
(1984) 09 KAR CK 0018
In the Karnataka High Court

K.S. Ramakrishan Setty

APPELLANT

Vs

Clarin Fisheries P. Ltd. and Others

RESPONDENT

Date of Decision : 10-09-1984

Acts Referred:

Companies Act, 1956 — Section 433 (e), 433 (f), 439 (1) (b)

Citation : (1986) 59 CompCas 508

Hon'ble Judges : M.P. Chandrakantaraj, J

Bench : Single Bench

Advocate : Chaitanaya Hegde and A.G. Holla, for the Respondent

Judgement

1. This is a petition u/s 433 (e) and (f) read with section 439 (1) (b) of the Companies Act, 1956 (hereinafter referred to as "the Act"), made by one K.S.Ramakrishna Setty seeking an order of this court winding - up the first respondent - Clarion Fisheries Private Ltd. - a company incorporated under the provisions of the Act having its registered office at No. 45, Industry House, Fair-Field Road, Bangalore -1. It is alleged by the petitioner that the former directors of the first respondent - company, Shri N.C.Soundara Pandian and Shri Jayaram Balaram Singh, approached him for financial assistance whereupon an agreement dated February 28, 1982, was executed by them under which the petitioner agreed to invest in the first respondent - company by way of deposits as well as by purchase of equity shares not exceeding one-third of the paid - up capital and half of the deposits. That agreement forms annexure A to the petition. Pursuant thereto, the petitioner claims that he invested Rs 1,95,500 which has been duly acknowledged by the first respondent - company in a subsequent agreement dated June 21, 1982, as well as by the earlier mentioned directors. The details of the deposits made are furnished together with the rate of interest such deposits carried. Thereafter, by another agreement dated September 20, 1982, the said directors who had joint liability with the company transferred their rights and interest in - T.R.Manjunath Hegde and I.M.Hiriyanna Gowda, together with the took and agreed to take over the liabilities jointly and severally along with of Rs. 1,95,500 together with interest at 12 per cent per annum. Despite demands

made, the first respondent - company and the new directors, respondents Nos. 2,3 and 4, have failed and refused to pay and discharge their liabilities towards the deposits made by the petitioner and, therefore, the petition. The statutory notice issued has been replied to by the first respondent - company and its directors disclaiming the liability to pay. Therefore, the present petition by the petitioner as a creditor of the first respondent - company seeking for an order winding up the first respondent company has been filed.

2. The respondents have entered appearance and filed their statement of objections. The sum and substance of the resistance to the petition is that the first respondent - company is absolved of its liability on account of the conduct of the petitioner and the past directors. It is alleged that O.S No. 2816 of 1982 was filed in one of the city civil courts at Bangalore and that suit came to be withdrawn as settled out of court by the petitioner who was the plaintiff and some of the defendants though the respondent - company had remained unserved on the date the settlement was reported out of court and the suit was withdrawn. It is in that circumstance, the respondents pressed into service the provisions of section 135 of the Indian Contract Act, 1872, alleging that any liability that the company had under the last of the agreement when the new directors took over the company as a going concern were absolved of that liability in the light of the settlement reached behind the back of the company by the petitioner with the former directors who were co - defendants in that suit.

3. It is unnecessary to refer to other details averred in the statement of objections. It is now well-settled by the numerous decisions of the High Courts and the Supreme Court in this country as well as the courts of the United Kingdom that a creditor's petition could be entertained and relief given on being satisfied of the need for making a winding - up order only when the creditor - debtor's relationship is established or is not disputed by the company, said to be a debtor. Undoubtedly, the law as laid down states that such resistance must be founded on bona fide grounds and on a legally tenable defence. In this context, it will be useful to refer to the view expressed by Venkatachaliah J. in C.A. No. 17 of 1976 disposed of on November 18, 1976, sitting as the company judge of this court then. He has expressed himself as follows:

"It is well settled that a winding -up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding - up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court . If a debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of section 434(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into operation, and the ground of winding up, namely, that the company is unable to pay its debts, is not substantiated. The debt, the alleged inability on the part of the company to pay which, is the foundation for a petition u/s 433(e) of the Companies Act, the court will not wind up the company if the debt is bona

fide disputed and the defence is a substantial one. The principles on which the court acts are "first that the defence of the company is in good faith and one of substance ; secondly, the defence is likely to succeed in point of law, and , thirdly, the company adduced prima facie proof of the facts on which the defence depends."""

