
(2004) 01 BOM CK 0054
In the Bombay High Court
Case No : Company Petition No. 158 of 2003

Hy-Line International

APPELLANT

Vs

C and M Hy-Line Farms (P) Ltd.

RESPONDENT

Date of Decision : 09-01-2004

Acts Referred:

Companies Act, 1956 — Section 433

Citation : (2004) 2 BomCR 10 : (2004) 2 CompLJ 506

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : F. Palkhivala, instructed by Prem Ranga, for C and M Farming, M.R. Sathe, Virendra V., Tulzapurkar and M.S. Doctor, instructed by Kanga and Co, for the Appellant; Virag V. Tulzapurkar and S.H. Parikh, instructed by Crawford Bayley and Co., for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.

1.-This petition is filed under sections 433 and 434 of the Companies Act praying for winding up of the company, named, "C & M Hy-Line Farms (P) Ltd." having registered office at C & M House, N.D. Patel Road, Nasik-422001. The petitioner is a partnership firm formed under the laws of Iowa, USA. The petitioner along with one C & M Farming Ltd., who has intervened in this petition (hereinafter referred to as the "Intervener Company" for the sake of brevity) an India based company, entered into joint venture to form the company which is proposed to be wound up by this petition, viz., C & M Hy-Line Farms (P) Ltd. (hereinafter referred to as "company" for the sake of brevity). It is not necessary to burden this judgment with the terms and conditions of the joint venture agreement. Suffice it to point out that under the said agreement, the petitioner was obliged to supply grandparent birds to the joint venture "company" in India on a continuous basis, as can be discerned from Clause 9.1(a) of this agreement. It is the petitioner's case that, in compliance of that undertaking, the petitioner

supplied grandparent birds to the company between September, 1998, and May, 2001, in respect of which no payment was made by the company to the petitioner being sum of US \$ 2,20,775. Correspondence was exchanged between the petitioner and the company in that behalf and eventually, a statutory notice was given inspite of which no payment has been made. It is in that backdrop the present petition has been filed.

2. The petition is opposed by the company by filing detailed reply affidavit. Besides the company, the Intervener Company who is the joint venture partner along with the petitioner has also filed detailed affidavit asserting that the present petition is mala-fide and has been filed only as unfair tactics, to subserve the ulterior designs of the petitioner. It is asserted that the object of the petitioner in instituting the present petition is to wrongly evade its obligation under the joint venture agreement. It is contended that since the petitioner along with the Intervener Company has entered into a joint venture -- that is in the nature of a partnership venture for that reason, the petitioner cannot be permitted to take recourse to the remedy u/s 433 of the Act for recovery of its amounts from the company. It is asserted that the claim set up in this petition by the petitioner is plainly covered by the joint venture agreement and the arbitration clause therein. Moreover, the amount in question has been expressly claimed by way of a counterclaim in the arbitration proceedings between the petitioner and the Intervener Company. Besides, it is contended that under the joint venture agreement, the petitioner is liable to make good the loss suffered by the company to the extent of 50% share and that obligation has not been discharged and so long as that obligation remains undischarged, the petitioner is not competent to take recourse to the remedy u/s 433 of the Act. It is asserted that the obligation of the petitioner is far in excess of the amount claimed by the petitioner. It is contended on behalf of the company as well as the Intervener Company that the statutory notice issued by the petitioner is a subterfuge to the main ground of seeking winding up on account of the loss of confidence between the partners and such a ground cannot be said to comprehend the clause of just and equitable reason for invoking the discretionary jurisdiction of this court of winding up of the company. It is also contended on behalf of the company as well as the Intervener Company that the ground u/s 433(e) cannot be invoked at the instance of the petitioner, because the petitioner is also liable to discharge the obligation under the joint venture agreement and to obviate that obligation, the present petition has been filed. According to the Intervener Company, the petitioner has taken recourse to this remedy, only with a view to create a ground for terminating the joint venture agreement, because in terms of Clause 7.1(a) (ii), it will be open to the petitioner to terminate the joint venture agreement if the company was to be wound up. According to the Intervener Company, the petitioner has, in fact, breached the obligation under the joint venture agreement as, by virtue of Clause 9.1(e), the petitioner was to supply grandparent birds exclusively to the company. However, the petitioner entered into contract with other firms in breach of that undertaking. On the above arguments, admission of

the present petition is resisted.

3. Whereas, according to the petitioner, the liability to pay in respect of the goods supplied to the company and the amount as claimed is not in dispute; rather it has been acknowledged by the company. Moreover, no ground has been made out either in the pleadings or during the arguments that the company was not liable to pay the amount or that it had any bona-fide dispute regarding the said amount. Counsel for the petitioner also contends that it is not open for the company or, for that matter, the Intervener Company to contend that the corporate veil be lifted so as to hold that the venture is undertaken by association of persons so as to disentitle the petitioner to invoke remedy u/s 433 on that count. He, however, contends that the principle of lifting of corporate veil is to be invoked when the company was to take shield of its corporate entity to fraudulently defeat its obligation to pay the debt. On the other hand, the petitioner had dual relationship with the company, and nothing prevented the petitioner to exercise the remedy in the status of a creditor.

