

(2012) 02 AP CK 0108

In the Andhra Pradesh High Court

Case No : Company Applications No's. 1537 and 1538 of 2011 in Company
Petition No. 209 of 2010

Integrated Broadcasting Co. P. Ltd.

APPELLANT

Vs

Nettlinx Ltd.

RESPONDENT

Date of Decision : 22-02-2012

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 434, 434(1)(a), 439

Citation : (2012) 171 CompCas 333

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : B.V. Subbaiah, for the Appellant; Chetluri Sreenivas, for the
Respondent

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, J.—Company Petition No. 209 of 2010 was filed by M/s. Nettlinx Ltd. (a company registered under the Companies Act, 1956, having its registered office at Hyderabad), under sections 433(e) and (f), 434(1)(a) and 439 of the Companies Act, 1956, read with rule 95 of the Companies (Court) Rules, 1959, for winding up of M/s. Integrated Broadcasting Co. P. Ltd. (I-News) having its registered office at Hyderabad. Notice before admission was ordered on November 23, 2010 and, despite service of notice, none appeared for the respondent-company. This court, after hearing counsel for the petitioner-company and having perused the petition and the documents enclosed thereto held, in its order dated April 11, 2011, that the material brought on record established that the respondent-company became indebted to the petitioner-company to a tune of Rs. 81,86,349 as on the date of filing of the petition and, despite service of statutory notice, it did not liquidate the liability. This court further held that the petitioner-company had made out a prima facie case for admission of the company petition, and in these circumstances directed, that the company petition be admitted. Thereafter the respondent-company has filed

these two applications (C.A. Nos. 1537 and 1538 of 2011). C.A. No. 1537 of 2011 is filed to set aside/recall the order of admission in C.P. No. 209 of 2010 dated April 11, 2011. C.A. No. 1538 of 2011 is filed by the respondent-company to reject the petition in C.P. No. 209 of 2010, and direct the parties to resolve the dispute through the arbitrator to be appointed by this court.

2. In the affidavit filed in support of C.A. No. 1537 of 2011, it is stated that the respondent-company is running a 24 hours news channel known as I-news; they had approached the petitioner for providing internet services to them; an agreement dated October 1, 2009, was entered into between the parties; in the month of October, 2010 the then management had sold their shares to the applicants; the purchasers of these shares had come into the affairs of the management; the new management was now running the said company; in the meanwhile the petitioner company had sent a notice dated July 20, 2010, u/s 433 of the Companies Act, and had filed a petition against the respondent-company seeking winding up; by then the present management was not in the picture; both notices seem to have been received by the office of the then respondent-company; unfortunately the same were not brought to the notice of the present management; therefore they had not, appeared before this court; they were not aware of the filing of the winding up petition; and hence the present application is filed to set aside the order in C.P. No. 209 of 2010 dated April 11, 2011.

3. In the affidavit filed in support of C.A. No. 1538 of 2011, while reiterating the averments in the affidavit filed in support of C.A. No. 1537 of 2011, it is further stated that the present management had entered into an agreement with the previous management of the respondent-company on October 1, 2009, on the terms and conditions mentioned therein; one of the conditions of the agreement was that any dispute between the parties, in connection with the said agreement, would be referred to an arbitrator, resolved in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the venue of such arbitration would be at Hyderabad; clause 17 thereof was the arbitration clause; in view of clause 17, the petitioner-company ought to have referred the dispute to the arbitrator instead of filing the company petition; the petitioner was claiming the amount based on the said agreement; in view of the arbitration clause, the company petition has to be dismissed in limine; the parties ought to be directed to resolve the dispute through the arbitrator to be appointed by this court; and the petitioner appears to have filed the company petition only to harass the respondent-company.

4. Sri B.V. Subbaiah, learned counsel for the applicant, would place a copy of the arbitration application filed by the respondent-company before this court seeking appointment of an arbitrator to decide the disputes between the parties (the petitioner and respondent-company). Learned counsel would also place certain documents for this court's perusal. These are (1) the certificate issued by the director and CEO of the petitioner-company dated August 24, 2011, stating that

the respondent-company was due a sum of Rs. 33,35,865 and they had no further claim in any form or in any manner over and above the said amount; (2) a comparative statement of the annual returns of the company to show that the respondent-company is commercially solvent; and (3) letter dated January 18, 2011, allegedly addressed by the director of the petitioner-company to the management of the respondent-company on January 18, 2011, wherein the petitioner is said to have stated that Rs. 33,35,865 was due as on June 30, 2010; the petitioner had earlier sent a legal notice followed by a winding up petition; they had held a couple of discussions with the senior vice-president of the respondent; although assurances were given that payment would be made, nothing had happened so far; and they looked forward to receive a cheque for Rs. 33,35,865 by January 24, 2011.

