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(1976) 01 BOM CK 0009

In the Bombay High Court

Case No : Company Petition No. 429 of 1974

**In Re: Softsule Private Ltd.
 P.G. Bhatia and Co.**

Date of Decision : 08-01-1976

Acts Referred:
Companies Act, 1956 — Section 292, 292(1), 292(2), 433, 434

Citation : (1976) 01 BOM CK 0009

Hon'ble Judges : Aggarwal, J

Bench : Single Bench

Advocate : Dhimant Malvi, for the Appellant; G.A. Thakkar and G.M. Gokani, for the Respondent

Judgement

Aggarwal, J.—This is a petition u/s 433(e) of the Companies Act, 1956, for the winding up of the company, Softsule Private Ltd. The two circumstances forming the basis of this petition are, firstly, that the company had failed and neglected to pay the sum of Rs. 40,000 and interest due thereon under the 16 hundis executed by the company in favour of the petitioners, a partnership firm. According the petitioners, they have served the required statutory notices u/s 434(1)(a) of the Companies Act, 1956, requiring the company to pay the amount due under the 16 hundis and the company has for three weeks thereafter neglected to pay the said sum of Rs. 40,000 and interest thereon or to secure of compound is deemed to be unable to pay its debts and is liable to be wound up. Secondly, the company has large liabilities to its secured as well as unsecured creditors, and according to the financial position of the company as on 30th June, 1974, the company has made a loss of Rs. 96,369, and considering the prospective and contingent liabilities of the company, the company is unable to pay its debts.

2. The petition is for admission and for consequential orders. The petitioners'' claim, as indicated in the above grounds, arises on the basis of 16 hundis each of Rs. 2,500 purported to have been executed by a director of the company named Manilal Keshavji Thakkar and guaranteed by another director named Mavji Keshavji Thakkar. According to the petitioners, of the maturity of the hundis,

they caused notices of demand to be sent to the company and stated that these notices shall be treated u/s 434 of the Companies Act, 1956. In the correspondence prior to the present proceedings, the company contended that they had not borrowed any amount from the petitioners and, consequently, the question of their not repaying the amount did not arise. However, the company, by its letters dated 11th November, 1974, 29th November, 1974, and 21st December, 1974, called upon the petitioners to give inspection of the alleged hundis. Ultimately, the petitioners gave inspection of the hundis on 15th May, 1975. By their letter dated 24th May, 1975, the company placed on record the fact that their accountant had taken inspection of the hundis and further reiterated that they had not received any consideration of the hundis alleged to have been executed by Manilal K. Thakkar purporting to act as director of the company and Mavji K. Thakkar as a guarantor. The company denied liability to pay any amount to the petitioners under the alleged hundis. It was further contended by the company that Manilal K. Thakkar had no authority to execute the alleged hundis and the company was not liable for any payment under the hundis or otherwise. It was further stated that the board of directors of the company had at no time authorised Manilal K. Thakkar to borrow money on behalf of the company and, therefore, the borrowing, if any, made by Mr. Manilal K. Thakkar purporting to act on behalf of the company was neither valid nor binding on the company. For these reasons, the company stated that the alleged borrowing by Manila K. Thakkar was ultra vires the company and in any event beyond the authority of Manilal K. Thakkar. By their letter dated 28th July, 1975, the petitioner in reply reiterated that the said Manilal K. Thakkar was the director of the company. It was denied that the said Manilal K. Thakkar had no authority to execute the hundis in question. The petitioners further stated that on earlier occasions they had advanced moneys to the company and in respect of which the said Manilal K. Thakkar had executed the hundis in question, and in the course of transactions, nothing was brought to the notice of the petitioners which would impose an obligations upon them to make inquiries as to the authority of the said Manilal K. Thakkar and/or the said Mavji K. Thakkar as directors of the company. It was in these circumstances that the present petition was instituted.

