

(2004) 05 BOM CK 0033
In the Bombay High Court
Case No : Company Petition No. 1081 of 2002

Global Trust Bank Ltd.

APPELLANT

Vs

Killick Nixon Ltd.

RESPONDENT

Date of Decision : 06-05-2004

Acts Referred:

Companies Act, 1956 — Section 433, 434, 439

Citation : (2004) 3 BC 458 : (2005) 128 CompCas 1007

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : S.S. Shah and Priya Dwarkadas, instructed by Wadia Ghandy and Company, for the Appellant; Shekhar S. Shetye, instructed by Pandya Gandhi and Company, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—The present Company Petition has been filed by the petitioner Global Trust Bank Ltd., a Banking Corporation incorporated under the Companies Act, 1956 (for short "Companies Act") against Killick Nixon Ltd., (for short "Company") a public limited Company, having its registered office at Killick House, Killick Estate, Baji Pasalkar Marg, Chandivili, Mumbai-400 072 (Maharashtra) and thereby invoked the provisions under Sections 433, 434 and 439 of the Act with a prayer to wind up the company and appointment of the provisional Liquidator, and/or the Official Liquidator, High Court, Bombay. The petitioner Bank has basically contended that the company has inability to pay the debt of Rs. 13,99,00,377/- and interest thereon, at the rate of 16.5% p.a., in spite of due and statutory notice under the Act, dated 23rd July, 2002. Therefore, the present winding up company petition has been filed on 18.10.2002. As the Company neglected and has inability to pay the debt, and therefore, as the Company is insolvent it is just and equitable to pass winding up orders as prayed, In or about 12th September, 1998, Company has availed the bill discount facility and cash credit facility and executed various documents in

favour of the petitioner Bank and an English Mortgage in favour of the petitioner Bank of Company's land and building and in respect of movable property the mortgage deed was executed, dated 19th March, 1999 towards the security. The Company have also executed demand promissory note, deed of hypothecation of immovable property as well as agreement and other security documents, dated 19th March, 1999. In addition to this, the company have also hypothecated its stock book debts. The aforesaid transaction has been guaranteed by Snocem India Ltd. and one Mr. Tejkumar Ruia. The Bank had discounted the bills from time-to-time drawn on the Company by Snocem India Ltd.

2. Because of irregularity in making repayment and as Company were in financial difficulties one time settlement (OTS) proposal was approved in favour of the Killick Group of the Companies and as per the total liability under all credit facilities was frozen at 21,40 crores on 15th December, 2000. As per the OTS proposal, the land which was secured by way of English Mortgage was sold and conveyed by the Company to the Bank by deed of conveyance dated 1st June, 2001 for consideration of Rs. 11.50 crores and the entire proceeds were adjusted and utilised towards the loan outstanding of the Company.

3. The company, thereafter, had also committed defaults in fulfilment of the terms and conditions in terms of OTS and, therefore, the petitioner Company by its letter dated 21st, June, 2002 terminated the said OTS. On 30th July, 2002, therefore, Rs. 13,57,62,042 amount was due and payable which includes demand loan and bills discounting, along with interest thereon from 1st July, 2002 on contracted rate 16.5% compounded with monthly rests from 1st July, 2002 and payment till realisation. Therefore, statutory notice dated 23rd July, 2002 was sent for the said amount under Sections 433 and 434 of the Act and the respondent company had received the same on 27th July, 2002. The statutory notice and acknowledgement are part of the record. Therefore, the present petition has been filed on 18.10.2002 by the Bank. It may be noted here that admittedly, company had not replied the said statutory notice.

4. Respondents' Advocate resisted the said petition by its affidavit dated 5th September, 2002 and denied that the company is commercially insolvent and as per the balance-sheet ended 31st March, 2002, the company is commercially sound, no amount is due and payable by the company to the petitioner. The petitioner Bank has already filed original application No. 265/2002 against the respondents before the Hon'ble Debt Recovery Tribunal No. II, Maharashtra, for recovery of the alleged dues of the petitioner. Respondent company has already filed written statement in the said matter and the said application is still pending for hearing. Therefore, also contended that the present petition is nothing but abuse of process of this Hon'ble Court by multiple proceedings against the respondent. Mr. Shetye also contended that the respondent Bank has created the first English Mortgage in favour of the petitioner of all pieces and parcel of the land situated at Marol.

