleged that the petitioners, right from the very beginning, were creating troubles for the company and that they had failed to deliver the job in time and, on the other hand, they started contacting the company's clients and were attempting to confirm future orders directly from them. It was next contended that because of the tactics of the petitioners, the company suffered heavy losses and, therefore, in order to clear the misunderstanding and for resolving the dispute between the petitioners and the company, a meeting was arranged in the office of the petitioners on 11th April, 1973, and then the affidavit further states as follows :

"..... when it was decided that the bills will be settled that 50 percent, less viz., 50 per cent of Rs. 54,021.52 and out of that amount, the company has to pay

half the amount, viz., Rs. 27,010.76. Out of that amount, Rs. 9,500 were paid and deducting that amount, a sum of Rs. 17,510.76 is due and payable by the company to the petitioners, and the company is ready and willing to pay the said amount by monthly installments of Rs. 400."

4. The petitioners in their affidavit-in-rejoinder denied that a meeting was held on 11th April, 1973, where it was decided that the bills would be settled at 50 per cent. rebate, and stated that the letter, dated 13th April, 1973, would falsify these allegations. The petitioners also denied the other allegations relating to the alleged settlements on 11th April, 1973, as set out in the reply.

5. As this stage, it is convenient to refer to the letter, dated 13th April, 1973 (exhibit B to the petition). Although in this letter a reference is made to the discussion which the company had with Mr. J. S. Khamesra on 11th April, 1973, and although it states that the company had suffered very heavily because of the information relieved by one of the petitioners' employees of Vision Advertising, yet, accordingly to the company, the things should be settled amicably. The company stated that it did not want to prolong the matter and suggested the following payments schedule :

"First payment on 28th April, 1973, and subsequent payments with a gap of 3 weeks (every 4th week) to be paid up in 4 or 5 installments.

We are also glad to note that you have agreed to allow us a discount of 5 per cent. on total bill in consideration of the loss that we have suffered. We also agree to your request that in case we get the payment as per our bills from the party concerned, we will not insist for 5 per cent. discount."

6. It was on the basis of these affidavits that the matter was argued before me on 18th February, 1976, and was adjourned of orders to 24th February, 1976. The purpose of adjourning the matter for order was to enable the learned advocate for the company to consider its position before the final order was pronounced. At the hearing on 18th February, 1976, Mr. Powle, the learned advocate of the company, had applied for an adjourned for filing an affidavit in surrejoinder. That application was refused. On 24th February, 1976, for the convenience of Mr. Powle and his client, the matter was kept back. It was again before me on 26th February, 1976, when again it was kept back on the occasions for the convenience of the company. At today's hearing, Mr. Powle sought to tender an affidavit in surrejoinder affirmed on 24th February, 1976. He stated that he desired to rely upon this affidavit in order to deal with the allegation made in the affidavit in rejoinder that the orders were executed in time. After the application had been refused and the matter adjourned for orders, an affidavit in surrejoinder was sought to be prepared and tendered on the ground that it related to a denial to a denial about the orders having been executed in time. In the first place, when the application for adjournment had been refused and, secondly, when the matter was adjourned for orders, the learned advocate for the company should not have again sought to tender a surrejoinder. In the

circumstances, I do not consider it proper that the company should be allowed to make use of the surrejoinder. I have, therefore, refused to take the surrejoinder on record.

7. Before proceeding to investigate into the matter, let me bear in mind some of the well-established principles on the point.

8. It is well-settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not some substantial ground, the court may decide it on the petition and make the order.

9. If the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of section 434(1)(a) of the Companies Act, 1956. If there is no neglect the deeming provision does not come into play and the winding-up on the ground that the company is unable to pay debts is not substantiated.

10. Another consideration in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

11. No hard and fast rule can be laid down on inquiring into the question of a bona fide dispute with regard to any debt. Whether there is a bona fide dispute with regard to any debt. Whether there is a bona fide dispute or not will necessarily depend on the facts and circumstances of each particular case.

