

(1998) 11 KAR CK 0065
In the Karnataka High Court
Case No : Company Petition No. 56 of 1995

Hariom Firestock Limited

APPELLANT

Vs

Sunjal Engineering Pvt. Ltd.

RESPONDENT

Date of Decision : 09-11-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 5
Companies Act, 1956 — Section 433

Citation : (1999) 97 CompCas 249

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : Jayavittal Rao Kolar, for the Appellant; G. Krishnamurthy, for the Respondent

Final Decision : Dismissed

Judgement

M.F. Saldanha, J.—This is a proceeding u/s 433 of the Companies Act, 1956, and the petitioners contend that the respondent-company is liable to be wound up, the principal ground being that a substantial amount of money that was claimed from the respondents is outstanding, the respondents having failed to pay it should be deemed to have become commercially insolvent and, therefore, disqualified from continuing to do business. The facts are hardly material because the two learned counsel who have argued the case with a high degree of skill and have been of considerable assistance to me, have basically proceeded on points of law. The petitioners claim that in the year 1987, they had advanced a sum of Rs. 6,00,000 to the respondent-company and that the amount being outstanding, they were required to institute a recovery suit in the civil court at Ahmedabad, since the claim was getting time-barred. According to them, the fact that the respondents have not responded to the statutory notice served on them to pay up the amount and complied with the requisition contained therein is prima facie evidence of their commercial insolvency and that consequently, apart from the recovery proceedings pending in the civil court, it is in the public interest that the company be wound up as otherwise, several other vulnerable

parties can also run into avoidable difficulties. I need to mention here that the defence pleaded on behalf of the respondents is that their company is not only running but that it is perfectly solvent that it is showing substantial turnover but that the reason for the non-payment is because the company maintains that the amount is not repayable by it. Briefly stated, their defence is that one Sri Khaithan had negotiated with the petitioners, which position is admitted, for securing finances to various companies of his group one of which is the respondents and, according to the defence, even some amount was paid in Bombay. They dispute the liability on the ground that this was a personal debt of the person who borrowed it and, secondly, on the ground that the company is not liable to repay the amount as it was not received by the company and used by it. I refrain from making any comment with regard to the contentions raised on both sides because the dispute is subjudice before the civil court and neither of the parties are either to be benefited or, prejudiced by the observations made in the company proceedings.

2. Mr. Kolar, learned counsel who represents the petitioners, has taken me through the averments in the petition and he submits that unless and until the respondents are able to demonstrate to the court that they have discharged the debt, refusal to pay on the ground of all sorts of specious defences is only a cover-up for inability to meet the liability and he submits that the necessary ingredients having been made out u/s 433 of the Companies Act the consequences must follow. I need to record here that Mr. Krishnamurthy, learned counsel who represents the respondents, has taken up a two-fold plea. Firstly, he contends that this petition is not maintainable because this court ought to accept the position that the respondents have presented a bona fide defence the merits of which will have to be examined and that the civil court is seized of the matter and, therefore, the first ingredient u/s 433, namely, that the company court must be satisfied that the liability is undisputed or beyond dispute is not satisfied. In view of the importance, of the law point involved, I shall discuss this issue separately. The second limb of the argument is that this petition will have to be dismissed on the ground that according to learned counsel there was no enforceable debt in existence in the year 1995, when the present petition was presented. What is contended is that the transaction was of the year 1987, and if the petitioners contend that the loan was not repaid the law would bar further action after the expiry of three years and that, therefore, the present proceeding instituted in the year 1995, is one commenced at a point of time when the original loan has become time-barred and, therefore, unenforceable. The submission is that if there is no liability in existence then the ingredient that is condition precedent for the institution of winding up proceedings is also non-existent and that this proceeding is virtually still born and would have to fail on this ground.

3. With regard to the first head, Mr. Kolar pointed out to me from the documents produced that a summary suit was filed by his clients before the civil court because the claim was getting time-barred. He has demonstrated to me on the

basis of case law that the law does certainly take cognizance of dual proceedings of this type and his argument was that if the object of the Companies Act winding up proceedings is to stop the operations of insolvent companies, as far as the recovery of the amounts that are due is concerned, the law does permit the institution of appropriate recovery proceedings in a civil court and that the two remedies are not mutually exclusive. This argument advanced is not only tenable but correct but I need to add one rider, namely, that the situations in which the courts have permitted such a course of action have been in cases where the winding up proceedings have commenced first and the party, thereafter approached a civil court and not vice versa as has happened in the present case. Secondly, Mr. Kolar submitted that the court has got to take a realistic view of what transpires in summary suits. Learned counsel pointed out to me that almost all summary suits are defended and that an affidavit-in-reply invariably makes out some sort of a defence and he was quick to point out that it is in a microscopic number of cases that the civil courts straightaway pass a decree in a summary suit and that invariably the moment a defence is pleaded, the civil court grants leave to defend and transfers the case to the list of contested cases. The thrust of the argument proceeds on the footing that merely because a defence is pleaded that the case is mechanically transferred to the list of contested cases this is absolutely no ground or indication of the fact that there is any substance in that defence and that, therefore, this court must independently evaluate whether the defence pleaded before this court which is the same one as the one pleaded before the civil court, is worthy of any credibility. Learned counsel pointed out that the order granting leave to defend does not bind this court and that the evaluation has to be independently done and he, therefore, made his submissions with regard to the merits of the defence for purposes of indicating to me that it is absolutely sham and that therefore, the winding up proceedings ought to be entertained and proceeded with.

