

(1999) 02 BOM CK 0004

In the Bombay High Court

Case No : Company Petition No. 420 of 1996

Gujarat State Financial Services Ltd.

APPELLANT

Vs

Maegabyte Consultancy Services Pvt. Ltd.

RESPONDENT

Date of Decision : 17-02-1999

Acts Referred:

Companies Act, 1956 — Section 434(1)

Citation : (2003) 115 CompCas 165

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : T.K. Cooper, instructed by, Dave and Girish and Co, for the Appellant; Rahul Rao, instructed by , Zohair and Co., for the Respondent

Final Decision : Dismissed

Judgement

F.I. Rebello, J.—The petitioners have filed the present petition for winding up of the company. While admitting the petition by order dated March 16, 1998, this court restricted the petition to Section 434(1)(c) of the Companies Act, 1956.

2. Section 434(1)(c) of the Companies Act reads as under :

"434. (1) A company shall be deemed to be unable to pay its debts--

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company ..."

3. The only averment relied on by the petitioners in so far as ground for winding up is concerned is paragraph 23 of the petition. The petitioners have therein set out that very fact that the cheques issued by the respondents were dishonoured by non-payment also bears out the fact that the company has no resource to meet its liabilities. In the circumstances, the company has become commercially insolvent and it is just, proper and necessary that the company be wound up

under the directions of this court.

4. At the stage of opposing the admission of the petition, the company had filed an affidavit of one Jayshree alias Jay Kunder. In reply to para. 23, the company dealt with the said averment in para. 32. The company denied that the company was due and payable to the petitioners a sum of Rs. 2,59,22,760 or any other sum as alleged. Thereafter, it was averred that the company denied that the company is unable to pay its debts allegedly arising in normal or ordinary course of business as alleged. It was further averred that the company denied that the company has no resources to meet its liabilities. It was further denied that the company had become commercially insolvent or that it was just or proper or necessary that the company be wound up under the directions of this court. A rejoinder was filed to the said reply. The averments in paragraph 32 were replied to in paragraph 20. The only averment in the said paragraph is that the petitioners repeat what is stated in the petition and deny all that is contrary thereto.

5. In the face of these pleadings it will have to be considered as to whether the petitioners have made out a case u/s 434(1)(c) of the Companies Act. There have to be two requirements in so far as Section 434(1)(c) is concerned to raise the presumption that the company is justly indebted to the petitioners. The first requirement is that the petitioners must show that the company is unable to pay its debts and secondly, in so deciding the court must take into account the contingent and prospective liabilities of the company. It may be true that the petitioners have been able to show that monies were advanced by the petitioners to the company and that the cheques when presented were dishonoured. That would be the first requirement, namely, that the company owes monies to the petitioners. However, that alone by itself is not sufficient. The second requirement which must be satisfied and which the court must take into consideration are the contingent and prospective liabilities of the company. A perusal of the averments in the petition and in the affidavit in rejoinder and the annexures thereto, there is no material placed before the court to show that the contingent and prospective liabilities of the company are such that they are unable to meet the debt claimed. It was sought to be contended on behalf of the petitioners by their learned counsel that the very fact that the cheques given by the company when presented were dishonoured by itself is an indication that the company is insolvent. To this the reply on behalf of the respondent-company is that they have contested the said contentions raised on behalf of the petitioners. It is further pointed out that it is on the petitioners to establish that on taking into account the contingent and prospective liabilities the company will not be in a position to pay its debts. The argument on behalf of the petitioners that the balance-sheet and profit and loss account have not been signed is countered by contending that the same would have only been required if the petitioners had made necessary averments in the pleadings. In the absence of those pleadings the company was not bound to reply to the averments wherein the contents were not specifically raised. Learned counsel has relied on the judgment of a learned

single judge of the High Court at Calcutta in the case of Om Prakash Mohta Vs. Steel Equipment and Construction Co. (P.) Ltd., . Before the learned single judge of the Calcutta High Court such a contention was raised. It was submitted that the omission to file the balance-sheets and the omission to give particulars of the assets and liabilities of the company in the affidavit-in-opposition raises a strong presumption of commercial insolvency u/s 114 of the Evidence Act, 1872, because the company which had special means of knowledge of these facts had not chosen to disclose them. The said contention was rejected by the learned single judge on the ground that the burden of proof of proving insolvency is on the applicant. It was thereafter set out that the allegation as to the insolvency made by the petitioner has been denied by the respondent-company. In reply the applicant did not rely on specific facts and not even the last balance-sheet which was published and distributed to the shareholders. The learned single judge thereafter proceeded to hold that in his view the omissions of the respondent are not sufficient to discharge the burden of proof, and in any event not sufficient in this matter. To my mind the facts before the learned single judge in the aforesaid judgment and the facts before this court are similar. The duty to prove that the company is commercially insolvent is always on the person who comes to the court. In the instant case it is the petitioner. Section 434(1)(c) itself has provided what factors the court must take into consideration in the case of commercial insolvency. It is in that aspect that the petitioners are bound to place all materials to show that the company is commercially insolvent. In the instant case in para. 23 the petitioners had pleaded that the company is commercially insolvent. The respondent in para. 32 in their reply had denied the said allegations. In the face of this the burden shifted on the petitioners to produce material before the court to show that the company was commercially insolvent. The petitioners did file a reply but chose not to produce any material to show that the company is commercially insolvent. By that I mean, that there was no material for the court to consider the contingent and prospective liabilities. In a case of the company petition where the company is to be wound up these requirements have to be strictly considered.

6. At the hearing of the petition at the Bar, learned counsel for the petitioners has argued that they had addressed letters to the respondent-company to produce the balance-sheets. This correspondence is of the year 1998. Mere exchange of correspondence did not stand in the way of the petitioners examining the record of the Registrar of Companies and/or amending their petition to bring out the facts that either the balance-sheets are not filed and/or that the contingent and prospective liabilities are such that the company was commercially insolvent. Mere exchange of correspondence would therefore be of no assistance in deciding the controversy arising in this petition.

7. In the instant case as the petitioners have not placed the above material, it is not possible to find out whether the company is commercially insolvent as the material pertaining to contingent and prospective liability is not available to this court.

8. For the reasons aforesaid, I find no substance in this petition which is accordingly rejected.

9. In the circumstances of the case, there shall be no order as to costs.