

(1994) 03 RAJ CK 0041
In the Rajasthan High Court
Case No : Company Petition No. 8 of 1992

Kitply Industries Ltd.

APPELLANT

Vs

Hari Narain and Sons Pvt. Ltd.

RESPONDENT

Date of Decision : 22-03-1994

Acts Referred:

Companies Act, 1956 — Section 433

Citation : (1998) 91 CompCas 715

Hon'ble Judges : G.S. Singhvi, J

Bench : Single Bench

Advocate : C.K. Garg and G.K. Garg, for the Appellant; S.C. Bhandari, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Singhvi, J.—This is a petition filed by Kitply Industries Pvt. Ltd. with a prayer that the respondent, Hari Narain and Sons Pvt. Ltd., be ordered to be wound up u/s 433 read with Sections 434 and 439 of the Companies Act, 1956.

2. The case set up by the petitioner is that it is carrying on the trade of manufacture and sale of various qualities of ply all over the country. The respondent-company is engaged in the business of manufacture of bus bodies for the Rajasthan State Road Transport Corporation and for manufacture of bus bodies wooden ply of various qualities is being used. The petitioner-company supplied various quality of ply to the respondent on various occasions for a period of three years. However, payment of the bills dated July 25, 1989, September 10, 1989, October 3, 1989, January 19, 1990, February 19, 1990, and March 9, 1990, for a sum of Rs. 1,74,560 have not been made by the respondent. After a notice had been given by the petitioner on April 1, 1992, a sum of Rs. 50,000 was paid by the respondent, vide draft No. 480138 on April 8, 1992, drawn on the State Bank of India. The petitioner claimed that a sum of Rs. 2,69,806 was due to it as on March 27, 1992 (principal amount of Rs. 1,74,560 and interest amounting to Rs. 95,246. Notice dated April 1, 1992, was sent by

the petitioner to the respondent and a reply to the said notice was sent by the respondent on April 20, 1992, through its advocate. The petitioner has pleaded that after deduction of Rs. 50,000, the petitioner-company is still entitled to get Rs. 2,19,806, but the respondent has failed to make payment of the amount. According to the petitioner, it was specifically mentioned on the bills that if the amount was not paid, interest will be charged from the respondent-company. Despite this, payment was not made in time and, thus, the petitioner has become entitled to claim interest at 21 per cent. per annum. The further case of the petitioner is that despite service of statutory notice, the respondent has failed to make payment of the amount and, thus it has made itself liable to be wound up.

3. A notice of this petition was issued on May 8, 1992, to show cause as to why the company may not be wound up. Reply to the petition has been filed on May 10, 1992, and therein it has contested the claim of the petitioner about the quantum of amount due from the respondent.

4. During the pendency of the petition, the respondent-company filed an application dated October 22, 1992, along with it, it submitted some documents indicating payment of Rs. 85,000, vide cheque Nos. 21793 and 22014 dated August 6, 1992, and September 30, 1992, respectively.

5. On October 25, 1993, another application has been filed by the petitioner in the form of clarification regarding payment. Therein it has been indicated that out of the principal sum of Rs. 2,74,560 payment in three instalments of Rs. 50,000 had been made on May 8, 1991, December 9, 1991 and April 8, 1992. The balance amount has been paid, vide cheque No. 21792, dated August 6, 1992 (Rs. 45,000), cheque No. 22014, dated September 30, 1992, for a sum of Rs. 40,000 and cheque No. 22015, dated October 30, 1992, for a sum of Rs. 40,000.

6. Shri C. K. Garg, appeared on behalf of the petitioner, and argued that the respondent-company is guilty of not making payment of the amount due to the petitioner despite service of statutory notice. Shri Bhan-dari argued that the respondent-company never denied its liability about the outstanding dues and, therefore, its failure to pay the outstanding dues cannot be construed as its failure to pay debts in terms of Section 433(e) of the Companies Act, 1956. Shri Garg further argued that by their conduct the parties had unequivocally brought into existence a contract for payment of interest. He argued that in the bills sent by the petitioner-company, it had specifically stipulated that if payment was not made within seven days, the petitioner shall be entitled to interest at the rate of 21 per cent. Shri Garg argued that the respondent has not denied the receipt of the bills and in fact has made payment in response to those bills. This by itself is conclusive of a contract between the parties regarding payment of interest on the amount due. By inviting the court's attention to the contents of the notice and the reply, Shri Garg pointed out that payment of interest was an implicit condition of the contract between the parties. He further pointed out that the

petitioner had itself admitted payment of the outstanding sum of Rs. 1,54,000 and, therefore, it must be held that there is no dispute between the parties regarding the amount payable to the petitioner. Shri Garg further submitted that by annexure "R-7", dated December 4, 1991, the petitioner had made it clear that the respondent shall have to make payment of interest. This liability was never denied or disputed by the respondent and, therefore, non-payment of interest by the respondent must be construed as its failure to pay debt. Shri Garg placed reliance on :

