

(1998) 06 MAD CK 0050
In the Madras High Court
Case No : C.A. No's. 730 to 732 of 1998

K. and Co.

APPELLANT

Vs

Aruna Sugars and Enterprises Ltd.

RESPONDENT

Date of Decision : 23-06-1998

Acts Referred:

Companies Act, 1956 — Section 433, 433(1), 536(2)

Citation : AIR 1999 Mad 45 : (1998) 2 LW 725

Hon'ble Judges : S. Thangaraj, J

Bench : Single Bench

Advocate : T.K. Seshadri, for the Appellant; Mohan Parsaran, for the Respondent

Judgement

S. Thangaraj, J.—This application is filed by the applicant for ad-interim injunction in relation to item No. 1 of the Notice dt. 31-3-1998 of

the extra ordinary General Meeting to be held on 20-5-1998.

C.A. No. 731/1998 :

2. This application is riled by the applicant for ad-interim injanction restraining, disposing of the fixed assets and divisions of the respondent

company.

C.A. No- 732/1998 :

3. This application is filed by the respondent/ applicant company to vacate the injunction granted in C.a. No. 730/1998 in C.P. No. 380/ 1997 dt.

5-5-1998.

4. M/s. K. and Company a partnership firm has filed C.P. No. 380/1997 on the file of this Court u/s 433(e) read with Section 434(1) of the

Companies Act, 1956 for winding up, on the allegation that the respondent M/s. Aruna Sugars and Enterprises Limited is unable to pay it's debts

to the tune of Rs. 53,58,457/- as on 15-2-1997, in spite of the statutory notice dated 9-6-1997 served on the respondent company. It was further

alleged that the respondent Company is heavily indebted and its liabilities to the extent of Rs. 110 crores are more than its assets and that the

respondent is convening an extra ordinary General Meeting on 20-5-1998 to consider inter alia to pass a resolution relating to transfer or

otherwise disposing of the hotel division known as "Quality-inn-Aruna" at no. 144, Sterling Road. Nungarnbakkam, Chennai 34 to M/s. Aruna

Foods Limited claiming to be a subsidiary of the respondent company pursuant to an alleged Memorandum of Understanding dated 31-3-1998.

During the pendency of the Company Petition for winding up of the respondent company, any disposition of the property made shall unless the

Court otherwise Orders be void as contemplated u/s 536(2) of the Companies Act. Therefore the applicant prayed for ad-interim injunction in

relation to item No. 1 of the Notice dt. 31-3-1998 of the Company extra ordinary General Meeting to be held on 20-5-1998 and also for similar

prayer restraining, disposing of the fixed assets of the division of the respondent company.

5. The Vacation Court has passed an Order of ad-interim injunction in favour of the applicant and subsequently the ad-interim injunction was

extended till 18-6-1998.

6. The respondent M/s. Aruna Sugars and Enterprises Limited filed C.A. No. 732 of 1998 to vacate the ad-interim injunction already passed by

refuting the various allegations made in the affidavit filed by the applicant M/s. K and Company. As there is specific denial of every allegation made

by the applicant M/s. K and Company, the respondent M/s. Aruna Sugars and Enterprises Limited thought fit not to file any separate counter in

C.A. Nos. 730 and 731 of 1998 and treated their affidavit filed in C.A. No. 732/1998 as the counter in those two applications.

7. Arguments of both sides heard.

8. Learned counsel for the applicant argued that the applicant company has filed C.P. No. 380/1997 u/s 433(e) read with Section 434(1) of the

Companies Act, 1956 for winding up of the respondent company M/s. Aruna Sugars and Enterprises Limited, that the Court has admitted the

petition and issued notice to the respondent and on receipt of the notice, the

respondent and their Advocates appeared in the Company Petition, that they took time for filing counter in the said petition and in the meantime the respondent pursuant to an Memorandum of Understanding dt. 31-3-1998 in the extraordinary General Meeting to be held on 20-5-1998 had to pass a resolution relating to the transfer or otherwise disposing of the hotel division i.e. Quality-Inn-Aruna at No. 144, Sterling Road, Chennai 34 to M/s. Aruna Foods Limited claiming to be a subsidiary of respondent company and such a disposition without the orders of the competent Court is void as per provisions of Section 536(2) of the Companies Act.

9. Learned counsel, for the applicant has further argued that the debts due to the applicant are not disputed, that the debts are not paid even after the receipt of the statutory notice would go to show that the company is unable to pay its debts as per provisions of Section 433(e) read with Section 434(1)(a) of the Companies Act, and as such there is sufficient materials in favour of winding up of the respondent company.

10. The respondent have disputed the claim of Rs. 53,58,457/- as on 15-12-1997 and admitted that the debt was only to the tune of Rs. 35 lakhs.

