(1989) 12 CAL CK 0024

In the Calcutta High Court

Case No : Company Petition No. 167 of 1987

In Re: Nopany and Sons Pvt. Ltd.

Date of Decision : 05-12-1989

Acts Referred:
Companies Act, 1956 — Section 433, 434

Citation : (1990) 1 CALLT 265 : (1991) 70 CompCas 262

Hon'ble Judges : Umesh Chandra Banerjee, J

Bench : Single Bench

Judgement

Umesh Chandra Banerjee, J.—The basic requirement of the provisions of Section 434 of the Companies Act, 1956, is the existence of a debt due and payable by the company to the petitioning creditor and in the event the petitioning creditor establishes such a claim even though prima facie, the question of the maintainability of the petition under the provisions of the Companies Act for winding up of the company cannot be doubted. At this juncture, it is to be noted that this burden lies on the company to satisfy the court as to the existence of a bona fide dispute in regard to the matter in issue and in the event a debt is bona fide disputed, the proper course would be for the law courts not to proceed with the winding up proceedings further and give leave to the petitioning creditor to file a suit for the adjudication of disputes in the matter in issue. While directing filing of the suit, the court may, however also, direct furnishing of some securities. Incidentally, it is to be noted, however, that where a debt is disputed, it is the duty of the court to go into the question of the genuineness or otherwise of the dispute and, in the event, the court is primarily satisfied as regards its genuineness and bona fides, such a liberty ought always to be given to the petitioning creditor and the court ought not itself to embark upon a detailed adjudication of the disputes between the parties. Conversely, however, in the event the dispute raised by the company does not seem to be genuine, it is a plain exercise of the judicial power to direct winding up of the company.

2. The expression bona fide in common English parlance means genuine : good faith (vide Chambers Twentieth Century Dictionary). In Om Prakash Mohta v. Steel Equipment and Construction Co. P. Ltd. [1967J 1 Comp LJ 172 : [1968] 38

Comp Cas 82 (Cal), bona fide dispute has been ascribed to mean a dispute based on a substantial ground. The English courts, however, attributed honesty as an equipment of bona fide (R. v. Holl [1881] 7 QBD 575 (CA)) dispute on substantial ground. Considering, however, of the meaning attributed to the phrase by the English courts bona fide is thus opposed to fraud, that does not, however, necessarily mean and imply that law courts will come to the conclusion that in the event the court is not satisfied as regards the dispute being termed to be a bona fide dispute, the court will come to the conclusion that the same is fraudulent and lack of bona fides does not necessarily mean fraudulent but it may lead to fraud. There cannot be such a generalisation as bona fide is opposed to fraud as such and some further factors are required to make it a fraud though bona fide is opposed to fraud.

3. It is to be noted that a growing practice has developed in this court to allow the company to pay up the debt by instalments. I refrained myself from dealing with the matter in greater detail as to the legality of such a practice but, considering the socio-economic conditions of the country, the practice seems to be a healthy one for at least an opportunity is given to the company to pay up its debts by instalments and survive rather than wind up its business the resultant effect of which would be total loss of employment opportunities with all other consequences.

4. Having discussed the law on the subject as above, it is at this juncture that the factual aspect ought to be noted but, before so doing, the chequered career of the matter under consideration ought also to be considered.

5. From the middle of 1987, this matter has travelled to the appellate court more than once and the trial court has had to deal with the matter on a number of occasions. Justice Mrs. Monjula Bose on June 19, 1987, passed an order in the matter for publication of advertisement though upon certain conditions, namely, failure to pay the dues of the petitioning creditor by instalments.

6. In this context, the observation of Mrs. Bose J. is pertinent to note :

"Having heard the respective submissions of the parties, the court views that sufficient and ample opportunity was given to the company to file its affidavit-in-opposition and if it had a bona fide defence to the petitioner''s claim, such defence could have been filed within the time granted. The very fact that, in spite of two extensions granted, no opposition was filed, make it apparent that the company has no defence to the petitioner''s legitimate entitlement and, in the court''s discretion, no further time should be allowed to a litigant who has not taken advantage of the discretion exercised twice in its favour by filing the necessary affidavit. To my mind, it is apparent that all attempts were made by the company to delay and harass the petitioning creditor and it had no defence to the petitioner''s claim and thus no affidavit-in-opposition was filed and since April 21, 1987, till today the matter has been kept pending and almost two months have passed and no steps whatsoever were taken for filing any affidavit.