4. Mr. Krishnamurthy, who represents the respondents met this argument by pointing out to me that under the provisions of Order 37, particularly Rule 5 thereof, the scheme of the law is not that merely because the defence is entered leave to defend is granted, On the contrary, learned counsel demonstrated that the situation is exactly the opposite in so far as it is the duty of the court to decree the suit if there is no defence or the defence is worthless, There is a duty cast on the civil court to examine the defence and if what one may call a prima facie defensible case or a plausible defence in such cases has been presented, then alone is leave to defend granted. I need to accept the argument advanced by Mr. Krishnamurthy, because first of all this position in law is correct but for the additional reason that when the court granted his client leave to defend, one would have to presume that the court applied its mind to the defence and then only granted leave to defend. The real test would come out of the fact that even if in a few instances leave to defend might have wrongly been granted it is open to the aggrieved party to get that order corrected. In this case, the petitioners have not carried the matter further and would therefore be precluded from going

behind that order and contending before this court that the order of leave to defend is either incorrect or unjustified. While that order does not certainly bind this court, it does require to be respected because it is an order of the civil court before which the dispute is pending and an order of a court before which the entire dispute has been placed for adjudication by the parties whereas in this proceeding, it is only one facet of the dispute that has come up for consideration. Also, since the issue is sub judice before the civil court, propriety would require that this court should not make any observations that could either affect or benefit either of the parties. Suffice it to say that in the present proceedings this court is required to evaluate as to whether there appears to be a genuine valid dispute with regard to the liability claimed and the order passed by the civil court is sufficient for this court to answer the question in the affirmative. This is not to indicate that the defence pleaded is either correct or that it is genuine or that it will succeed but the fact is that the liability has been seriously disputed and unless it is examined and adjudicated upon, it cannot be categorised as an undisputed liability and if this is the position, it would not be permissible to proceed further in the winding up proceedings.

5. The respondents' learned counsel drew my attention to a few decisions. In the case of Divya Export Enterprises Vs. Producin Private Ltd., , this court took the view that a defence pleaded is required to be summarily evaluated in the manner in which a court would examine the reply in a summary suit. In the decision of Airwings Private Limited Vs. Viktoria Air Cargo Gmbh Langer Kornweg, the Division Bench has laid down various guidelines in relation to winding up petitions but what is argued by the respondents' learned counsel will effectively hold good while considering the second point urged by him. In the case of Globe Detective Agency P. Ltd. Vs. Subbiah Machine Tools P. Ltd. and Others, , the court has laid down that the enquiry which this court is required to embark upon in Section 433 proceedings basically postulates that the court has to address itself to the question as to whether an arguable defence has been made out. It is precisely the aforesaid principles that I have borne in mind while hearing the learned counsel on both sides and recording my findings in this order.

6. As regards the second point, Mr. Krishnamurthy's submission is that the substratum of this petition gets eliminated if one were to look at the relevant dates and the facts that on the petitioner's own admission the loan was advanced in 1987, whereas the present petition is filed in 1995. It is pointed out that under the provisions of the Limitation Act the debt, assuming one existed, has become time-barred in 1990, and that, therefore, was no debt in existence or no enforceable claim in 1995. Learned counsel sought to rely on the observations of the Division Bench in the decision referred to supra which, inter alia, stipulated that it is a condition precedent that there must be a genuine debt in existence and that one of the tests is that the court must check whether the debt pleaded is not barred by limitation.

7. In response to this contention, Mr. Kolar submitted that the argument is

untenable because the debt has not been extinguished. He points out to me that even though the respondents have not acknowledged their liability the petitioners have instituted legal proceedings within the period of limitation and that those proceedings were very much pending and alive in 1995, when the present petition was filed. It is pointed out that since that proceeding is yet to be concluded through a process of legal fiction the debt in question is deemed to be still alive and learned counsel submitted that there is absolutely no substance in the argument that in 1995, there was no enforceable debt in existence because he submits that the suit in question was for enforcement of that very debt and that it was very much in existence. To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and de hors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted.

8. Having regard to the aforesaid situation, the consequences are inevitable in so far as the present proceeding would have to fail and this petition stands dismissed. I need to, however, clarify that nothing stated in this petition shall affect the civil proceedings that are pending between the parties and that the forum in question shall proceed independently, strictly on the merits of that record and the law applicable to the case.

9. The petition accordingly fails and stands dismissed. No order as to costs.