5. The respondent company has admittedly received the consideration after

selling some of the immovable properties in part satisfaction of their liability in respect of the credit facilities. The ultimate beneficiary of the amount advanced by the petitioner Bank was G.K. Group and not respondent company. Therefore, the demand and or statutory notice against the petitioner company was not correct. The reference is also made of Misc. Application No. 440 of 2002 pending before the Hon''ble Special Court, Bombay. In which lastly, order dated 5th April, 2004 was passed in respect of mortgaged land property. It is also contended that the company is running concern and there are more than 620 employees working with the respondent company and accordingly submitted the details of number of executives staff and sale staff and workers of the respondent company. It is also mentioned that the monthly income approximately is one crore. The details of other factories are also placed on record. All in all, the basic contention is that no order of winding up can be passed in the matter like this. He further read and referred the 3/4th Annual reports of account of 2001 to 2002. But nothing was placed on record report and account of years 2002 to 2003 in spite of opportunity, granted to the respondent company. Mr. Shetye on behalf of the respondent company read the Directors report to show the total income of the company and also read the auditors report. Both the respective Counsels in fact read and referred the auditors report to show their respective and or rival contentions. The relevant para is as under:

"Without considering the items in paras 6(iii), (iv), and (v) above, the effect of which could not be determined, had our observations in para 6(ii) above been considered, the loss for the year would have been Rs. 616,937,141/- (as against the reported loss of Rs. 58,772,064, the debit balance in Profit and Loss Account at the end of the year would have been Rs. 601,552,329/- (as against the reported debit balance figure of Rs. 43,387,152), current liabilities and provisions would have been Rs. 1,650,294,072/ (as against the reported figure of Rs. 1,170,743,772) and current assets, loans and advances would have been Rs. 1,570,921,012/- (as against the reported figure of Rs. 1,649,535,889/-)."

Which shows current liabilities of Rs. 1,65,294.02 and current assets, loss and advances would have been Rs. 1,570,921,012/-.

6. The petitioners Bank have also filed affidavit rejoinder dated 18th September, 2003 and again resisted the averments of respondent company even in respect of loss of more than 620 employees or livelihood as contended. It is also objected that the balance sheet for the year ended 31st of March, 2002 has not been annexed. The net loss of Rs. 5.88 crores as per the auditors balance sheet for the year ended March, 2002 is approved. The mortgage in respect of the said building still subsists and continued and the petitioner is entitled to enforce the same. The petitioners thereby reiterated the contentions raised in the petition. The petitioner Bank also contended that the security of the building is totally inadequate and insufficient, since its value is Rs. 40.35 lakhs only. The petitioner Bank, therefore, contended that the petition should be admitted and advertised, in accordance with the law, as there is no sufficient security as contended by the

respondent company.

7. Following judgments are relied by the Counsels:

(i) Company Cases 2001 (106) 52, Canfin Homes Ltd. v. Lloyds Steel Industries Ltd.

(ii) Company Cases 1978 (48) 378, United Western Bank Ltd.

(iii) Company Cases 1985,(58), 174, Bharat Overseas Bank Ltd. v. Shree Arcee Steels P. Ltd.

(iv) Misc. Appln. No. 131 of 2003 in Execution Application No. 98/2002 in Misc. Petition No. 189/1995, The Custodian v. Grey Steel Casting and Finishing Company Pvt. Ltd. and Ors. and Global Trust Bank Ltd.

(v) Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., .

8. Mr. Shah appearing for the petitioner Bank, basically relied on M/s Madhusudan Gorhandas's case (supra);

"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company."

"Where the debt is undisputed the Court will not act upon a defence that the Company has the ability to pay the debt, but the Company chooses not to pay that particular debt (See Re. A Company 94 SJ 369. Where, however, there is no doubt that the Company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed, the Court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd. 162 Ch. 406. The principles on which the Court acts are firstly that the defence of the Company is in good faith and one of substance, secondly the defence is likely to succeed in point of law, and thirdly the company adduce prima facie proof of the facts on which the defence depends."

He further relied on Bharat Overseas Bank Ltd. case (supra);

"We are of the opinion that bearing in mind the clear provisions of the Companies Act and the principles which have been discussed in detail in the Madras High Court and the Calcutta High Court judgments above cited, the rejection of the petition in this case at the stage of admission was not at all justified. The petition was required to be admitted and advertised and it is at the stage that the Court could go into the question as to whether the securities are sufficient or not and exercise its discretion to accept the petitioning creditor's claims and request for winding up or to reject the same on judicial consideration."

