

(1983) 05 CAL CK 0002

In the Calcutta High Court

Case No : Company Petition No. 605 of 1982

In Re: Siddhartha Apparels P. Ltd.; In Re: Biren Roy Trust

Date of Decision : 02-05-1983

Acts Referred:

Companies Act, 1956 — Section 433, 434

Citation : (1986) 59 CompCas 435

Hon'ble Judges : Padma Khastgir, J

Bench : Single Bench

Judgement

Padma Khastgir, J.—This application is for winding up of the company, Siddhartha Apparels Pvt. Ltd. The claim of the petitioning creditor arises in respect of the arrears of rent payable by the company. By an -agreement in writing dated April 29, 1979, executed by and between the petitioning creditor and the said company, the petitioner let out and delivered vacant possession of about 88,000 sq. ft. space in the third floor of premises No. 24/1/1, Alipore Road, Calcutta, to the company. The company entered into possession, and agreed to pay the rent on and from May 1, 1979, at the rate of Rs. 8,000 per month, according to English calendar year, payable in advance on or before seventh of every month, occupier"s shares of taxes and/or other taxes payable by the occupier and pay the proportionate charges or shares for the maintenance of the pumps, meters, electricity consumed and for water supply. On May 2, 1979, the company paid a sum of Rs. 7,000 by cheque being the rent for the month of May, 1979, but the company defaulted from the month of February, 1981, in payment of rent and as a result, a total sum of Rs. 1,36,000 representing rent payable for the period February, 1981, to June, 1982, exclusive of interest and a further sum of Rs. 48,000 representing occupier"s shares of taxes, Rs. 2,000 representing charges for water supply and electricity consumed, charges aggregating to a sum of Rs. 1,86,000 became due and payable. As a result, the petitioner filed an ejectment suit against the company being Title Suit No. 85 of 1981 before the Alipore Court and prayed for a decree for ejectment, damages, perpetual injunction, costs, etc. The company filed an application in the said suit under the provisions of Section 17(2)(a) and (b) of the West Bengal Premises Tenancy Act wherein the company

admitted that it was not in a position to pay all the arrears of rent at a time inasmuch as the company was running at a loss and passing through financial stringency and wished to pay only a sum of Rs. 1,000 per month, that is, the company desired to pay the dues of the petitioning creditor in 187 months, nearly, in 15 years" time. The petitioner contended that it being a charitable trust and in the event the company paid the arrears of dues to the tune of Rs. 1,000 per month, it would suffer irreparable loss and prejudice. The petitioner contended that the company is commercially insolvent and is unable to pay its debts and has categorically admitted before a court of law its inability to pay and its financial stringency. Moreover, the company failed to submit its annual report and the balance-sheet since 1976.

2. According to the company, this winding-up petition was a pressure tactics inasmuch as the petitioning creditor had already instituted a suit for eviction on the ground of non-payment of rent before the Alipore court. Under the circumstances, the company contended that this proceeding was in the nature of parallel proceedings in respect of the same cause of action and as a result, such course should be deprecated by this court more so to avoid conflict of jurisdiction of findings by two parallel courts of competent jurisdiction. The petitioner had not served the statutory notice for its claim on account of non-payment of rent. Under the circumstances, there could be no presumption for constructive admission of liability to pay the petitioner's dues. The presumption of inability to pay the debts of the petitioner is not available in the instant case within the meaning of Section 434 of the Companies Act. It had been further contended that the petitioning creditor before the Alipore court moved an application on an untrue allegation that the company was trying to part with possession of the premises and/or sub-let the same without the prior consent of the landlord but when it was brought to the notice of the learned judge that under the agreement the company was entitled to sub-let the said premises, the said interim order was vacated. According to the company, because of the acrimonious litigation initiated by the petitioner, the State Bank of India in whose favour the company was attempting to grant a sub-lease of the demised premises has resiled from such agreement and as a result the company suffered loss and damages. According to the company, the company had a total turnover of Rs. 80 lakhs and under the circumstances, the company could not be treated as insolvent or financially unsound. The petitioner creditor also belatedly filed the petition for winding up which was affirmed in July, 1982, but not filed till January, 1983. Under the circumstances, the company asserted that the petitioning creditor was guilty of inordinate delay. As a result no order should be passed on this application.