As per Section 434(1)(a) of the Companies Act, if the debt due is above Rs. 500/- and other conditions are fulfilled, the order of winding up can

be passed. Therefore we need not go deep into the actual amount due to the petitioner by the respondent when admittedly the debt due is Rs. 35

lakhs which is much more than the amount prescribed under law.

11. The next allegation that the respondent M/s. Aruna Sugars and Enterprises Limited have to pay a debt of Rs. 110 crores to various creditors

and their assets are much lesser than the debts of Rs. 110 crores due to various creditors. The presumption that the respondent company is un-

able to pay its debts, was also challenged by the respondent company on the ground that their assets are much more than debts and have got

sufficient means to pay off their debts. These are all matters which should be gone into during the enquiry in the main C.P. No. 380/1997 wherein

the respondent have yet to file their counter, which the respondent explained by saying that the counter is ready to be filed into the Court. This

ground also can be gone into during the enquiry of the main Company Petition and not in the application where the parties canvass for and against

the ad-interim injunction already passed by this Court:

12. The petitioner has relied on various provisions of the Companies Act.

(i) "Section 441(2) says -- In any other case, the winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

By showing this provision, it was argued that the winding-up of the respondent company by the Court was deemed to have commenced on 19-12-

1997 the date of presentation of the company petition.

(ii) "Section 456(2) says -- All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for winding up of the company.

13. Learned counsel for the petitioner has argued that Sections 441(2) and 456(2) should be taken together and thereby the meaning conveyed

under those two Sections would be that even from the date of filing of the company petition for winding up of the company all the property and

effects of the company shall be deemed to be in the custody of the Court. Accordingly the property and effects of the respondent M/s. Aruna

Sugars and Enterprises Limited shall be deemed to be in the custody of the Court after filing the winding up petition. We need not enter into the

question of the actual meaning conveyed under these two Sections of the Companies Act, however it is clear from the various provisions that when

once a petition for winding up of a company is filed and the Court has admitted it thereafter the respondent/debtor company cannot effect any

disposition of its property without the orders of the Court. This view is fortified by Section 536(2) of the Companies Act, relied on by both parties

to canvass their respective cases,

Section 536 :

Avoidance of transfers, etc., after commencement of winding up-

(1) In the case of a voluntary winding up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator,

and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void.

(2) In the case of a winding up by or subject to the supervision of the Court, any disposition of the property (including actionable claims) of the

company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up,

shall, unless the Court otherwise orders, be void.

Sub Section 2 of Section 536 was relied upon by the respondent and contended that Quality-Inn-Aruna at No. 144, Sterling Road,

Nungambakkam, Chennai 34" is one of the several divisions of the respondent company and it comes under the hotel division, known as M/s.

Aruna Foods Limited a subsidiary and almost entirely controlled by the respondent which is holding of 97.42% of the equity shares approximately

and to prove the bona fides, the respondent has assured that it would not in any manner alienate any of the equity shares in the subsidiary company

M/s. Aruna Foods Limited to which the hotel division is vested in view of the restructuring proposal. To that effect the respondent has also further

submitted an affidavit sworn by one Mr. N. Subramanian Director in M/s. Aruna Foods Limited Company to the effect that till the disposal of the

company petition, the said hotel division which is to be vested with M/s. Aruna Foods Limited as per the proposal in item No. 1 to the notice dt.

31-3-1998 would not be either transferred or sold to any third party without further orders of this Court.

14. It was strenuously contended on the side of the petitioner that as per various provisions of the companies Act shown above, the respondent

cannot effect any transfer of Quality-Inn-Aruna which forms part of the respondent to M/s. Aruna Foods Limited though it is a subsidiary company

of the respondent.

15. The main object of the companies Act is to safeguard the interest of the company as well as its creditors. With a view to safeguard the interest

of one party, the other party should not be allowed to deprive of their rights. Section 536(2) of the Companies Act gives ample power to the

Court to pass appropriate orders with a view to safeguard the interest of the parties. The object of the companies Act is not to collect and pay the

debts of the creditors of the company and when a company loses its entire substratum and it becomes unable to pay its debts, in order to

safeguard the interest of the creditors the company court passes an equitable order safeguarding the interest of the creditors. Till then it is justifiable

to pass an equitable order considering the interest of the company also. The

Court in its discretion can pass such equitable orders and the discretion to be exercised on the same principles as guide the exercise of judicial discretion generally and even while using such a discretion the interest of the company has to be kept in mind. If the company is totally unable to pay its debts, and become commercially insolvent, the Court can pass an order at any stage when there are scope for paying the debts and to recoup its business so that the company can survive. Any honest disposition made by the company in the ordinary course of business are usually allowed by the Courts.