It is only during the course of hearing when the company felt that the preliminary plea taken was not going to be acceptable to the court, then a third extension of time for filing of an affidavit was sought and as such, the court is disinclined to give any further indulgence to such a litigant."

7. The order of Mrs. Bose J., however, was challenged before the court of appeal and the appellate court disposed of the appeal in the application by directing deposit of all the instalments in terms of the order dated June 19, 1987, though, however, time to pay as regards the first instalment was extended till July 22, 1987. Such a deposit was directed to be made to the advocate on record of the petitioning creditor and the appellate court directed payment of cost thrown away before the trial court as well as the cost of the appeal assessed at 200 gms. to be paid within one week from the date of the order. There was also a default clause that, in the event of failure to deposit the instalment as directed in terms of the trial judge''s order, leave was given to the petitioning creditor ,to take further proceedings for winding up of the appellant after obtaining fresh direction from the learned company judge. Subsequently, on August 18, 1987, even though the appeal was disposed of at an earlier point of time, namely, July 15, 1987, on the prayer of the company, the time to pay the second instalment in terms of the order of the learned company judge has been extended till August 28, 1987, and, in default, leave was given to the petitioning creditor to proceed in terms of the order of the learned trial judge. The order of the appellate court, however, was not adhered to, by reason whereof the petitioning creditor applied before the learned company judge and Mrs. Bose J., on September 3, 1987, extended the returnable date by six weeks from the date of the order and advertisements were directed to be published once in the Statesman and once in Aajkal. On the very next day, however, i.e., on September 4, 1987, the matter was again mentioned and upon hearing the learned company judge ordered that upon payment of Rs. 1 lakh by 4 p.m. on that date and a further sum of Rs. 62,000 by pay order by Tuesday next after September 4, 1987, the advertisements were directed not to be published and the matter was directed to appear as a specially fixed matter on Wednesday next after September 4. On September 17, 1987, however, it was submitted to the learned company judge that the September instalment has also not been paid by September 15, 1987, being the due date in pursuance whereof time was extended till October 3, 1987, and in default of payment by that time, the advertisements were directed to be published as ordered earlier. Incidentally, however, on September 28, 1987, and during the long vacation, the company moved the learned vacation judge and obtained an order of extension till November 2, 1987. On October 27, 1987, however, the matter again came up before the learned company judge and Bose J., recorded an order on that date to the following effect :

"The court has viewed the order dated September 29, 1987, and particularly noted the conduct of the party, namely, the company. Time and again, the court had given indulgence to the company to enable it to pay the dues of the petitioning creditor and taking advantage of the extensions given, it appears that the vacation Bench was moved for extending the time to make payment in terms of the order passed by the court on September 17, 1987. Be that as it may, it appears by the order dated September 28, 1987, the vacation Bench has extended the time to make payment for instalment due on October 3, 1987, till November 2, 1987. This order, however, does not interfere with the order passed by this court, since it is clear that the extension would not interfere with the payment for the other dates of instalments, and it appears that there has been default in payment of instalment for the month of October, 1987. As such, no further mercy or indulgence should be shown to the company which appears to be taking advantage of the extensions given not with a view to pay the petitioning creditor''s dues, but merely to take time and to avoid payment of its debts. Advertisements will thus be published in accordance with the order passed on September 3, 1987. Returnable date is extended by six weeks."

8. On November 18, 1987, the learned company judge further ordered that, according to the appeal court''s direction, the order for payment stands and as such the advocate on record will hand over the money to the petitioning creditor. Subsequently, on January 15, 1988, the learned company judge passed the following order :

"Time for filing the affidavit-in-opposition has expired on December 27, 1987. It appears that previously at the time of admission directions had been given twice and the time was extended and the matter has come in the first page today after advertisements. It appears that since the passing of the order dated June 19, 1987, only two instalments have been paid by the company and the company is in arrear in respect of other instalments requiring the advertisements to be issued.