3. From the facts and circumstances of this case, it appeared that the company was unable to pay the lawful dues of the landlord and in fact admitted in a legal proceeding before a court of law its inability to pay the arrears of rent at a time and prayed for payment by monthly instalments of a paltry sum of Rs. 1,000. It is admitted that the company did not comply with its statutory obligation of filing

the audited balance-sheet since 1976. The learned Alipore court is competent to entertain and/or try the title suit filed by the petitioning creditor for eviction on the ground of non-payment of rent as also it had been alleged that the company had been storing combustible and other inflammable articles in the demised premises and for other reasons the company was entitled to vacate possession inasmuch as on those grounds the tenancy created in favour of the company had been terminated. The present application had been taken out for winding-up under the company jurisdiction of this court on the ground that the company is unable to pay its debts as also the company being guilty of non-compliance of the statutory duties as envisaged under the Companies Act. Both the proceedings could not be considered as parallel proceedings for the same cause of action. Although no statutory notice u/s 434 of the Companies Act had been served on the company and as a result the petitioning creditor was not entitled to the benefit of the presumption of the company's inability to pay its debts. Apart from that, the petitioning creditor is entitled to and had been able to establish before this court upon the admission of the company that it was suffering from financial stringency and hardship and was unable to pay the arrears of rent.

4. Section 433 of the Companies Act provides the circumstances under which the company may be wound up by court. Under Sub-clause (e), if the company is unable to pay its debts, it is liable to be wound up by the company. Default in filing the statutory report or holding statutory meeting also is a ground under Sub-clause (b) and such an application also can be taken out by a creditor. Apart from that if the court is of the opinion that it is just and equitable that the company should be wound up it can do so. Although no statutory notice had been served on the company and as a result the petitioning creditor is not entitled to take any benefit of the presumption of non-payment or inability to pay, the petitioning creditor may still prove that the company is otherwise unable to pay its debts. The debt of the petitioning creditor is not disputed. In the case, *Central Bank of India v. Sukhani Mining and Engineering Industries Pvt. Ltd.* [1977] 47 Comp Cas 1 (Pat) it had been held (headnote):

" There is no provision in the Companies Act, 1956, nor is there any decision of any court to show that the mere fact that a creditor files a suit for the realisation of the debt would debar him from proceeding with his petition for winding up the company which is already pending. There is nothing either to show that the court in such circumstances has no jurisdiction to proceed with the winding-up proceeding or that it would be even proper to stay the winding-up proceeding itself or dismiss it for that reason alone. The Act has provided for the stay of a suit against the company when there is a winding-up order against the company. If the Legislature had intended that on account of the fact that a suit or proceeding has been filed in another court, the court in seisin of the winding-up application will stay that proceeding on that ground alone, there would have been a provision to that effect in the Companies Act. There is no such provision, the reason being that a winding-up proceeding is not merely for the benefit of

the petitioner but of all shareholders, creditors or contributories of the company. Therefore, winding-up proceedings could not be stayed merely because the creditor has filed a suit against the company."

5. In the case, *Pandam Tea Co. Ltd. v. Darjeeling Commercial Co. Ltd.* [1977] 47 Comp Cas 15 (Cal), it had been held by a Division Bench of this court (headnote):

" The respondent, after issuing a notice to the appellant-company u/s 434 of the Companies Act, 1956, filed a petition for winding up the appellant-company. The appellant-company instituted a suit in the Darjeeling court and in that suit an injunction was issued restraining the respondent from "proceeding in any action on basis of demands" in the notice u/s 434 of the Act. On the basis of that injunction order, the appellant applied to the High Court for permanent stay of the winding-up proceedings. The stay petition was dismissed by a single judge. The appellant appealed: On appeal it was held: that by the injunction order of the Darjeeling court, the respondent was restrained from proceeding in any action on the basis of the solicitor's notice u/s 434. The demand in such notice was for winding up the company on the basis that the company was to be deemed to be unable to pay its debts when such debts were not secured or compounded to the satisfaction of the creditor within the statutory period. The creditor, apart from the notice, was entitled to prove by other evidence that the company was unable to pay its debt."