16. The petitioner herein have cited a ruling of the Kerala High Court in (Travancore Rayons Ltd. v. Registrar of Companies), (1988) 64 Com

Cas 819 wherein a decision of the Chancery Division of England in Burton and Deakin Ltd., In re (1977) 1 All 631 stated as follows:--

In my view, the animus of the sub-section is to forbid malapropos and objectionable disposition or dissipation of property which would ultimately fall to a low ebb or tail off the assets otherwise available for distribution among the creditors of the company in the event of winding up. But the section leaves a reserve power of discretion to justify and uphold all genuine and proper transactions, exercising a sound discretion normally validating transactions which are benign and honest; transactions which have been done in the best interest of the company and in the ordinary course of the company's business.

The Courts have uniformly held allowing any disposition during the pendency of the insolvency proceedings entirely on the circumstances of the case, if it is done in the interest of the company honestly in the ordinary course of business of the Company and without causing any harm to the interest of the creditors which includes the unsecured creditors also.

In Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjunwalla and Another, the Supreme Court held that the inherent powers of the

Court have not been taken away or restricted by Section 433(1) of the Companies Act which would go to show that apart from what is stated in

Section 433(1) of the Companies Act, the Court in its inherent powers can pass such justifiable orders which required under any particular circumstance of the case.

In R.C. Mehta & Co. v. Himabhai Manufacturing Co. Limited, 1970 (40) Com Cas

1230 : 1971 Tax LR 1855) the Gujarat High Court held that

the Court has got absolute discretion u/s 536(2) to sanction and validate any disposition of properties of the company after commencement of the

winding up proceedings if it is found that it is for the benefit of and necessary or expedient in the general interest of the company or for keeping the

company going.

17. The above decisions rendered by various Courts would go to show that the hands of the Court are not fettered u/s 433(1) of the Companies

Act from exercising its inherent powers. If the transaction is bona fide and it has been done in the ordinary course of business without causing any

harm to the general body of the creditors, such disposition of properties of the company after commencement of the winding-up can be sanctioned

if it is necessary in the interest of the company also.

18. In the instant-case, the affidavit filed by the respondent-company would go to show that they have no mala fide intention to transfer the

Quality-inn-Aruna to M/s. Aruna Foods Limited which is a subsidiary company of the respondent-company. It was admitted in the affidavit that

97.42% of the shares of M/s. Aruna Foods Limited is controlled by the respondent-company. Though the petitioner-company has stated that they

have filed this petition on their behalf and in the interest of the general body of the creditors, no other creditor has joined in support of the petitioner

herein. This was pointed out by the respondent-company saying that no other creditor except the petitioner herein have any objection for the

transfer of Quality-inn-Aruna to M/s. Aruna Foods Limited. The affidavit has been filed by the respondent to the effect that such a transfer would

not stand in any manner to defeat the interest of the creditors and it has been done for the purpose of business expediency and part of the

restructuring proposals. From the arguments advanced on the side of the respondent-company it is clear that the transfer of Quality-inn-Aruna to

M/s. Aruna Foods Limited is on the basis of restructuring proposals and business expediency. It is the admitted case of the respondent that they

earn more profit in Quality-inn-Aruna than the other subsidiaries of the respondent company-M/s. Aruna Sugars and Enterprises Limited. The

respondent has not denied its debts though it has denied the amount claimed by the petitioner-company in its affidavit. The respondent has also

admitted that there are other debts due to the various creditors. For the purpose of payment of one debt to one of the creditors, the entire business

of the company should not be closed down. As already stated what is contemplated under Companies Act is the survival of the company as well

as the interest of the general body of the creditors and these two have to co-exist. Though it was argued on the side of the petitioner-company that

with a view to deprive the interest of the creditors, the respondent-company are attempting to transfer Quality-inn-Aruna to M/s. Aruna Foods

Limited, there are no ground or circumstance to accept such a view. The general view is that any disposition made during the pendency of the

winding up proceedings would be void. The discretion is vested in the Courts to see the bona fide disposition done in the usual course of business

or in the interest of the company without depriving the interest of the general body of the creditors. The respondent herein have given sufficient

reasons in their petition that they are not doing the transfer with a view to deprive their creditors and they have also filed an affidavit. They have

clearly stated the aim that it is done under the restructuring proposals and in business expediency. After giving such an undertaking, there is no

reason for the respondent herein to go back from such undertaking. Even if they violate the undertaking, the Courts are here to prevent such

violations. Therefore, it is a clear case wherein the action already initiated by the respondent by convening the extraordinary general meeting of the

creditors. For these reasons ad interim injunction already granted has to be vacated and the application filed by the respondent herein has to be

allowed.

In the result, C.A. Nos. 730 and 731/1998 in C.P. No. 380/1997 are dismissed, and C.A. No. 732/1998 in C.P. No. 380/1997 is allowed and

in the circumstances without costs.