

(1974) 08 KL CK 0005

In the High Court Of Kerala

Case No : Company Petition No. 16 of 1973

Jugalkishore Benarsidas

APPELLANT

Vs

South India Saw Mills (P.) Ltd.

RESPONDENT

Date of Decision : 08-08-1974

Acts Referred:

Companies Act, 1956 — Section 433, 434, 439

Citation : (1975) 45 CompCas 273

Hon'ble Judges : G. Balagangadharan Nair, J

Bench : Single Bench

Advocate : K. Ramakumar, for the Appellant; P.C. Balakrishna Menon, V.P. Mohan Kumar and Sumathy Dandapani, for the Respondent

Final Decision : Dismissed

Judgement

Balagangadharan Nair, J.—This is a creditor's petition u/s 439 read with Sections 433(e) and 434 of the Companies Act.

2. The averments in the petition are briefly the following: The respondent-company's principal business is to run a saw mill and carry on trade in timber. In respect of the supply of band saw and circular saw blades and other goods made by the petitioner, the company was indebted to the petitioner in a sum of Rs. 1,167.43 on account of principal and interest under the ledger maintained by the petitioner. On February 24, 1973, the petitioner issued a registered notice demanding payment of this debt and it was accepted by the company on February 28, 1973. Thereafter, the company paid the petitioner Rs. 100 on March 14, 1973. The petitioner understands that large amounts are due by the company by way of arrears of employer's share of contribution of provident fund sums as well as employer's share of E.S.I. payable to the Employees' State Insurance Corporation. It is also understood that a suit had been filed by the Corporation Bank Ltd., Calicut, against the company for recovery of a sum of Rs. 62,449.22 and interest and costs. It is thus manifest that the company is unable to pay its debts. The petition was filed on August 16, 1973.

3. On February 18, 1974, the company's manager filed a counter-affidavit to the following effect: The company was having dealings with the petitioner from 1959. The petitioner's ledger produced in the case would show that the actual amount outstanding on November 13, 1972, was only Rs. 1,087.43. There was no settlement of accounts and the company had been making payments for several of the items purchased. After receipt of the notice, the company paid Rs. 40 also on March 19, 1973, besides the Rs. 100 admitted in the petition, for some of the items purchased. The petitioner has not, however, given credit to the payment of Rs. 40. The company has also paid Rs. 50 on October 3, 1973, and another Rs. 50 on December 29, 1973. After these payments, the balance due to the petitioner would only be Rs. 847.43. It was not correct to say that large amounts are due from the company by way of arrears of E.S.I. and E.P.F. contributions. The company is regularly making such payments as and when they become due. The allegation that the respondent has many other debts is wrong. The Corporation Bank, Calicut, had not filed any suit or taken any other proceeding against the company in any court for realising a sum of Rs. 61,449.22. Although the company has dealings with the bank, the bank had no occasion to bring any suit against the company. The financial position of the company is very sound and it is very solvent and the petitioner has been moved by some improper motives to file the petition without any merits. The company has no intention either to evade or avoid payment; in fact the company is prepared to pay the balance due to the petitioner in a lump.

4. To this the petitioner filed a reply-affidavit on March 26, 1974, that the payments mentioned in the counter-affidavit which have not been given in the affidavit were subsequent to the petition. The Corporation Bank/ Kozhikode, had filed O.S. No. 94 of 1972 on the file of the Sub-court, Kozhikode, for Rs. 68,704.39 against the company for recovery of a debt and the statement to the contrary in the counter-affidavit of the company is false. The affidavit proceeded to say that the financial position of the company is not at all solvent and that there are a number of attachments pending against the company, effected by officers for the revenue recovery collections in the Taluk Office, Kozhikode.

5. On June 21, 1974, the company through its manager filed a further counter-affidavit by way of reply. It said that there had been no settlement of its accounts with the petitioner, that the company does not admit the correctness of the amount demanded, that there was no stipulation to pay interest at 12% and that in the circumstances the notice of demand was not a valid notice u/s 434 attracting the presumption under that section. The acceptance of Rs. 240 by the petitioner after receipt of the notice should in the circumstances be deemed to be a composition of the demand. Even on the basis of the petitioner's demand the balance amount, after payment of Rs. 240, was only Rs. 927.43. This amount was tendered to the petitioner's counsel by a cheque drawn in his name on June 16, 1974, but it was not accepted. Despite its dispute about the claim, this tender was made lest the winding-up petition should harm the company's reputation.