3. The company, in its affidavit opposing the admission of the petition, has substantially repeated the allegations mentioned above, an in particular the company had emphasized the it has received no consideration or money from the petitioners and that no money has been received in the coffers of the company in connection with the execution of the hundis and that in the books of accounts of the company there are no entries showing any borrowings from the petitioners on the relevant day or any other date. It is submitted that the alleged borrowing is in contravention of the provisions as section 292 of the Companies Act, 1956. It is also contended that the notices of demand were sent by the petitioners enough their attorneys without first presenting the hundis for payment and without dishonour thereof. The company, after having denying the allegation that it has large liabilities, has stated that its position as ending 30th June, 1975, is

as follows :

"I say that for the year ending 30th June, 1975, the value of the fixed assets of the company such as plant, machineries and buildings, fittings, equipments, is over Rs. 8,00,000 after depreciation. The company''s liability to the secured creditors in respect thereof is Rs. 1,03,606, the value of stock and raw materials is over Rs. 9,50,000 against the total liability of about Rs. 4,88,000 by pledge or hypothecation thereof. The company''s book debts exceed Rs. 7,00,000 against which the company has borrowings of Rs. 3,35,708. Thus, the total assets of the company are of the value of over Rs. 24,50,000 and the same are secured as above to the extent of less than Rs. 9,30,000 as at the end of June, 1975. The dues of the sundry creditors are to the extent of Rs. 5,12,863 during the same period. Against the said amount, the company has recoveries in cash and kind of about Rs. 4,00,000. I say that the loans given by the directors of the company are not repayable immediately as they have assured the company that they will not enforce their claims. I say that during the current year 1974-75, the company has made net profits of Rs. 1,50,000. I say that the assets of the company are much more than the liabilities and the company has good business orders of the production has increased considerably during the last several months after the emergency was declared."

4. Again, in para. 18 of the affidavit-in-reply, it is stated as follows :

"I say that after the company was formed and incorporated in the year 1962, it was at that time in need of finance and had borrowed about Rs. 2 lakhs and had repaid the same within about 3 years'' time. I say that for the purpose of such borrowings during the initial period of the company''s business, the board of directors of the company had unauthorised any on of the directors to act on behalf of the company and sign on the hundis. I say that all such hundis have been repaid. The company has not borrowed any money on hundis after 1969."

5. The petitioners had an opportunity to file an affidavit-in-rejoinder. This affidavit was tendered at the hearing. Mr. G. A. Thakkar, the learned counsel for the company, submitted that the affidavit-in-rejoinder should not be taken on file as the same is filed at a late stage, affording no opportunity to the company to deal with the allegations set forth therein. The affidavit-in-rejoinder was taken on file on he condition that the allegations made therein shall be deemed to have been denied by the company. In this affidavit-in-rejoinder, the petitioners seem to rely on the letter dated 5th January, 1963, addressed by the company to the firm of Messrs. P. Naraindas & Co., which says that the firm of Messrs. P. Naraindas & Co. was appointed as the sole finance broker for raising loan for the company. With this letter, the company enclosed a resolution dated nil, saying that the company had resolved to appoint the firm of Messrs. P. Naraindas & Co. as finance broker for raising loan from the market at market rate, and that the limit of such loan to be taken on hundis will be Rs. 2 lakhs. It further says, "any two of the directors will sign jointly and severally on the hundis". This resolution is signed by six directors which includes Manila Keshavji Thakkar and Mavji

Keshavji Thakkar. On the basis of this resolution, it is pleaded by the petitioners that the company has continued borrowing from the market and, in particular, form, the said Messers. P. Naraindas & Co. It is stated that the money advanced under the 16 hundis were borrowed by the company through Messrs. P. Naraindas & Co. and it is also sought to be submitted that any two directors are required to sign on the hundis either jointly or severally, and that the hundis have been signed by the two directors. The petitioners merely stated that it was false that the company had not received consideration or money from the petitioners.

6. On behalf of the petitioners, it was urged by the learned attorney, Mr. Dhimant Malvi, for the petitioners that the company has, through its directors, Manilal K. Thakkar and Mavji K. Thakkar, executed the 16 hundis referred to in paragraphs 7 to 10 of the petition and that the hundis have been executed for consideration and notice so demand have been duly served upon the company. At all times material, Manilal K. Thakkar was the director of the company. The provisions of Section 292 of the Companies Act have been complied with, inasmuch as the resolution which is disclosed in the affidavit-in-rejoinder shows that the company had in fact passed a resolution authorising any two of the directors to sign the hundis jointly and severally. It was also contended that the company had not submitted the audited balance-sheet for the year ending June, 1975, and, therefore, more reliance should be attached to the financial position as disclosed in the affidavit in reply reading to the period ending June, 1975. Mr. Dhimant Malvi, however, gave up the second ground of the company being commercially insolvent which is pleaded in paragraph 13 of the petition and rested his case on the circumstances mentioned in paragraph 12 of the petition.