He further relied on United Western Bank Ltd. (supra);

"On a petition u/s 433 of the Companies Act, 1956 where the defence is that the debt is disputed, the Court has to see first whether the dispute on the face of it is

genuine or merely a cloak to cover the company's real inability to pay just debts. The inability is indicated by its neglect to pay after a proper demand and a lapse of three weeks. Such neglect must be judged on the facts of each case. Merely seeking to raise certain dispute for putting off liability for payment of the debt or creating a kind of defence to the claim will not make the debt a disputed one. Dispute which appears to have been created or manufactured for the purpose of creating pleas to cover up the liability for payment of the debt can never be considered to be bona fide and will be of no avail in resisting a winding up petition."

Held, that the company did not give any particulars of the alleged agreement. It was not clear why the company accepted the bills of the petitioner, if the petitioner were a creditor of the company. The facts showed that the dispute raised by the Company regarding the debt was not a bona fide dispute. The petition u/s 433 could not, therefore, be dismissed.

The basic reliance of Mr. Shah is also on Canfin Homes Ltd. (supra)

"There is no merit in the other contentions which have been averred. Learned Counsel appearing on behalf of the petitioner stated that the last payment which was made by the respondent company was in 1997 after which on April 1, 1998 it has acknowledged that there are Outstanding dues of Rs. 4.42 crores to the petitioner. Thereafter, various amounts have been paid by the company in pursuance of the ad interim order which passed by this Court. The fact that the company has offered additional security to the petitioner is one indicator of the fact that the security which has been made available to the petitioner is inadequate to meet the dues. This question, however, need not detain the Court any further since in my view the acknowledgement of the liability in the present case shows that there are substantial dues owing to the petitioner at least to the extent of Rs. 4.42 crores as on April 1, 1998. In these circumstances, the Company petition is required to be admitted. The Company petition is accordingly admitted and made returnable on July 4, 2001. Respondent waives service."

9. Mr. Shetye relied on the following judgments.

(i) 1986 Company Cases Vol.. 59, 969, Malbar Industrial Co. Ltd. v. Malbar Industrial Co. Ltd.

(ii) 1971 Company Cases, Vol. 41, 66, Rajasthan Spinning and Weaving Mills Ltd. v. Exttool Company Ltd.

(iii) 1968 Company Cases Vol. 38, 82, In Re Steel Equipment and Construction Co. Pvt. Ltd. -- Om Prakash Mohta v. Steel Equipment and Construction Co. Pvt. Ltd..

(iv) 1970 Company Case's Vo. 40, 259, Aluminium Corporation of India Ltd. and Anr. v. Lakshmi Ratan Cotton Mills Co. Ltd. and Ors.

(v) 1965 Company Cases Vol. XXXV, 456, Amalgamated Commercial Traders (P) Ltd. v. ACK. Krishanaswami and Anr.

10. Mr. Shetye relied on the following judgment, Malbar Industrial Co. Ltd. v. Malbar Industrial Co. Ltd. (supra)

"There is nothing in J.M. Patel v. Extrusion Process (P) Ltd. (1966) 2 C. LJ 74 (Bom.), in support of the contention of the petitioners that an order u/s 443(2) can be passed only after relied on by the Counsel to support the contention that Sub-section (2) of Section 443 cannot be invoked in the absence of effective remedies. While considering the powers u/s 443(2), the following observations were made in that decision:

"It is true that the Court hearing the application under Clause (f) of Section 433 may u/s 443(2) refuse to make the order for winding up if it is of opinion that an alternative remedy is available. It is then for the Court to consider whether such remedy would be effective and not or merely a doubtful remedy and whether the petitioner is acting in an unreasonable manner in asking the company to be wound up."

It is now well-established by decisions of the Supreme Court and this Court that a Court can refuse to make an order of winding up a company on an application filed under just and equitable clause, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy; that safeguard against oppression in management has been provided under Sections 397 and 398 of the Act; that relief u/s 433(f) based on just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interest of the company and that Sections 397 and 398 provided an effective remedy to a contributor who has filed an application under just and equitable clauses alleging oppression of minority, misconduct and mismanagement."

He further relied on the judgment, Rajasthan Spinning and Weaving Mills Ltd. v. Textbook Company Ltd. (supra),

"The-question whether a dispute is bona fide or not depends upon the circumstances of each case. The test is whether the dispute is raised only to avoid payment of the debt and not based on a substantial ground. Bona fide dispute means that the dispute is based on a substantial ground and if such a dispute is raised, the Court should refuse to make an order of winding up even if only a part of the debt is disputed on a substantial ground vide. O.P. Mohta v. Steel Equipment and Construction Co."

He further, relied on the judgment, Steel Equipment and Construction Co. (P) Ltd. v. Steel Equipment and Construction Co. (P) Ltd. (supra).