7. *Stephen Chemicals Ltd. Vs. Delhi Cloth and General Mills Co. Ltd.*, Beninson v. Shiber 1946 AIR 1946 PC 145 ; *Shanmugam Pillai v. Annalakshmi Ammal* [1950] AIR 1950 FC 38 and *Harishchandra and Another Vs. Kailashchandra and Another*,

8. Shri Bhandari, learned counsel for the respondent, argued that no agreement was entered into between the parties at any point of time for payment of interest by the respondent in the event of non-payment of the amount specified in the bills within seven days. He argued that there can be no justification whatsoever for the petitioner to make a claim for payment of interest. Shri Bhandari argued that the condition of payment of interest had been unilaterally incorporated by the petitioner and that cannot be treated as a part of the contract. He emphatically submitted that the respondent had at no point of time agreed to pay interest to the petitioner. He further pointed out that the respondent at no point of time delayed payment of the amount due. What the respondent-company had pointed out to the petitioner was that there was some dispute between it and the Rajasthan State Road Transport Corporation regarding payment of the amount and that as soon as that amount is received by the company, payment shall be made to it. Shri Bhandari pointed out that the respondent had made payment of the entire amount due to the company. He further pointed out that the present petition has been filed with an oblique motive to coerce the respondent-company to agree to pay some thing more to the petitioner. Pointing out to various documents filed along with the reply and the two applications filed by the respondent company, learned counsel for the respondent argued that the entire amount of Rs. 2,74,560 has been paid to the petitioner, because the respondent had, in fact, paid Rs. 2,75,000. He further submitted that the assertions made by the petitioner regarding its claim for interest are contrary because while in annexure "R-7", interest at 18 per cent. per annum has been claimed, in the petition interest at the rate of 21 per cent. per annum has been claimed. He further painted out that in the notice, annexure "2", also interest at the rate of 21 per cent. per annum has been claimed. This, according to learned counsel, shows that there was no agreement between the parties regarding payment of interest. He pointed out that not a single bill had been filed by (he petitioner to substantiate its plea about the implied condition of the contract. Shri Bhandari submitted that before the parties entered into the agreement for supply of the goods, it has not been agreed that in the event of failure of the respondent to make payment of bills within seven days, it would be liable to pay interest at the rate of 18 per cent. or 21 per cent. He further

submitted that even at the stage of supply of goods no such agreement was entered into between the parties. Learned counsel submitted that merely because the petitioner had in the bills printed a particular condition, such condition cannot be treated as a part of the contract and no liability can be fastened on the respondent on the basis of a unilaterally printed condition. Shri Bhandari lastly argued that there is a serious controversy between the parties about the entitlement of the petitioner to interest at the rate of 18 per cent. or 21 per cent. and the dispute is a genuine and bona fide dispute. Such dispute cannot become the subject-matter of the petition filed for winding up of the company. He further submitted that in reply to the notice dated April 20, 1992, which the respondent had sent in response to the notice, it had been made clear by the respondent that the interest claimed on the bill amount was never agreed between the parties and that on a telephonic conversation between the parties it was agreed that the petitioner shall not insist on payment of interest if the balance of Rs. 1,24,560 was paid. Learned counsel relied on :

9. Ultimate Advertising and Marketing Vs. G.B. Laboratories Ltd., Kanpur, Hindustan Sanitary and Hardware Store Vs. J.C.T. Electronics Ltd., Shantilal Khushaldas and Brothers P. Ltd., In Re Smt. Manulanaben Bapalal Gosalia and others Vs. Shantilal Khushaldas and Brothers P. Ltd., Bellary Spinning and Weaving Co. Ltd. Vs. Syndicate Bank and others, and Gangadhar Narsinghdas Agrawal v. Timble Pvt. Ltd. 1992 74 Comp Cas 846 Bom.