7. On behalf of the company, it was submitted that no consideration had passed to the company under the alleged 16 hundis. There is no resolution of the board of directors as required by section 292(1) and (2) of the Companies Act and, therefore, the alleged borrowing is not proper and legal. Manilal K. Thakkar had no power to borrow the money on behalf of the company. It was submitted that the dispute raised by the company is bona fide and substantial. Having regard to the facts and circumstances of the case, the petitioners cannot invoke the extraordinary remedy under the provisions of the Companies Act, as by admitting the petitioner great harm and irreparable loss would be caused to the company.

8. Before proceeding to investigate into the rival contentions, let me bear in mind some of the well-established principles on the point.

8. It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order.

9. Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay"

within the meaning of section 434(1)(a) of the Companies Act, 1956. If there is on neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.

10. Thirdly, a debt about the liability to pay which at the time of the service of insolvency notice, there is a bona fide dispute, is not "due" within the meaning of section 434(1)(a) and non-payment of the amount of such bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability u/s 433(e) read with section 434(1)(a) of the Companies Act, 1956.

11. Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet it liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

12. It is not necessary for me to lay down all the principles which could be deducible from the case law and notable commentaries because, in my opinion, the above principles are a sufficient guideline on the facts of the present case. No hard and fast rule can be laid down in inquiring into the question of a bona fide dispute with regard to any debt. Whether there is a bona fide dispute or not will necessarily depend on the facts and circumstances of each particular case.

13. Again, it is well-settled that a detailed inquiry at the preliminary stage of administration should be avoided. All the same, the court has to consider the dispute raised by the company. This can be achieved by assessment and appreciation of the affidavit evidence before the court at the stage of the admission. It is for the limited purpose of arriving at a conclusion whether a bona fide, serious and substantial dispute arises or not, that the occur examines the matter. The court looks out for a prima facie case. If a petitioner makes out a prima facie case, then the court would exercise its discretion. The remedy afforded is an equitable one.

14. At this stage, it is convenient to refer to the observations relied upon on behalf of the company from page 662 of the Guide to the Companies Act by A. Ramaiya, 7th edition :

"Two rules are well-settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company .... Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but chooses not to pay that particular debt [In re A Company [1894] 2 Ch 349 . 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 t is disputed, the court will make a winding-up order without requiring the is creditor to quantify the debt precisely. [See In re Tweeds Garages Ltd. [1962] Ch. 406: 32 Comp Cas 795 (Ch D). The principles on which the court acts are : (1) that the defence of the company is in good faith and one of substance; (2) the defence is likely to succeed in point of law; and (3) the company adduces prima facie proof of the facts on which the defence depends."

15. Now, the fact that there is a dispute is not open to question. The questions which require investigation are whether the dispute is bona fide and whether there are substantial questions raised in the dispute. It is a limited inquiry at the stage of admission.

16. The disputes about the execution of the 16 hundis on behalf of the company by its director, Manilal K. Thakkar, raises a mixed question of fact and law and requires the interpretation of the provisions of section 292 of the Companies Act. The petitioner have relied upon the resolution annexed to the letter dated 5th January, 1963, and, therefore, it can be reasonably said that the resolution is of some period prior to 5th January, 1963. This resolution in terms says that any two of the directors were required to sign on the hundis. Prima facie this resolution seems not to have been complied with. The hundis are signed by only one director, namely, Manilal K. Thakkar. The other director, Mavji K. Thakkar, which has signed the hundis has signed as a guarantor. In signing the hundis as a guarantor, Mavji''s signature appears in the following manner :

"I the undersigned a director of the above company hereby guarantee the repayment of the above-mentioned amount.

Mavji K. Thakkar."

17. Therefore, a question does arise as to whether the hundis are executed in terms of the said resolution or not ? A reading of the resolution and bearing in mind the relevant provisions of section 292 of the Companies Act shows that the defence of the company is bona fide. It is not one of those categories which can be characterised as "false" or "to avoid liability" or "to postpone the evil day". There is also considerable force in the submission made on behalf of the company that the resolution which is of the year 1963 has exhausted itself as the alleged borrowing took place some time in 1974. The outer limit of rupees two lakhs fixed in the said resolution also raises some questions of fact. The interpretation of section 292 is also a matter which cannot be overlooked. The nature of this dispute is both bona fide and substantial in my judgment.