The learned advocate appearing for the company has also on this occasion prayed for extension of time to file an affidavit-in-opposition on the ground of Mr. Nopany''s illness. This very prayer was made on two earlier occasions. As such, the court cannot give any further indulgence to the company on the self-same ground. The court also enquired from the learned advocate appearing for the company as to whether the company was agreeable to pay any part of the amounts in default for the court to consider as to whether the court should exercise its direction in allowing further time for filing the said affidavit-in-opposition.

The learned advocate on behalf of the company on instruction submitted that the company is not in a position at present to pay any amount and, in this view of the matter, the court is not inclined to grant the prayer for extension of time to file the affidavit-in-opposition. Further prayer was made by the company to adjourn the matter till today for further instructions to be taken, which in the court''s view will serve no useful purpose as the representative of the company present in court has instructed the learned advocate for the company that no amount can be paid by the company. The court also gave an opportunity to the company to mention as to how much it would be able to pay now if at all, and the company expressed its inability to pay anything. This shows that throughout the company has been acting in a dilatory manner. The order dated June 19, 1987, also speaks for itself and the conduct of the company would be apparent therefrom.

It is significant that, when the winding up petition was admitted, several extensions were granted for filing the affidavit-in-opposition, but no affidavit-in-opposition, was filed and after the advertisements have been published, the self-same ground has been taken by the company to file its affidavit-in-opposition The court sees no reason to grant any further indulgence to the company and, as such the prayer for extension of time to file the affidavit-in-opposition is rejected.

Accordingly, the court has no opinion but to pass the order in terms of prayer (a) of the petition. All parties and the official liquidator are to act on the signed copy of this dictated order ..."

9. The matter again, however, travelled to the court of appeal and the appellate court in its order dated January 21, 1988, recorded the inadvertence of the lawyer appearing for the company as regards the filing of affidavit. By reason of failure to draw the attention of the learned company judge in regard to the affidavit which was filed before the company judge at that stage after admission of the petition for winding up which contained the defence of the appellant to the claim of the petitioning creditor, it was not placed before nor considered by the learned company judge. In that perspective, the order of the learned company judge was set aside and directed the matter to be heard on the basis of the affidavit already filed in the matter before the learned company judge for consideration of the matter afresh on merits. While passing the order, however, the appellate court was pleased to appoint a special officer being a member of the Bar to make an inventory of the assets of the appellant company with the assistance of the respective advocate on record of the parties. It would be pertinent to deal with the report of the special officer at this juncture. The special officer categorically recorded on the basis of the statement of one Sri S.P. Sharma, an accountant of the company and in the presence of one of the directors of the company that the company has no factory whatsoever and there is not a single asset in the registered office of the company nor even furniture, fittings and fixtures. The special officer went on to observe that, according to Mr. Sharma, the landed property at 11, Rowdon Street, Calcutta, belongs to the company though, however, the original title deed has already been deposited with the United Commercial Bank, Burrabazar branch, in connection with the loan granted by the said bank to Birla Spinning Mills and Industries Ltd., against the equitable mortgage of the property. The special officer observed that the mortgage property as stated by Mr. Sharma has been agreed to be sold on July 7, 1984, and the sale proceeds to be deposited by the purchaser directly in the UCO Bank against the mortgage. Though certain bank accounts have been mentioned, no particulars have been recorded in the report of the special officer.

10. The above narration, though longish in nature, has to be recorded since the background of the matter in issue at this stage of the proceeding ought to be noted in the matter of disposal of this application. It will thus be convenient to deal with the factual aspect at this stage.

