
(2006) 08 GAU CK 0100
In the Gauhati High Court

Kitply Industries Ltd.

APPELLANT

Vs

California Pacific Trading Corporation

RESPONDENT

Date of Decision : 23-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
COMPANIES ACT, 1956 — Section 433, 439A
Contract Act, 1872 — Section 73

Citation : (2008) 142 CompCas 286

Hon'ble Judges : H.N. Sharma, J;D. Biswas, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—Being aggrieved by the impugned order dated November 18, 2003 (California Pacific Trading Corporation v. Kitply Industries Ltd. 2004 118 Comp Cas 580 (Gau)), admitting the Company Petition No. 10 of 2002 by the learned company judge, rejecting the prayer of the appellant, the present appeal has been filed.

2. We have heard Mrs. M. Hazarika, learned senior counsel for the appellant and Dr. A. K. Saraf, learned senior counsel for the respondent.

3. The aforesaid company petition was filed by the respondent-company praying for passing necessary orders to wind up the appellant company as, according to them, the appellant-company was unable to pay its debt due to the respondent-company. The basis of claim of the respondent-company is a foreign judgment passed by the District Court for the Middle District of North Carolina, Greensboro Division in Civil Action No. 1 : 98CV01041. By the said judgment the appellant-company has been made liable to pay a sum of \$ 2,257,147.58 together with interest thereon at the statutory rate and the cost of the action as taxed by the clerk of the court, to the respondent-company.

4. At the time of admission of the company petition, the appellant entered

appearance and raised objection before the learned company judge questioning the maintainability of the winding up petition, inter alia, on the ground that the petitioner is not entitled to base its claim for winding up on the basis of the aforesaid judgment passed by the District Court of the Middle District of North Carolina and if any such remedy is available to the petitioner, the same is by way of filing execution case in the civil court. Referring the provisions in Section 13 of the Code of Civil Procedure, 1908, objection has been raised by Mrs. Hazarika that the judgment/order of the foreign court relied on by the respondent is inexecutable and, hence, the same cannot be pressed into service in the winding up petition. The learned company judge adequately dealt with the matter and considering the provisions of Section 13 of the Code of Civil Procedure, 1908, and other relevant laws holding the field, decided against the appellant and the petition was admitted by the impugned order directing to advertise the same in Form No. 99 in accordance with rule 96 of the Companies (Court) Rules, 1959.

5. Mrs. Hazarika, learned senior counsel for the appellant submits that the respondent not having armed with any executable decree in their favour, the same cannot form the basis of the prayer for winding up petition alleging inability to pay the amount mentioned in the said foreign judgment. According to learned Counsel, the debt alleged to be due from the appellant-company is in fact no debt in the eye of law and in the absence of a legally valid adjudication of the dispute involved between the parties by applying the relevant Indian laws, the same cannot be said to be a executable one giving rise to a cause of action for filing the winding up petition. In support of her contention, Mrs. Hazarika has referred to the provisions of Section 13 of the Code of Civil Procedure, 1908, and the provisions of Section 73 of the Indian Contract Act, 1872. It is further submitted that against such a judgment and/or decree passed by a foreign court, the petitioner has got the remedy available under the CPC and had such recourse been taken, the appellant would have got greater scope to oppose the said judgment by filing necessary objection petition, but the petitioner has preferred to file a winding up petition wherein the appellant can have only a restricted right inasmuch as such a winding up petition is to be regulated and guided by the provisions of the Companies Act and the rules framed thereunder contrary to the larger rights available under the Code of Civil Procedure.

6. Dr. Saraf, learned senior counsel per contra submits that the appellant having initially contested the proceeding initiated against them in the Court of North Carolina, and later on having withdrawn from the said proceeding, the learned court has properly adjudicated the matter on merit taking note of the relevant facts and has found the appellant liable to pay the amount and the appellant-company being unable to satisfy the said debt and/or dues so adjudicated in the said civil action, the winding up petition has been, wherein the learned company judge after adequately dealing with the matter, over-ruled the contention raised on behalf of the appellant regarding its maintainability and admitted to the petition to be dealt with and decided in accordance with the Companies Act and the rules framed thereunder.

7. It is an admitted position that the winding up petition before the learned company judge is in its nascent stage, i.e., at the notice stage. The appellant in defending the winding up of the company will be entitled to raise its defence in accordance with the provisions contained in Section 439A(i) and (ii) of the Companies Act. It is, thus, clear that whatever defence the appellant may want to raise, the same would be able to be fully canvassed before the learned company court, justifying its refusal to pay the alleged debt.

8. It is true that a foreign decree/order can be executed by ordinary mode of execution as provided under Order 21 of the Code of Civil Procedure, 1908. The right to approach the company court for winding up of a company by filing appropriate application as provided u/s 433(f) of the Companies Act, 1956, is an independent right and not subjected to any other remedy or mode of recovery available in the Civil Procedure Code. The petitioner has adopted the latter course of action presumably on the ground that the petitioner is armed with an order passed in its favour by a foreign court wherein the appellant has been saddled with the pecuniar)" liability and it having failed to discharge the same, the appellant-company should be wound up. The aforesaid plea as raised in the winding up petition would certainly be dealt with by the learned company judge at appropriate time of the adjudicatory process in accordance with the Companies Act and the relevant rules. In fact execution of a decree and filing an application for winding up stands on different footing. Execution of a decree/order rests on existence of an executable decree/order; whereas a winding up petition u/s 433(f) of the Companies Act is based on inability to pay its debt. Thus, it cannot be construed that such a right to file winding up petition which is a statutory one under the Companies Act is excluded for having available with any other mode of execution of the decree as provided under Order 21 of the Code of Civil Procedure. Accordingly, we do not find that the company petition is not maintainable on that count, as canvassed before us.

9. So far as the other point raised by learned Counsel at the bar is concerned, we find that since the matter is yet to be finally decided after delivering defence by the appellant and the matter is still in its initial stage before the learned company court, any finding of ours may pre-judge the issue which we do not intend to do for the interest of either of the parties, and learned Counsel concur on this view. In that view of the matter, we do not find any merit in this appeal and, accordingly, the same is dismissed.

10. Referring to the apprehension expressed by Mrs. Hazarika that the observation of the learned company judge in deciding the maintainability of the appeal might affect the appellant at later stage of the proceeding, we make it clear that those findings/observations have been made only for the purpose of deciding the limited prayer relating to the maintainability raised by the appellant and the learned company judge will independently assess the matter at the final stage of hearing on the basis of defence that may be delivered by the appellant in support of its case.

Subject to the observation made above, this company appeal stands dismissed.