"In England, the Courts have refused to make order for winding up when a part of the debt is disputed although admitted to exceed fifty pounds; Brighton Club

and Norfolk Hotel Col., In re, London and Paris Banking Corporation In Re, Gold Hill Mines, In Re. In the case of Cardiff Preserved Coal and Cake Company, however, Lord Chelmsford expressed a contrary view, which in my opinion is not only consistent with the relative sections but also reason. In the case of Company v. Sir Rameswar Singh, Chief Justice Sanderson extended the scope of disputed debt; "it appears to the Court that on the materials before it there is ground for supposing that there is a bona fide petition was made." Therefore, according to this decision, the bona fide dispute need not extend to the whole debt but is sufficient if a substantial part thereof is bona fide disputed. In the case of Bharat Vegetable Products, In re, the same trend is discernible.

In the case of a bona fide dispute, the Court may decide finally the disputes as to the debt in order to save costs as was done In re Imperial Silver Quarries Company and Landauer and Co. v. Alexander and Co. or the Court may adjourn the petition to enable the question to be decided in an action, with or without a direction that the entire amount of the debt or a part thereof be paid into Court or dismiss the petition. (See same paragraph at Halsbury's Laws of England)."

He further relied on (1970) 40 Comp Cas, 259

"In Re Chapel House Colliery Co. Bowen L.J. observed that even a proved creditor could only claim a right to "equitable execution" "ex debito justitiae" in a special sense. He held that the Court had to refuse, in that case, on equitable grounds, a winding up order altogether despite the proved inability of the Company, within the terms of the statute, to pay its debts,

Learned Counsel for the petitioner relied largely on English decision, which are only persuasive authorities for us, on the ground that the provisions of our Companies Acts are based on the corresponding provisions of English Acts, English cases are not wanting where it had been held that "the Court is not bound ex debito justitiae to make an immediate order to wind up a company, even where a petitioning creditor's debt exceeding the required amount is admitted and net paid within the time fixed by statute after a demand by notice, without giving time or opportunity, in the exercise of its discretion, to make arrangements to pay up (see e.g. In re Brighton Hotel Company and In re Western of Canada Oil, Lands and Works Company).

In W.T. Henley's Telegraph Works Co. v. Gorakhpur Electric Supply Co., Iqbal Ahmed J. observed, with regard to this Court's discretionary power now found in Section 433 of the Act, to wind up a company:

"It would thus appear that the company is unable to pay its debts. This fact, however, does not necessarily entitle the petitioner to an order for the winding up of the company, as the discretion to pass such an order, even, in the case of the inability of a company to pay its debts, is by Section 162 vested in the Court."

I am unable take a different view of the power contained in provisions of Section 433 of the Act. I, therefore, respectfully dissent from some of the views

expressed recently by Vimadalal J. of the Bombay High Court In re Advent Corporation (P) Ltd. when admitting a winding up petition. Moreover, on facts, the position of the petitioners appeared equitably strong there.

Although the power to wind up is discretionary, it has been exercised judicially. This means that it is only where the balance of equities is shown by a petitioner to tilt appreciably in favour of a winding up order that it will be made *ex debito justitiae*. It is in this special sense that a petitioner relying on grounds contained in Section 433 can get a winding up order as a matter of right. It is issued as a matter of right when the proved contents of the right produce a compelling effect. It is not granted mechanically as a matter of course on proof of certain facts. In other words, equitable considerations have decisive effect even when the power to wind up a company is invoked under a clause of Section 433 other than the general, just and equitable Clause (f). The provisions of Section 434(1) determine when the requirements of Section 433(e) will be deemed to be fulfilled, but they do not lay down when a winding up order must necessarily be passed. It is not true that a creditor is not bound to wait and give time to the company beyond the time prescribed after the statutory notice before filing his petition. But, the Court may, if there are sufficient counter-balancing equitable grounds, deny an immediate winding up order, or, in appropriate cases, even refuse it altogether in spite of the proved inability of a company to pay its debts. Exercise of such discretionary power must necessarily be governed by justice and equity."

He further relied on (1965) 35 Comp Cas 456 ;

It is well-settled that "a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the Company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order."

