

(1998) 11 CAL CK 0011
In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction, C.P. No. 90 and 91 of 1998

Ganapati Commerce Ltd.

APPELLANT

Vs

The Bank of Rajasthan Ltd.

RESPONDENT

Date of Decision : 18-11-1998

Acts Referred:

Banks and Financial Institutions Act, 1993 — Section 17, 18
Companies Act, 1956 — Section 433, 434, 439
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1919 Cal 261(1) : (1999) 3 CALLT 98

Hon'ble Judges : Ronojit Kumar Mitra, J

Bench : Single Bench

Advocate : Mr. Siddhartha Mitra, for the Appellant; Mr. Mukti Chandra Ghosh, for the Respondent

Judgement

1. The Court: In this application the petitioner has prayed for winding-up of the company on the basis of allegations that having acknowledged its dues to the petitioner, the company had failed to pay its debt and that the company was insolvent and its continuance to exist constituted a threat to the commercial morality of the public. It would appear from the pleadings of the parties that, between October 17, 1994 and January 19, 1995 the petitioner had advanced and the company had received an aggregate sum of Rs. 4,25,00,000 by way of a "packing credit loan". The loan was to be repaid by the company, in terms and conditions of the agreement between the parties, by submitting export documents within a month from the date of the advance, and in any event within 180 days therefrom. Except for a sum of Rs. 22.20,000, inspite of demands, the company had failed to pay any portion of the balance amount of Rs. 4.02,80,000. According to the petitioner the company was indebted to the petitioner for an aggregate sum of Rs. 6,56.76007. On the basis of those allegations the petitioner made an application for winding up of the company. The petitioner made a second application for winding up of the company on the allegations that the company was unable to pay to the petitioner a sum of Rs.

1.50.62.908, being interest on the original dues up to December 31.1996 computed at the agreed rate. The dues which had accrued by way of interest in terms of the agreement between the parties, the petitioner had debited the amount in an overdraft account of the company, maintained by the petitioner in its books of accounts. The parties jointly requested, and the two applications were heard analogously and are disposed of by this order. The petitioner alleged that it had made several demands for repayment of its dues but the company did not and was unable to make any payment. Advocate for the petitioner argued, that the company did not reply to the statutory notice of demand, and that no defence of any worth had been made out by the company in its affidavit in opposition.

2. Advocate for the company submitted that though the applications before this court were in the nature of winding up applications, in effect the petitioner was interested in recovering its dues, and that by reason of the provisions contained in the Recovery of Debts, Dues to Banks and Financial Institution;: Act, 1993, the" two applications for winding up were not maintainable and were liable to be returned to the appropriate Tribunal, constituted to hear and dispose of such matters. He specifically placed and relied on sections 17 & 18 of the Act. He contended, that the legislature had categorically barred the intervention by the law-courts in any matter relating to or concerning the recovery by the banks of any debt due or payable, to the banks.

3. Appearing on behalf of the bank, advocate for the petitioner submitted that the bank had made applications where the only prayer was for winding up of the company, and no where in the petitions was there any prayer for recovery of its dues or debt. He argued that while the Act was in respect to recovery of the dues and debts of the banks, the Tribunal did not have the capacity to order winding-up of the company, nor would that application, if made before the Tribunal, be an application representative in nature and consequently the creditors of the company would be left in the dark. He contended, that having admitted the claim and being unable to make out any defence, the company was aware that in terms of the relevant provisions of the Companies Act it was liable to be wound-up, and that it was therefore left with no choice but to make frivolous and untenable submissions before this Court. In support of his submissions, he cited and relied on a decision reported in Andhra Steel Corporation Ltd. Vs. Bank of Baroda, .