18. Another defence raised is that the company has not received any consideration from the petitioners or, in other words, there were no transactions between the petitioners and the company during the material period. In this connection, I am prima facie satisfied that this aspect of the case also raises a bona fide dispute and the defence of the company is in good faith and one of substance. The case of the company appear to be that it has not borrowed any moneys on hundis after 1969. The company relies on its books of account in this connection and asserts that no money has gone into its kitty. As against this emphatic statement on oath, the petitioners, in spite of the opportunity available to them while making their affidavit-in-rejoinder, have failed to set out the manner in which the alleged consideration passed from the petitioners to the company. It is significant that neither in the considerable correspondence spread

out between August, 1974, and May, 1975, nor in the petition nor in the affidavit-in-rejoinder dated 7th January, 1976, did the petitioners choose to assert that the alleged consideration of Rs. 40,000 under the 16 hundis had passed either wholly in cash or partly by cheque and partly in cash or wholly by cheque or in any other way. This is within their knowledge. I asked for the books of accounts of the petitioners-firm. I was told that the books were not brought to the court and none on behalf of the petitioners-firm was present at the hearing. There is no material before me, on the basis of which I can as that the petitioners have made out a prima facie case that the alleged consideration has passed to the company. On this point, the learned attorney for the petitioners fallback upon the statutory presumption embodied in section 118(a) of the Negotiable Instruments Act, 1881, which provides that unless the contrary is proved, a presumption shall be made that every negotiable instrument was made or drawn for consideration. Now, this special rule of evidence is not an absolute rule. The presumption is rebuttable. In the present case, the execution of the hundis by a director clothed with the power to borrow on hundis is denied and the consideration is also denied. On the facts of the present case, I do not think that this feeble stand u/s 118(a) can further case of the petitioners.

19. None the less, in the teeth of a clear statement that the company has not borrowed any money on hundis after 1969, one would have expected the petitioners to come forward to say as to whether the amounts were lent and advanced from time to time in cash or by cheques or the same were handed over to the directors or officers of the company or the finance broker''s firm and to whom for being paid over to the company. On the other hand, what is sought to be stated in the affidavit-in-rejoinder is that "the moneys advanced under the said 16 hundis mentioned in the petition were borrowed by the company through the said brokers, Messrs. P. Naraindas & Co." There is no affidavit made on behalf of Messrs. P. Naraindas & Co. showing that they acted as brokers in the present case or the company borrowed the money from the petitioners through them. Mr. Dhimant Malvi, the learned attorney, referred to the original hundis which show that the hundis are issued in favour of P. Naraindas & Co. and also bear their name in rubber stamp on the face of the hundis on the left bottom side. This material is of no assistance in the circumstances of the present case. The stand taken by the company appears to be consistent from the stage of the notice to the stage of the hearing. This consistent in the Defence has some bearing on the issue of bona fide dispute. There cannot be two opinions that the nature of this dispute is also substantial.

20. In the circumstances of the present case indicated above, it cannot be said that the omission or failure to pay the amount demanded under the statutory notice amounts to neglect to pay within the meaning of clause (a) of sub-section (1) of section 434 of the Companies Act, 1956, since the disputes raised are bona fide and substantial.

21. The ground of the company being commercially insolvent was given up by Mr.

Dhimant Malvi. Even otherwise, though the company has suffered a loss of about Rs. 96,000 in the year ending June, 1974, and, has shown a profit of Rs. 1,50,000 for the year ending June, 1975, I have no reason to disbelieve the statement on oath of a director of the company though the accounts are not audited for that year. This ground inherently did not rest on sound premises and, therefore, wisely it was not made use of at the hearing. To my mind, this company is more than reasonably solvent. The insolvency contemplated by the Companies Act is that the company should be commercial insolvent. Its assets and liabilities must be such as to make the court feel satisfied that the existing and probable assets will be insufficient to meet the existing liabilities. In the present case, the company is definitely commercially solvent. It must be remembered that winding up is an extraordinary remedy and in my opinion, the court should be slow in exercise of its powers and discretion.

22. In this view of the matter, I find that no prima facie case has been made out by the petitioners which calls for winding up of the company.

23. In the result, the petition is rejected. The petitioners to pay to the company costs of this petition.