6. Under the circumstances, the very fact that a suit had been filed before the Alipore court for ejectment and for recovery of arrears of dues cannot be a ground for rejection of the petition. In the suit filed before the Alipore court the petitioner had prayed for ejectment and possession, of the premises, claim for damages, injunction, costs, etc. The fact of non-service of the statutory notice had not debarred the petitioning creditor from proving otherwise, more so in view of the admission made by the company itself before the Alipore court of its inability to pay its debts. Apart from the presumption of the company's inability to pay its debts, the petitioning creditor had been able to satisfy this court that in fact the company was unable to pay its debts and prayed for 15 years' time to liquidate the bona fide undisputed dues of the landlord. The suit that had been filed by the petitioning creditor is for possession and ejectment and not for the recovery of the arrears. In the case, *Pandam Tea Co. Ltd. v. Darjeeling Commercial Co. Ltd.* [1977] 47 Comp Cas 15 (Cal), where a Division Bench of this court held that although the absence of material and requisite particulars in a notice u/s 434 invalidate a petition for winding up, where there was clear and unambiguous admission of debt, no prejudice would be caused to the company by reason of the absence of particulars and such absence cannot affect the maintainability of the application for winding up. Even if the notice u/s 434 is treated as non-existent, the petitioning creditor is entitled to prove by other evidence that the company was unable to pay its debts. Indebtedness can be proved aliunde.

7. The learned lawyer appearing on behalf of the petitioning creditor relied on M.

Elias Private Ltd. Vs. Raj Mohini Jhamb, and made his submission as to what amounted to a disputed debt. He also craved reference to the case, Nathoo Lal Vs. Durga Prasad, , and submitted, relying on the case, Registrar of Companies v. Section Sohanmull Golcha P. Ltd. [1972] 42 Comp Cas 386 (Raj), that the company was commercially insolvent.

8. Mrs. U.B. Mukherjee appeared on behalf of the company and relied on the case, Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI) and Another, the learned judge of the Division Bench observed as to when the company could be held to be unable to pay its debts and as to the nature of the dispute of cases where disputed debts were to be excluded. There the learned judges also held that even if it was not available for the petitioning creditor the presumptive or constructive liability of the company to pay the debts, the petitioner was at liberty to prove still in other ways the debts.

9. Mrs. Mukherjee relied on the case, Bengal Flying Club Ltd., In re 1961] 71 CWN 38, and submitted that the court should not allow the winding-up proceedings to be exploited as a normal alternative to the ordinary mode of debt realisation. The company court will forbear from deciding a dispute which can be more conveniently investigated in a regular action when the grounds on which the liability is disputed are bona fide and substantial.

10. In the case, In Re: The Cine Industries and Recording Co. Ltd., , where it was held by Mr. Justice Chagla that the main consideration in a winding-up application is the interest of the shareholders and creditors. There in an application for winding-up, the court had to consider the test for determining whether a company should be wound up on the ground that the company is commercially insolvent at the date of the petition for winding-up. The learned judge held that the expression "commercially insolvent" means that the existing assets and liabilities of the company are such as to make it reasonably certain as to make the court satisfied that the existing and probable assets would be insufficient to meet the existing liabilities. Again the other test is whether at the date of the presentation of the winding-up petition, there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained. It was further held :

" The test for determining whether a company should be wound up is whether the company is commercially insolvent at the date of the petition for winding-up. The expression "commercially insolvent" means insolvent not in any technical sense but plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such, as to make the court feel satisfied that the existing and probable assets would be insufficient to meet the existing liabilities.

The other test is whether at the date of the presentation of the winding-up petition, there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained.

It is for the petitioner to prove that the test is satisfied in the case of the particular company which he asks the court to wind up. The substratum of the company must be deemed to be gone so as to entitle the court to pass a winding-up order when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of trading at a profit can be attained, or (d) the existing and probable assets are insufficient to meet the existing liabilities. When none of the four tests can be applied to the facts of the particular case, the company cannot be wound up. "

11. In the case, *National Conduits (P) Ltd. Vs. S.S. Arora*, , it was held that in answer to a notice to show cause why a petition for winding-up be not admitted, the company is entitled to show cause and contend that the filing of the petition amounts to an abuse of the process of the court. It is open to the company to submit that in the interest of justice or to prevent abuse of the process of the court, the petition should not be advertised. It was further held following *A Company, In re* [1894] 2 Ch 349 that where a petition is presented for winding-up not in good faith and for legitimate purpose, but for other purpose such as putting pressure on the company, the court will restrain the advertisement of the petition and stay all further proceedings where the petition was not a bona fide petition and the petitioner was acting with ulterior motive or his attempt to obtain a winding-up order was unreasonable. The court is not an instrument of harassment and even of blackmail inasmuch as the court has ample power to stay advertisement even after the petition for winding-up is admitted, in view of the fact the business of the company is bound to suffer serious loss and injury.