4. If that explanation of the law should hold the field, then petition should be rejected. However, Mr.S.P.Khanna, learned counsel for the petitioner, contends that if the last of the agreements which is at annexure C to the petition is red, there is a clear admission of the debt owed to the petitioner and on that basis this court should have no hesitation to come to the conclusion that the petitioner has established the relationship of creditor and debtor and, therefore, entitled to a winding - up order. It is true, the agreement at annexure C to the petition does no more than decide the mutual obligations of the contracting parties. It is also true that the obligation undertaken to pay off the petitioner under the terms agreed to in annexure C has not been discharged. That the original suit mentioned in the course of this order was indeed filed by the petitioner though not for realising the amounts in deposit together with interest but to restrain the company from effecting transfer of all assets including the letter of intent and also taking on to its board any additional directors and that the suit was withdrawn is not disputed. This court is not enlightened as to the term of the settlement reached between the petitioner and some of the defendants. Mr.Khanna has not disputed that the company had remained unserved at the time the suit was withdrawn. It is this latter circumstance that compels this court to take the view that the defence now put forward in this case is a tenable bona fide defence.

5. The company court under the provisions of the Act cannot convert itself into a court of original jurisdiction setting civil disputes including drawing up of a decree in favour of one or the other of the parties in does have original jurisdiction to settle claims of all kinds when it exercises the nature of power exercise under the two sections are widely different. Under the latter section, jurisdiction is acquired only if an order is made u/s 433 of the Act and not otherwise. If there is no order u/s 433 of the Act including the appointment of a provisional liquidator, then there is no jurisdiction acquired by the court u/s 446 of the Act. If this is borne in mind, then section 433 of the Act which is normally a discretionary jurisdiction should necessarily be so understood only when the court is fully satisfied that it is called upon to examine the merits of the need of a wind - up order and not settling disputes of an agreement. In fact, I will go to the extent of stating that even if a company is sought to be wound up on the basis of a promissory note, if the disputes either receipt of consideration or the execution thereof, then this court would be compelled to refer such a petitioner to the civil court for obtaining the necessary decree before he can move the company court for a wind - up order. In other words, the test would be whether this court should first grant a decree for an alleged debt and then convert itself into a kind of executing court

by passing the winding - up order. That should be avoided.

6. Mr. khanna drew my attention to the decision of the Delhi High Court in the case of Citibank N.A. Vs. Juggilal Kamlapat Jute Mills Co. Ltd., In that decision, it has been held that a suit by the bank against the principal debtor and subsequent sale after decree of the properties in execution would not absolve a surety from his liability to the bank. As a broad proposition of law, one need not disagree with that ruling, but in every case whether to the surety benefit of section 135 of the Contract Act could be extended to the surety would depend very much on the facts of the case. In other words, it requires the examination of such evidence, interpretation of such documents as the parties may place before the court. In any event, that decision was rendered in an original suit Companies Act, particularly section 433 in proceedings arising under the Companies Act, particularly section 433 of the Act. That court exercising its original civil jurisdiction has tried the suit on its merits and, on the facts of that case, came to the concluding that the surety could not resist the claim bank, perhaps for what remained unsatisfied after the principal debtor had failed to satisfy.

7. I have already expressed that in cases like this whether it is made out prima facie that the respondent - company may succeed in its defence or not, the parties should be referred to the civil court for adjudication. It is not proper for this court to pronounce upon a defence validly set up, the ground for which cannot be said not to exist.

8. In that view of the matter, I am satisfied that this is not a case in which this court should interfere under the Act to coerce the first respondent company to pay its debt when it is not yet quantified or adjudicated upon by the competent civil court.

9. Therefore, the petition is rejected with liberty reserved to the petitioner to seek the remedy in the civil court.