4. Inability to pay its debt, was of course a ground for winding up a company u/s 434 of the Companies Act, 1956. Eventually, it was possible that the creditor may realise the whole or portion of its debt, along with all other creditors of the company. In a winding-up petition, Courts often make orders for payment by the company in instalments, sometimes on the prayer of the company and sometimes by the Court but always by way of affording the company an opportunity to avoid being wound-up. The question sought to be posed before this Court on behalf of the company was, why winding-up proceedings therefore,

ought not to be treated as proceedings for recovery of dues and debt and referred to the appropriate Tribunal. The answer, it would appear, was quite elementary requiring no particular exercise or any legal acumen. The only prayer which was entertained in an application u/s 434 was a prayer for winding-up of the company. The Court can only make an order for winding-up of the company should the court find that the application did warrant the grant of the prayer. It is significant that the opportunity afforded to the company to pay and avoid an order for winding-up was not executable by the petitioner in the event the company did not pay. The effect of non-payment would be more often than not provided in the order and in terms thereof the process of winding-up would ensue. It would, would it not therefore, appear that by no stretch of imagination, the proceedings taken out under sections 433, 434 and 439 of the Companies Act with a prayer for winding up of the Company, could be referred to be an action for recovery of a debt due as envisaged under sections 17 or 18 of the Act. For a closer consideration of the provisions contained in the sections it would be pertinent to set out the contents of the sections.

" 17. Jurisdiction authorities and power of Tribunals.

(1) A Tribunal shall exercise on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the bank and financial institutions for recovery of debts, due to such banks and financial institutions."

"Section 18. Bar of Jurisdiction

On and from the appointed day, the court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in section 17."

5. The law as I have noted earlier has no scope for interpretation. It has, in my view, been made abundantly clear that the bar of jurisdiction of the courts was restricted to " applications from the banks and financial institutions for recovery of debts due". Indeed, before an order was made in an application for winding up of a company, should the company pray or if in the opinion of the court it appeared to be just and equitable, the company ought to be granted an opportunity to enable it to pay its debt to the creditor and that surely would not, and I am inclined to hold does not change the character of the application. The application continues to remain an application for winding up, under the relevant provisions of the Companies Act, and was not transformed into an application for recovery of a debt. It would also appear to me, that proceedings for the recovery of a debt and proceedings for the winding up of a company are as different as chalk and cheese. A mix-up of the two would in effect result into a clear deviation from what the legislators had intended. I would have thought, had it been the intention of the legislators, there would have been a specific mention in the Act to the effect that recovery of a debt for the purpose of the Act, would

include and mean winding-up proceedings also. It was also a fact, that in order to recover a debt in the civil courts, it would be necessary to institute a suit. Recovery of a debt by way of an application made before the company court was unknown in the procedures of this Court.

6. In those circumstances I am inclined to hold that, it would be ? incorrect in law and procedure to treat an application for winding up of a company under the provisions of the Companies Act to be an application for recovery of a debt due to "banks and financial institution" as provided under the Act. The allegation made by the petitioner in a winding up petition, that the Company was indebted to the petitioner and that the company was unable to pay its debt, did not mean nor could it be understood to mean, that the application was for the recovery of the debt of the petitioner, especially as there was no prayer in the petition for recovery of dues of the petitioner. In those circumstances it would appear that the contention of the company lacked bonafide and was not maintainable in law or otherwise.

7. For those reasons, both the petitions are admitted. Advocate for the company prayed for instalments, to enable the company to pay its debt. It would appear that the company was indebted to the petitioner for an aggregate sum of Rs. 11,17,10,937.11. The company shall pay a sum of Rs. 2,00.00,000 by November 20, 1998 and thereafter pay the balance in monthly instalments of Rs. 1,00,00.000 on the 30th of each month. The first of such instalments shall commence from January 1, 1999. Upon payment of the entire dues by the company as has been directed earlier, this application shall remain permanently stayed.

8. In default of any payment by the company as directed in this order, the petitioner shall be at liberty to publish advertisements once in the "Statesman" and once in "Bartaman". Publication in the Official Gazette is dispensed with. The two applications shall in that event be returnable 4 weeks after such publication.

Parties shall act on a xerox of the signed copy of the minutes of this order.

9. Order accordingly