12. In the case, *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries P. Ltd.* [1972] 42 Comp Cas 125 (SC), it was held that the application for winding-up can be refused when the claim of the petitioner is bona fide disputed by the company. Where the petition is filed out of improper motive to coerce the company and in satisfying some groundless claim made against it by the petitioner, the court will refuse to pass an order inasmuch as it was held that the petition was presented out of improper motive. There, in the facts and circumstances of the case, the learned judges came to the conclusion that the petition was presented out of improper motive to coerce the company in satisfying some groundless claim made against it by the creditor. In the instant case, the claim of the landlord is not disputed, nor is the claim of the landlord based on groundless claim inasmuch as it is an admitted fact that the company defaulted in payment of the arrears of rent and corporation rates and taxes. Under the circumstances, the instant petition cannot be held to be an abuse of the process of the court. There had been an admission of liability in the pleadings as also in the deposition given before the Alipore court in the title suit. Under the circumstances, the petitioner's claim does not appear to be groundless or frivolous.

13. In the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , in paragraph 21, it had been held (p. 131 of 42 Comp Cas):

" 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. 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. The principles on which the court acts are first 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 adduces prima facie proof of the facts on which the defence depends. "

14. In the case, Registrar of Companies, Rajasthan v. S. Sohanmull Golcha P. Ltd. [1972] 42 Comp Cas 386 (Raj) it had been held (p. 388) :

"Section 433 of the Companies Act, 1956, is similar to Section 222 of the English Companies Act of 1948, while our Section 434(1) corresponds to Section 223 of the English Act. There are four clauses in Section 223 of the English Companies Act, while our Section 434(1) contains three such clauses. Clause (c) of Section 434(1) of our Act is similar to Clause (d) of Section 223 of the English Act and, for reasons already stated, this case has to be examined with reference to that clause. Now, the position regarding that clause has been stated as follows in Halsbury's Laws of England, third edition, volume 6, paragraph 1033 :

" A company, not being a life assurance company, may also be wound up on the ground of inability to pay debts when it is commercially insolvent, namely, unable to pay its debts as they become due, although its assets when realised, including uncalled capital, exceed its liabilities."

It, therefore, appears that the inability to pay the debts has to be examined with reference to the period of time when " they become due ".

The point was expressly examined in In re European Life Assurance Society [1869] LR 9 Eq. 122, 127 and it was held as follows :

".....inability to pay debts must refer to debts absolutely due, that is to say, debts for which a creditor may go at once to the company's office and demand payment."

A reference to Buckley on the Companies Acts, 13th edition, shows that the position has been clearly brought out there. It has been stated at page 460 that Clauses (a), (b) and (c) are all included in Clause (d) of Section 223 (of the Companies Act of 1948), and they are all instances of commercial insolvency, " that is of the company being unable to meet current demands upon it". Dealing with Clause (d) of Section 223 (which corresponds to Clause (c) of our Act), the position has been stated as follows :

" Para, (d), however, now recognizes and, in conjunction with Section 222(e),

expressly authorises a winding-up in the case of another kind of insolvency, that is to say, if the existing and probable assets will be insufficient to meet the liabilities, taking into account not only liabilities, presently due but also those which are contingent and prospective. " "

15. It was further observed relying on various cases that the company may have liabilities more than its assets but still may have, in the particular circumstances of the case, the capacity to meet the demands from its creditors. But then again it was held that the test laid down that the company should be commercially solvent in the sense that it should be in a position to meet its liabilities as and when they arise should be the test applicable while considering the facts and circumstances of a particular case for winding-up.

16. In the affidavit of Vinayak K. Nevatia, affirmed on February 10, 1983, no provisional pro forma balance-sheet had been annexed for the purpose of consideration by this court as to the viability of the company as indicated earlier, and the statutory obligation of filing balance-sheet had not been complied with since 1976. The company in its affidavit did not rely on any documents to support its claims that the company had a turnover of Rs. 80,000 per year; in view of the absence of the audited balance-sheet, it was difficult to accept the uncorroborated affidavit on behalf of the company.

17. In view of the facts and circumstances of this case and the cases considered relating thereto, this court is of the view that the petition be admitted and advertisement be given once in Amrita Bazar Patrika and once in Aaz kaal. However, there would be stay of publication for four weeks returnable eight weeks thereafter.