11. The petitioner-company presented this petition for winding up on the ground of inability to pay the dues of the petitioning creditor amounting to Rs. 18,67,876 arising out of a loan transaction between the petitioner and the respondent-company. On the factual score, it appears that, on February 6, 1981, the petitioner at the request of the company lent and advanced a sum of Rs. 2,90,000 repayable on demand with interest thereon at the agreed rate of 18% per annum. Subsequently, however, the company on its part Between April 20, 1981, and December 22, 1981, paid a sum of Rs. 2,00,000 by four cheques drawn in favour of the petitioner herein. On September 16, however, a further sum of Rs. 10 lakhs was lent and advanced by the petitioner to the company with interest thereon at the agreed rate of 16% per annum. The payments were however, made by ten cheques drawn on the Punjab and Sind Bank for Rs. 1 lakh each in favour of the company and all dated September 16, 1985. The company, however, also executed a promissory note for Rs. 10 lakhs in favour of the petitioner dated September 16, 1985, repayable on demand. On December 9, 1985, a further sum of Rs. 4 lakhs was also lent and advanced with interest thereon at the agreed rate of 16% per annum and the company also executed a promissory note for Rs. 4 lakhs as a collateral security in favour of the petitioner. From time to time, interest bills were raised as and by way of debit notes and the company also from time to time made payments on account of interest and after giving credit for all sums paid, there remained a sum of Rs. 18,67,876 due and payable up to January, 1987. Incidentally, it is to be noted that, at no point of time, was there any dispute as regards debit notes issued by the petitioning creditor in favour of the respondent company and as a matter of fact, payments were made from time to time on the basis thereof as noted above. In the counter affidavit by the company, it has, however, been stated that the question of raising any debit note did not arise at ail but no explanation whatsoever has been offered as regards the payment made on the basis thereof on account of interest and it is by reason of the failure to pay the dues of the petitioning creditor, this winding up of the company has been presented on the ground of inability to pay its dues. It is at this juncture that the earlier orders as noted above ought to be considered. The petition was presented, the matter was heard in the presence of the lawyers appearing for the company and the company, for reasons best known to the company, has chosen not to file any affidavit. The advertisements were also published. The learned company judge dealing with the matter at the initial stage allowed an opportunity to the company to pay its dues by instalments, some instalments have been paid though not fully by reasons wherefore advertisements were directed to be published. At the final hearing stage after advertisement, the company was directed to be wound up though the order for winding up was, however, set aside on the ground that the trial judge

did not consider the affidavit which has already been on record.

12. Let us, therefore, now analyse as to whether the affidavit filed does disclose any defence or a bona fie defence so as to permit this court to assume jurisdiction to direct winding up of the company.

13. Mr. Mukherjee, appearing in support of the petition, strongly commented upon the statements in the affidavit and in my view rightly so by reason of three cases made out in the affidavits, namely, (a) allegation to the effect that, on September 16, 1985, and December 9, 1985, the petitioner lent and advanced a sum of Rs. 10 lakhs and a sum of Rs. 4 lakhs to the company is a myth ; (b) the petitioner issued ten cheques of Rs. 1 lakh each in favour of the company and simultaneously, on September 16, 1985, itself at the request of the petitioner, ten bearer cheques of Rs. 1 lakh each were issued and made over by the company to the petitioner. The third case made out by the company is that the petitioner and the company and its other associates maintained a very cordial relationship till they fell out in 1986 and the petitioner in 1985, represented to the company that he was in dire need of cash and that he would deem it a great favour if the company could see its way to provide temporary accommodation to him so that a sum of Rs. 14 lakhs could become available to him in cash.

14. During the course of hearing, strong criticism was levelled on behalf of the company as regards the case made out by the petitioner to the effect that, in the normal course of events, no one would issue ten cheques. While it is true that there might be some justification of such comments in regard to the aforesaid, the fact remains that the issuance of the cheques was not disputed on the contrary, it has been stated that the money was repaid by ten self-bearer cheques of Rs. 1 lakh each by the company to the petitioner. The company came out with a definite case to the effect that self-bearer cheques were made over and money encashed thereon by one P.K. Khandelwal being an employee of the petitioner herein.