12. Again, it is well-settled that a detailed inquiry at the preliminary stage of admission should be avoided. All the same, the court has to consider the dispute raised by the company. This can be achieved by assessment and appreciation of the affidavit evidence before the court at the stage of the admission. It is for the limited purpose of arriving at a conclusion whether a bona fide, serious and substantial dispute arises or not, that the court examines the matter. The court looks out for a prima facie case. If a petitioner makes out a prima facie case, then the court would exercise its discretion.

13. Mr. Powle, the learned advocate for the company, principally argued that the dispute raised by company is a bona fide one. The affidavit evidence does show that the petitioners' representative, Prabhakar had seen Vision Advertising who are agents for Tudors, the clients of the company, and this created misunderstanding or irritation in the words of the company. Apart from this malady even on the basis of the company's own stand, a sum, of Rs. 17,510 76 is clearly admitted by the company, even if I were not to accept that at the alleged meeting of 11th April, 1973, an arrangement was arrived at, whereby the company agreed to pay 50 per cent of the amount of the petitioners, although prima facie it does not seem to be true having regard to the contents of the letter dated 13th April, 1973 (exhibit B to the petition). If such a settlement had taken place between the parties, the writer of the letter would not have failed to

incorporate the settlement in that letter. According to the company, the settlement was that 50 per cent. of Rs. 54,021.52 was to be balance of Rs. 9,500 already paid was to be deducted and the balance of Rs. 17,510.76 was to be paid by monthly Installments of Rs. 400. The letter dated 13th April, 1973, shows that the first payment was to be made on 28th April, 1973, and subsequent payments with a gap of three weeks to be paid up in 4 or 5 Installments. This procedure of payment shows the each amount was to be paid up in 4 to 5 installments beginning from 28th April, 1973, and the installments were to have a gap of about four weeks. On the other hand, the company had given a cheque for Rs. 5,000 on 30th April, 1973, which was dishonoured some time in the last week of May, 1973. Thereafter, Rs. 5,000 were paid on 24th September, 1973, Rs. 1,000 on 13th February, 1974, Rs. 1,000 and on 2nd March, 1974 Rs. 500 on 29th August, 1974, Rs. 500 on 3rd October, 1974, Rs. 500 on 23rd October, 1974, followed by two payments of Rs. 500 each on 5th December, 1974, and 10th January, 1975. The plea of the company that monthly installments at the rate of Rs. 400 were agreed, in the circumstances, appears not to be true. Furthermore, according to the company, the settlement was made on 11th April, 1973, when it was agreed that Rs. 9,500 were to be deducted. The aforesaid part payments shows that amounts were paid between 30th April, 1973, and 10th January, 1975. In the circumstances, it is strange that the company pleads a settlement on 11th April, 1973, whereas an amount of Rs. 9,500 was sought to be deducted from Rs. 27,010.76 leaving a balance of Rs. 17,510.76 as due and payable. This state of facts established that the alleged settlement is not true and the plea set up by the company is false. These circumstances lead me to the conclusion that the defence set up by the company before me is not a bona fide. If any event, on the company's own admission, the sum of Rs. 17,510.76 is due and payable at the petitioners, which sum admitted by the company has failed and neglected to pay. I am, therefore, of the opinion that the company has been unable to pay the debt of the petitioners and the presumption u/s 434(1)(a) of the Companies Act must necessarily be held in favour of the petitioners.

14. I had given Mr. Powle an opportunity to produce the latest audited balance-sheet of the company, but he was unable to do so. When the matter was before me on 26th February, 1976, he stated that his client had gone to the office of this chartered accountant to fetch the balance-sheet and, therefore, the matter was kept back till 2-45 p.m. Even at that time the balance-sheet was not produced. Even at today's hearing, the company was unable to produce the balance-sheet. This shows that the company does not have sufficient evidence to indicate that it is commercially solvent.

15. In these circumstances, the petition must be admitted. To be advertised In Maharashtra Government Gazette, Indian Express and Bombay Samachar. Hearing of the petition fixed on 26th April, 1976, Advertisement to be stayed for two weeks from today.