4. Having examined the pleadings and considering the rival submissions, I have no hesitation in dismissing this petition for the reasons I shall record hereinafter. Indeed, the petition has been filed under Sections 433 and 434 of the Act, but, during the course of arguments, counsel for the petitioner has conceded that the petition is pressed only u/s 433(e) of the Act, i.e., inability of the company to pay its debts. In that backdrop, I shall proceed to examine the matter. No doubt, the petitioner had supplied grandparent birds to the company for which the petitioner was entitled to recover the amounts therefore from the company, being outstanding dues. The fact, however, remains that the petitioner is a joint venture partner along with the Intervener Company. In that sense, the petitioner has dual relationship with the company proposed to be wound up. The petitioner is not only the creditor of the company, but is also its shareholder on equal basis with the Intervener Company.

5. Counsel for the company, in my view, has rightly relied on the decision of the apex court reported in *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, of this decision, the court has considered the principle regarding lifting of corporate veil and, in paragraph 38, in the context of the fact situation of that case, it is observed that the contribution towards the resources of joint venture was in the nature of a partnership between the Indian group of companies and the Singapore based company who had jointly undertaken the commercial enterprise wherein they were to contribute to the assets and share the risks. Similar situation obtains in the present case where the petitioner, in association with the Intervener Company, entered into a joint venture for commercial enterprise by contributing to the assets and also undertaking to share the risks. However, the record indicates that the petitioner has not discharged its obligation to share the losses, viz., the risks suffered by the company, which is far in excess of the amounts payable to the petitioner by the company. If that is so, the question of invoking remedy u/s 433 at the instance

of the petitioner does not arise. Reliance has been placed by the counsel for the company on the decision reported in Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another, . Reliance was placed on paragraphs 24 to 28 of this decision which deals with the principle of lifting the corporate veil. The court has adverted to the statement of law expounded by Sanborn, J., that --

"When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. The same can be seen in various European jurisdictions."

5.1 Counsel for the petitioner, however, contends that the question of invoking corporate veil does not arise in this case, because that principle can be invoked only when the company was to seek wrongful protection taking advantage of its corporate entity. This submission clearly overlooks the argument canvassed on behalf of the company and the Intervener Company. What was contended before me, on their behalf, is that if the corporate veil was to be lifted, it would appear that the petitioner and the Intervener Company were essentially partners in the joint venture company. If that is so, it was not open for the partner to invoke a remedy such as the present one or institute action for recovery of amounts against the firm. In this context, reliance was placed on the decisions reported in Rustomji Aspandiarji Sethna v. Sheth Purshotamdas Chaturdas 3 Bombay Law Reporter 227 wherein a Division Bench of this court has adverted to the doctrine that where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them, while such an individual was a partner. On that principle, the court went on to observe that one partner cannot sue for money lent by him to a firm, of which he is a member, as the advance would be, but an item in the partnership account. Reliance is also placed on the decision reported in Lachmichand Jagarnath Firm Vs. Jagoo Lal Jasaraj Firm, where it has been observed that when the relationship between the parties was one of partners, and, in absence of a prayer for dissolution of the partnership, the suit, as framed, was not maintainable. The court then adverted to the settled legal position that it is not an invariable rule that a partner is not entitled to maintain a suit for accounts against a co-partner with out seeking dissolution of the partnership: but it has been pointed out in the decision in 54 Mad 671 that before such a suit can be instituted, a special ground must be made out; that is to say, that ordinarily, a partner is not entitled to partial accounts, but if he wants an account of the partnership dealings, he must sue for a general account. It will be useful to refer to one more decision relied by the counsel for the company in Mohamad Ali Vs. Karji Kondho Rayaguru, . The court, while adverting to the settled legal position, observed that partners in a firm are not ordinarily entitled to bring a contribution suit in respect of individual items which they have paid on account of partnership debts; and one partner has no right of action against another for the balance owing to him until after final settlement of the accounts. In the present case, if the claim of the petitioner was to be accepted, it would result in only partial

settlement of the claim, because the petitioner is obliged by the joint venture agreement to make good the losses suffered by the company. And the petitioner has not discharged that obligation which is far in excess of the amount receivable towards the supply of grandparent bird to the company. I find substance in the arguments of the company that the object of instituting this petition is not only to evade the obligation under the joint venture agreement, but also to create a ground to terminate the joint venture agreement. Moreover, the counsel for the company as well as the Intervener Company were justified in contending that if the petitioner was to make good his share towards the loss suffered by the company, the company will not only be able to pay the debt in question, but settle all its liability in toto, Understood thus, to my mind, it will be inappropriate to entertain this petition, or to exercise discretion at the instance of the petitioner so as to pass a drastic order against the company.

6. Hence the petition is dismissed.