10. He has also placed reliance on :

Stephen Chemical Limited Vs. Innosearch Limited, Gadadhar Dixit v. Utkal Flour Mills (Pvt.) Ltd. 1989 66 Comp Cas 188 (Ori) ; Surajmall Shiwbhagawan Vs. Kalinga Iron Works, UCO Bank v. Jagitia Paper Mills (P.) Ltd. 1988 2 RLR 357 and, Bombay Metropolitan Transport Corporation Ltd. Vs. Employees of BMTC (Cidco) Maharashtra General Kumgar Union,

11. Before a company can be ordered to be wound up in a petition filed under the Companies Act, the court has to be satisfied that the petitioner has been able to make out a case for winding up. Inability to pay debt is one of the grounds on which a company can be ordered to be wound up. However, one thing which the court has always to bear in mind is that a petition under the Act of 1956 is not used as a coercive method of recovering debts. Unless the creditor proves the debt in unequivocal terms, an order for winding up cannot be made. Similarly, if a dispute is raised by the company and such dispute is bona fide, the company petition is liable to be dismissed. These principles of law which are required to be kept in mind while examining the claim made for winding up, have time and again been stated and re-stated by the apex court.

12. In Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., their Lordships of the Supreme Court have held that when the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court also observed that the defence of the company has to be in

good faith and one of substance.

13. In Bombay Metropolitan Transport Corporation Ltd. Vs. Employees of BMTC (Cidco) Maharashtra General Kungar Union, a learned judge of the Bombay High Court has held that it is well established that a petitioner should not be allowed to take recourse as a means to recover debts from the company. It is not the legitimate way to enforce payment of debts which are bona fide disputed by the company and cannot be used as a weapon to pressurise and coerce a company to make payment.

14. In UCO Bank v. Jagitia Paper Mills (P.) Ltd. 1988 2 RLR 357, this court has expressed the same view. Other decisions on which learned counsel for the respondent placed reliance also lay down the same principles of law.

15. The above quoted principles of law are to be applied in each and every case having regard to the facts of that case. No hard and fast rule can be laid down for arriving at a conclusion whether the dispute raised by the company is a bona fide one, or whether it is a substantial and real dispute.

16. In so far as the present case is concerned, the petitioner-company has not produced any written agreement which the parties had entered into before the petitioner started supply of goods to the respondent. It is also not pleaded that any oral agreement had been arrived at between the parties that the respondent shall pay interest at a particular rate in case of its failure to pay amount of a particular bill. The petitioner has also not come out with the case that at the time of supply of goods any such agreement was arrived at between the parties. It can, thus, be said that till the petitioner has completed the supply of goods there was no agreement between the parties regarding payment of interest. The claim of interest was, for the first time, made by the petitioner when it sent bills to the respondent and the only basis for claiming interest is that when it had sent the bills to the respondent an implied agreement came into existence between the parties. In my opinion, the petitioner's plea that an implied agreement had been arrived at between the parties, cannot be accepted merely because in the printed bills sent to the respondents a condition had been incorporated that if the respondent fails to make payment within seven days, the petitioner shall be entitled to claim interest at the rate of 21 per cent. The petitioner was free to incorporate any condition in its bills sent to the respondent, but those conditions cannot be construed as part of the contract arrived at between the parties. The respondent company has seriously contested the claim of the petitioner that it had agreed to pay interest to the petitioner on its failure to make payment of the bill within a specified time. In reply to the statutory notice, the respondent has specifically disputed its liability to pay interest. That apart, the petitioner-company is not even certain as to at what rate it was claiming interest because while in annexure "R-7" it has claimed interest at 18 per cent. in annexure "1", it has claimed interest at the rate of 21 per cent. Above all, the petitioner has for reasons best known to it not thought it proper to produce copies of those bills which were sent to the respondent for payment. Copies of such bills are in the

possession of the petitioner and, therefore, its failure to produce copies is also an important factor which has to be taken note of by the court while determining as to whether the claim made by the petitioner is genuine and whether the dispute raised by the petitioner is a real and substantial one. In my opinion, in the absence of any agreement between the parties, the dispute which the respondent has raised regarding its liability to pay interest cannot be treated as a fictitious or frivolous dispute. There is sufficient justification in the claim of the respondent that the dispute is a bona fide dispute. It is also to be noted that the petitioner has not even said that the parties had agreed for payment within a particular time period. In the absence of such an agreement, the claim made by the petitioner for his right to get interest at the rate of 18 per cent. or 21 per cent. cannot be treated as an admitted debt. Thus, I am clearly of the opinion that the respondent has raised a dispute of substantial nature and it is not possible to hold that the respondent has failed to pay debt due from it.

17. In the result, the petition fails and it is hereby dismissed.

18. Costs made easy.