5. It may not be appropriate for this court to examine the documents passed across the bar as the petitioner-company is in no position to rebut the contents of these documents. Even otherwise it is evident, from the letter addressed by the petitioner to the respondent on January 18, 2011, that they had informed the respondent about the winding up petition having been filed. It is the case of the applicants that the change in management took place in October, 2010 which is much prior to the aforesaid letter dated January 18, 2011. The company petition was admitted by this court, by order dated April 11, 2011, nearly three months after the said letter dated January 18, 2011, was received by the respondent. It is thus evident that, despite being made aware of the company petition having been filed for winding up the respondent-company chose not to appear and contest the matter.

6. Even otherwise, winding up is sought of the company which is a legal entity distinct from its shareholders. A company has an independent and legal personality distinct from the individuals who are its members (Life Insurance Corporation of India Vs. Escorts Ltd. and Others, Unlike an unincorporated company, which has no separate existence and which the law does not distinguish from its members, an incorporated company has a separate existence and the law recognises it as a legal person separate and distinct from its members. This new legal personality emerges from the moment of incorporation and from that date the persons subscribing to the memorandum of association and other persons joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an entity. But the members who form the incorporated company do not pool their status or their personality. The personality of the members has little to do with the persona of the incorporated company. The persona that comes into being is not the aggregate of the personae either in law or in metaphor. The corporation really has no physical existence it is a mere "abstraction of law" (The State Trading Corporation of India Ltd. and Others Vs. The Commercial Tax Officer, Visakhapatnam and Others, . While there may well have been a transfer of shares, and a change in the management, the respondent-company a distinct legal entity continues to remain in existence. As what was sought in the company

petition is the winding up of the respondent-company, a change in its shareholding pattern or of its management is of no consequence. The inter se disputes between the erstwhile and the present management cannot be a ground to refuse admission of a winding up petition, where the respondent-company is deemed to be unable to pay its debts.

7. Even if the amount claimed in the statutory notice is higher than the admitted amount, as long as the admitted amount exceeds the minimum amount stipulated u/s 434(1)(a) of the Companies Act, and despite service of a statutory notice, the respondent-company fails to pay the lesser amount, it must be deemed that the respondent-company is unable to pay its debts in view of the legal fiction u/s 434(1)(a) of the Companies Act. In *Vijay Industries Vs. NATL Technologies Limited*, , the Supreme Court held that what was necessary for invoking section 434 of the Companies Act was that, despite service of notice by the creditor, the company which was indebted in a sum exceeding the amount specified therein, had failed and/or neglected to repay the same within three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor; section 433 of the Companies Act did not state that the debt must be precisely a definite sum; and if, on the date of filing of the petition, dues in respect of at least a part of the debt which was more than the amount specified in section 434(1)(a) of the Companies Act was not denied, the petition should be admitted as it was not a requirement of the law that the entire debt must be definite and certain.

8. The power to recall an order inheres in the court to correct its own mistakes. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. If the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration would result in miscarriage of justice then it cannot, on any principle, be precluded from rectifying the error. Mistake is accepted as a valid reason to recall an order. Difference lies in the nature of the mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the court. Technicalities apart, if the court is satisfied of the injustice then it is its legal obligation to set it right by recalling its order. It is the duty of the court to rectify, revise and re-call its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences *S. Nagaraj and Others Vs. State of Karnataka and Another*, If the court commits a mistake which prejudices a party, the court has the inherent power to recall its order *Benoy Krishna Mukerjee Vs. Mohanlal Goenka and Others*, , *Gajanand Sha and Others Vs. Dayanand Thakur*, , AIR 1947 236 (Nagpur) AIR 1926 315 (Oudh) AIR 1929 385 (Oudh) *Bankey Behari Lal v. Abdul Rahman* [1932] 7 ILR Lucknow 350; AIR 1932 Oudh 63, *Lekshmi Amma Chacki*