6. No oral evidence was given by either party but they have produced certain documents--exhibits P-1 to P-3 on behalf of the petitioner and exhibits D-1 to D-4 on behalf of the company. Exhibit P-1 is a copy of the plaint in O.S. No. 94 of 1972 of the Sub-court, Kozhikode, instituted by the Corporation Bank Ltd. against the company and its directors for recovery of Rs. 68,703.39, being the balance due under a loan of Rs. 75,000, granted on August 8, 1968. Exhibit P-2 is a copy of the petitioner's ledger for 1971-72 in the name of the company, showing a balance of Rs. 1,087.43 and exhibit P-3 is a copy of the notice issued by the petitioner to the company demanding the above amount with interest at 12% and Rs. 1'85, being the cost of issuing the notice. Exhibits D-1 to D-4 are receipts issued by the petitioner to the company acknowledging receipt of Rs. 100 on March 14, 1973, Rs. 40 on March 19, 1973, Rs. 50 on October 3, 1973, and Rs. 50 on December 29, 1973, respectively.

7. Counsel for the petitioner strongly contended that in view of the admitted notice of demand and the non-payment of the debt, the company should be deemed to be unable to pay its debts within Section 434(1)(a) and this entitles the petitioner to an order for winding-up the company. In support of this contention counsel relied upon the following passage from Palmer's Company Precedents, Part II, 1960 edition (page 25), which was quoted with approval by the Supreme Court in Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan, :

" A winding-up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the court gives to a creditor against a company unable to pay its debts. "

8. The Supreme Court, however, proceeded to observe :

" It is true that " a winding-up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise. "

9. It is thus clear that although a winding-up petition is a proper remedy and a mode of execution against a company unable to pay its debts it is not an alternative to the ordinary procedure for the realisation of the debts due by the company. It is also manifest that even where the power to wind up exists, its exercise is governed by considerations of propriety. In The Aluminium Corporation of India Ltd. and Another Vs. Lakshmi Ratan Cotton Mills Co. Ltd. and Others, which arose on a creditor's petition to wind-up the respondent-company, it was held:

" The fact that the company is unable to pay its debts, does not necessarily entitle the court to order winding-up of the company as the discretion to pass such an order, even in the case of the inability of a company to pay its debts, is by Section 433 vested in the court.

But the discretion has to be exercised judicially. This means that it is only where

the balance of equities is shown by a petitioner to tilt appreciably in favour of a winding-up order that it will be made *ex debito justitiae*. It is in this special sense that a petitioner relying on grounds contained in Section 433 can get a winding-up order as a matter of right. It is issued as a matter of right when the proved contents of the right produce a compelling effect. It is not granted mechanically as a matter of course on proof of certain facts. In other words, equitable considerations have a decisive effect even when the power to wind-up a company is invoked under a clause of Section 433 other than the general just and equitable Clause (f). The provisions of Section 434(1) determine when the requirements of Section 433(e) will be deemed to be fulfilled, but they do not lay down when a winding-up order must necessarily be passed. It is true that a creditor is not bound to wait and give time to the company beyond the time prescribed after the statutory notice, before filing his petition. But the court may, if there are sufficient counter-balancing equitable grounds, deny an immediate winding-up order, or, in appropriate cases, even refuse it altogether in spite of the proved inability of a company to pay its debts. Exercise of such discretionary power must necessarily be governed by justice and equity " (Head Note).

10. That being the legal position, I cannot accept the broad contention that the petitioner is absolutely entitled to an order winding up the company *ex debito justitiae* on the mere plea that a balance of Rs. 927.43, out of the original claim of Rs. 1,167.43, is due from the company--apart from the company's plea that there has been no settlement of accounts and no contract to pay interest. Subsequent to the receipt of notice, the company has paid Rs. 240 to the petitioner--Rs. 140, before and Rs. 100, after the petition. The company's counter-affidavit dated June 21, 1964, asserts that a cheque for the full balance was tendered to the petitioner's counsel on June 16, 1974. This was not contested. At every date of hearing, counsel for the company submitted that he had the money with him and was prepared to pay it to the petitioner's counsel but the latter represented that his instruction was not to receive it. Even in the first counter-affidavit, the company offered to pay the amount in a lump. In this situation the company can scarcely be said to be unable to pay the petitioner's debt and in the face of the company's repeated offer to pay off the debt, the petitioner's conduct in persisting in the attempts to have the company wound-up underlines that it is an eminently fit case in which this court should not exercise its power in favour of the petitioner. I am satisfied that the petitioner, even if originally justified in bringing the petition, is persisting in its prosecution, with iniquitous motives and should be denied relief.

11. It was, however, said that despite the company's offer to pay the petitioner, the debt in exhibit P-1 suit is outstanding and that would spell inability to pay its debts justifying a winding up. The bank which has filed that suit has not intervened to support the petition and it is not known what the company's defence to that suit is, or whether the company is unable to pay that debt, even if the debt is fully due, or whether the bank is willing to accommodate the company. In the circumstances, the petitioner cannot claim a vicarious boost

from that debt and it will be of no avail to sustain the petition.

12. I dismiss the petition with costs, including advocate"s fee of Rs. 250.