15. Incidentally, it is to be noted that certain cheques were produced before the court at the hearing from the custody of the Punjab and Sind Bank through sub-poena wherefrom it appears that the company has in fact issued a good number of self-bearer cheques on which the encashment was effected by P.K. Khandelwal much before the payment of Rs. 14 lakhs were effected by the petitioner to the company. Another redeeming feature that emerges from out of cheques in court is that P.J. Khandelwal was entrusted to encash the self-bearer cheque for the company only in the event of the amount being on the higher side. The cheques for small amounts were usually encashed by other employees but not those for larger amounts.

16. The learned advocate appearing for the company further submitted that it was in fact a book adjustment only that was effected since the parties were well known to each other. But, as regards the promissory notes, the only submission made is that, had it been in the usual course of business, the loan would have

been called up and steps would have been taken earlier. The fact remains that there exist two promissory notes one for Rs. 10 lakhs and another for Rs. 4 lakhs. In the counter affidavit, it has been stated that the promissory note was given only to give a colour of genuine transaction and in fact no consideration passed therefore. The company came out with the further defence that it was represented by the petitioning creditor that the promissory note would not be utilised and, believing such a representation, the company executed two promissory notes as above. Incidentally, it is also to be noted that, in the counter affidavit, the company further stated as follows :

"(j) On the date of execution of the promissory notes of Rs. 1 lakh, i.e., on 16th September, 1985, the company had in its bank account held by it with the Punjab and Sind Bank, Old Court House Street branch, only a sum of Rs. 4,213.11. The company had no overdraft facility with the Punjab and Sind Bank, Old Court House Street branch, of which the petitioner was fully aware of and had knowledge."

17. On this state of facts, can it thus be said that the defence raised by the company in this petition for winding up is bona fide ? In my view, the answer is in the negative. If one has to give credence to the defence raised by the company; the following questions immediately come up for consideration : (a) Why would a person issue ten cheques which were duly encashed by the payee but obtain payment immediately thereafter ? (b) A person having a sum of Rs. 4,213.11 in a particular bank account would issue ten cheques for Rs. 1 lakh each, (c) A die-hard businessman would leave the promissory note for Rs. 14 lakhs with another even after payment assuming payment has been made. These questions, on this state of facts, remain unanswered. In my view, promissory notes worth Rs. 14 lakhs would be left outstanding on the representation that the same would not be dealt with is rather difficult to accept. Similar is the position in regard to the case made out by the company for issuance of ten cheques on the same day and four cheques on another occasion immediately after the issuance of the cheques by the petitioning creditor. It is at this juncture, also that the earlier stages of the proceedings to be noted, namely, payment of instalment at least some by the company in terms of the order of this court. Reading the affidavit as a whole, in my view, no credence can be placed thereon nor a case made out can be accepted as raising a dispute, far less a bona fide dispute. In my view, the company has failed to establish any defence which can be termed to be of a serious nature for being adjudicated on further evidence in a properly constituted suit. The defence cannot but be stated to be a sham. The case put up by the company is not worth any consideration neither does the attempted explanation stand to reason and as such cannot be accepted.

18. But, since the company has paid certain money and produced a pay order in terms of the order of the court and being kept with the advocate-on-record of the company, in my view, a further opportunity ought to be given to the company to pay its debts and, in that view of the matter, I direct the company to

pay all outstanding dues of the petitioning creditor together with the agreed rate of interest at the agreed rate of 16 per cent. per annum. The advocate-on-record for the company is directed to make over the pay order for Rs. 3 lakhs, held by him in terms of the order of this court within a period of four days from date. After adjustment of the above noted sum of Rs. 3 lakhs, the balance amount together with interest as above be paid by monthly instalment of Rs. 1 lakh each. In the event, however, upon calculation of interest, the last instalment falls short of Rs. 1 lakh, then and in that event the last instalment be paid on actuals then remaining outstanding. The first such instalment be paid by January 15, 1990, and all subsequent instalments by the 15th of each succeeding month. In default of payment of any one of the instalments, however, there shall be an order in terms of prayer (a) of the petition. All parties and the official liquidator, the advocate-on-record of the company are to act on a signed copy of the operative portion of this order.