Amma v. Mammen Mammen [1955] KLT 459; AIR 1956 Trav-Coch 87 and *Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd.*, It is only if the earlier order suffers from such an error as to necessitate its being recalled and corrected would this court be required to recall the order. Despite service of notice, the respondent-company chose not to appear. Even during the hearing of the present applications, the applicant-company (the respondent in the company petition) does not deny its liability to pay Rs. 33,35,865 to the petitioner. All that they contend is that the company is solvent, and there is a remedy of arbitration provided under the contract. Both these contentions do not merit acceptance. In view of the legal fiction u/s 434(1)(a) and on compliance of the conditions stipulated therein, if the company does not pay the amount due it must then be deemed to be unable to pay its debts. The question whether the company is or is not commercially solvent is of little consequence, as the legal fiction u/s 434(1)(a) requires this court to deem that the company is unable to pay its debts. An examination of the company's solvency may be a useful aid in determining whether the refusal to pay the debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company's liability, it is difficult to hold that the company would be able to pay the debt merely by proving that it is able to pay the debt. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant in the context of whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterised as a stand alone ground *IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.*,

9. Likewise, the mere existence of an arbitration clause would not bar exercise of jurisdiction by this court u/s 433(e) of the Companies Act for winding up of a company which is deemed to be unable to pay its debts. Proceedings u/s 433/434 read with section 439 of the Companies Act are in a completely different jurisdiction than the one under which the remedy or relief can be sought by way of arbitration. Proceedings for winding up are not proceedings for recovery of any amount (*Tirlok Chand Jain v. Swastika Strips P. Ltd.* [1991] 70 Comp Cas 197 (P & H)). The jurisdiction for ordering winding up of a company is a special jurisdiction which has been conferred on the High Courts. The object of passing such an order is that the assets of the company should be realised and debts paid expeditiously. The passing of such an order against the company has a serious consequence and, therefore, the jurisdiction has been conferred on the High Courts. The order of winding up can be passed on any of the grounds mentioned in section 433 of the Companies Act. It does not appear to be the intention of the Legislature that such a power can be conferred on an arbitrator. The petition for winding up cannot be treated as one for recovery of an amount of debt from the company (*William Jacks and Company (India) Limited Vs. Saraswati Industrial Syndicate Limited*, and *Hind Mercantile Corporation P. Ltd.*

Vs. J.H. Rayner and Co. Ltd.,

10. The jurisdiction of the company court will not be taken away by the mere existence of an arbitration clause (Maruti Ltd. (in liquidation) v. B.G. Shirke and Co. P. Ltd. [1981] 51 Comp Cas 11 (P & H) and Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be of the effect that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company, as such a power is conferred on, and is vested with, the court under the Companies Act (Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., and Prime Century City Developments P. Ltd. v. Ansal Buildwell Ltd. [2003] 113 Comp Cas 68 (Delhi)). Even if an arbitration clause subsists between the parties, the High Court would have unfettered powers to entertain winding up petitions Madhya Pradesh Iron and Steel Company Vs. G.B. Springs (P) Ltd. and Mohta Bright Steel (P) Ltd., . In terms of the arbitration agreement, the arbitrator can always find out and adjudicate as to whether or not a company is functional and, if it was not functional, he could always find out the nature and status of its assets and can also issue directions and pass orders regarding dues and liabilities and also for taking recourse to the appropriate remedy (Everest Holding Ltd. v. Shyam Kumar Shrivastava [2008] 16 SCC 774). There is no conflict between the statutory relief of winding up and of the contractual right to have disputes settled by arbitration. Once a bona fide defence is shown to exist, arbitration will be the efficacious and proper remedy. Where, however, the defence is mala fide and a moon-shine, arbitrable disputes would not exist and the company judge would have the power to pass appropriate orders Madhya Pradesh Iron and Steel Company Vs. G.B. Springs (P) Ltd. and Mohta Bright Steel (P) Ltd.,). Existence of an arbitration clause does not oust the jurisdiction of this court to either entertain or to admit a petition for winding up. I see no reason, therefore, either to recall the earlier order passed by this court directing admission of the company petition, or to dismiss the company petition relegating the parties to arbitration in terms of the arbitration clause in the agreement. Both the applications fail and are, accordingly, dismissed.