11. After considering the above judgments as well as the merits of the matter one thing is very clear that the respondent company even submitted and argued through its Counsel that there are sufficient securities available for the petitioner to recover their debts or amount payable but at the same stroke, the petitioner company is objecting from all angles and side, even before DRAT where the application filed by the petitioner for recovery of the same amount is pending, and that application is also still pending for hearing. There is no bar to file winding up petition even if there is application filed or pending before DRT for recovery of the said amount by the petitioner Bank against the respondent company. If, the respondent company has the capacity and wants to deposit or

make the payment as prayed, the company should have shown its bona fide by making the deposit by this time, as admittedly, there is no dispute so far as liability part is concerned. The defence raised by the respondent company at this stage through its affidavit is not bona fide and genuine. The parties are making the statement that they have the capacity and/or petitioner Bank is secured in view of the security already available of the mortgaged property or such other property, then there is no reason to oppose the same and should have in fact conceded for further sale or disposal of the said property, so that the petitioner Bank in given case would have recovered the debts or amount, as recoverable. The petitioner company here is at one ? stroke resisting winding up petition, as well as application before DRT on merit. However, at the same stroke also making submission that amount is fully secured and therefore there is no question of order of winding up as prayed by the petitioner. In my view this defence is not bona fide and, admittedly, in view of the statement recorded even in the balance sheet as referred, the respondent company, is not solvent or not in sound financial position. The respondent company has, admittedly, in spite of repeated requests "neglected to make the payment" and it shows difficulties and "inability to pay the debt," in spite of statutory notice which was duly received by the respondent company but not denied or replied at any time. AH this is sufficient to justify the submission raised by Mr. Shah, in view of the quoted para of the judgments relied by Mr. Shah that the present petition is needed to be admitted and advertised.

12. Mr. Shah further contended that the security offered by the respondent company is inadequate to meet the dues. Mr. Shetye, however, contended that those securities are sufficient and petitioner Bank is free to release the amount by selling those properties, but at the same time the respondent company is opposing all the recovery proceedings filed by the petitioner Bank, specially original application before DRT for recovery of the same amount as per the statutory notice in question. In my view the petitioner Banks are always in need of money and they want to recover their amount, in accordance with law. If person like respondent oppose the same and still making statement that the financial position of the company is sound and it is running concern, I see there is no reason that the respondent company should not make the payment as prayed by the petitioner Bank. In this case admittedly they have neglected to make the payment and, therefore, it is just and equitable at this stage that the petition should be admitted and advertised. As on record admittedly, the respondent company is liable to make the payment as prayed as per the statutory notice and in spite of the demand till this date, unable to make the payment within stipulated period.

13. Conclusion: Respondent company's dispute to the debt is not bona fide or genuine. There are inconsistencies in defences raised by the respondent company. The material placed on record itself justify to hold that the respondent company is not financially sound and have no ability to pay the debt. The securities are not sufficient and are not available to release the debt of the

petitioner Bank. Assumed for a moment and as contended by the respondent company's Counsel, that those securities are sufficient, but the conduct and the defence raised, shows that respondent company is not ready and willing to make the payment and/or consenting for the sell out or such other steps, so far as the debt of the company as prayed can be released. The respondent company if have intention to make the payment, and have capacity to pay the particular debt, in that case, in spite of statutory notice and demand, till this date, "neglected to make the payment." Such neglect is clear on the facts of this case. One way or the other, respondent company objecting and/or raising objections to the sell out of the mortgaged property or such other properties. The petitioner company or such other person, in such case, cannot wait for settlement of dispute of such properties, specially when such disputes have been created for the purpose of creating such defences to postpone the liability for payment of the debt and are pending since long.

On facts as per the balance sheet and material on the record, as well as the submissions made by the Counsel for the parties, further shows that the alternative remedy and/or pending recovery proceeding before DRT that itself cannot deter the Court from passing, if case is made out, the order of winding up, as prayed by the petitioner Bank, specially when respondent company is contesting the said proceeding also. Merely because respondent company as alleged is running concern and employees are working, that itself cannot be the reason to reject such winding up company petition specially, when other ingredients of Sections 433 and 434 are available.

14. In the facts and circumstances of the case, it is just and equitable to pass the winding up order in the present matter. There is no material on record to exercise the judicial discretion in favour of the respondent company. The case falls within the ambit of Sections 433 and 434 of the Companies Act and, therefore, I am inclined to pass order in favour of the petitioner Bank.

15. All the authorities cited by the Counsels for the respective parties are distinguishable on the fact itself. The law as laid down and reproduced above itself is foundation for this view. However, the respondent company is thereby given full opportunity to deposit the money within 8 weeks from the receipt of the copy of the order and/or settle the matter with the petitioner Bank, failing which following order will operated, forthwith.

16. The petition is admitted and made returnable after three months.

* The petition be advertised in Free Press Journal, Navshakti, and Maharashtra Gazette only.

* The petitioner should deposit sum of Rs. 2,500/- with the Registrar, Prothonotary and Sr. Master, within a period of 8 weeks from today.

* C.C. expedited.

* Parties concerned to act on a simple copy of this order, duly authenticated by

the Court Stenographer/Company Registrar of this Court.