
(1990) 02 KAR CK 0013
In the Karnataka High Court

Kudremukh Iron Ore Co. Ltd.

APPELLANT

Vs

Kooky Roadways P. Ltd.

RESPONDENT

Date of Decision : 22-02-1990

Acts Referred:

Companies Act, 1956 — Section 433, 434, 438, 483

Citation : (1992) 73 CompCas 418 : (1990) ILR (Kar) 2230

Hon'ble Judges : S.A. Hakeem, J;N. Venkatachala, J

Bench : Division Bench

Advocate : Ramaswamy Iyengar, for the Appellant; J. Joseph, T.J. Rajan and S. Nityananda, for the Respondent

Judgement

1. The order by which a petition for winding up of a company was dismissed by a learned single judge of this court, * is appealed against in this Original Side Appeal presented u/s 483 of the Companies Act, 1956 (for short "the Act").

2. Kudremukh Iron Ore Co. Ltd., the appellant herein, was the petitioner in the company petition filed in this court under clause (e) of section 433 of the Act against Kooky Roadways P.Ltd., the respondent therein, which is now the respondent herein. The prayer for ordering the winding up of the respondent-company's inability to pay its debts. The case set out in the petition as to how the respondent-company was unable to pay its debts may be put thus :

The petitioner, Kudremukh Iron Ore Co.Ltd., is a Government of India enterprise, which had to carry its goods comprising steel materials from Bangalore to Mangalore. The respondent-company, a public carrier, was engaged by the petitioner for carriage of certain quantities of the said steel material from Bangalore to Mangalore from October, 1982, to January, 1983. The respondent-company did not deliver at Mangalore all the steel materials which it had collected at Bangalore for carriage. Short delivery discovered was in order of 131.630 metric tonnes. When that short delivery was brought to the notice of the respondent-company, a letter dated January 17, 1983, written on its behalf came to be received by the petitioner. The respondent-company, while

acknowledging the short delivery in that letter, sought therein grant of time up to January 31, 1983, for making good the short delivery. Thereafter, the respondent-company *See [1986] 60 Comp Cas 1069 (Kar). hardly delivered 9.840 metric tonnes of steel materials leaving a net shortage of steel materials at 121.790 metric tonnes. The said situation made the petitioner write to the respondent-company a letter dated April 26, 1983, calling upon the latter either to deliver immediately the undelivered steel materials or to pay Rs.5,88,724.01, being their (cost). As the respondent-company did not respond to that letter, the petitioner, by another letter dated May 26, 1983, called upon the respondent-company to remit the value of the undelivered steel materials, as mentioned in its remittance of a sum of notice dated September 6, 1983, demanding from it remittance of a sum of Rs. 5,88,724.01 being the value of the undelivered steel materials making it clear that that notice had been issued u/s 434 read with section 438 of the Act. As there was no response from the respondent-company to the said lawyer's notice, the petitioner had filed the company petition seeking from this court an order for the winding up of the respondent-company for the reason of its inability to pay its debits.

3. Though notice of the petition was served on the respondent- company as ordered by the court on January 3, 1984, it remained absent. Subsequently, the learned single judge who admitted the company petition got that petition advertised in an issue of a local daily newspaper Deccan Herald fixing the date of hearing of that petition ex parte the respondent-company and made the order of dismissal of the petition which is now under-appeal.

4. As seen from the said order, according to the learned single judge, the short delivery of steel materials entrusted by the petitioner to the respondent-company for their carriage was not a debt owed by the respondent-company to the petitioner within the meaning of the word "debt" found in clause (e) of section 433 of the Act and the petitioner was not a creditor within the meaning of the word "creditor" found in section 439 of the Act and hence the company petition for winding up of the respondent-company filed by the petitioner founded on the ground that the respondent- company was unable to pay its debt, was not maintainable.

5. As the correctness of the said views of the learned single judge expressed in his order under appeal leading to the dismissal of the petitioner company's petition for winding up of the respondent-company is questioned, the points which arise for our decision in this appeal admit of the following formulations :

(i) Whether the liability of the respondent-company to the petitioner arising on account of short delivery of goods entrusted to it for carriage could be regarded as a debt within the meaning of the word "debt" in clause (e) of section 433 of the Act ?

(ii) Whether the petitioner who had entrusted the goods to the respondent-company for carriage becomes a creditor of the latter for short delivered goods,

within the meaning of the word "creditor" in section 439 of the Act ?

6. We shall now proceed to consider and decide the said points.

Re. Point (i).- The petitioner entrusted steel materials to the respondent-company for their carriage from Bangalore to Mangalore. The petitioner, as the owner of those materials, was entitled to obtain their delivery at Mangalore from the respondent-company. When short delivery of the said materials by the respondent-company was brought to the notice of its managing director, the same was acknowledged by the latter, yet was not made good. The liability of the common carrier arising u/s 8 of the Carriers Act, 1895 (for short "the Carriers Act"), to the owner of the goods for the undelivered goods, made the respondent-company, a common carrier, liable to the petitioner, the owner of steel materials, for such steel materials the goods short-delivered. Further, section 9 of the Carriers Act enabled the petitioner to bring a suit against the respondent-company, to enforce the latter's said liability without need for it to prove that the short delivery of the steel materials due to the negligence or criminal act of the respondent-company, its servants or agents. Whether such a liability of the respondent-company, could be regarded as a "debit" in clause (e) of section 433 of the Act is the real point which, therefore, needs our consideration and decision. As the decision on the said points has to necessarily depend upon the meaning ascribable to the word "debit" found in clause (e) of section 433 of the Act, we shall examine the matter in the light of decided cases.

7. In *Web v. Stenton* [1988] 11 QB 518, the Court of Appeal had to decide upon the question whether debtor's interest in a trust fund can be taken to be a "debt" due to him from the trustees within the meaning of the word "debt" under order XLV, rule 2, of the Judicature Act. In that context, Lindley L.J. gave the meaning of the word "debt" thus (at page 527) :

"....a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in present solvendum in futuro."

8. In *O'Driscoll v. Manchester Insurance Committee* [1915] 3 KB 499 (CA), the Court of Appeal considered the meaning of the word "debt" in the context of fees payable by the National Insurance Committee to a panel doctor. There, the Insurance Committee had entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Commissioners were to be distributed among the panel doctors in accordance with a scale of fees. The contention was that there could not be a debt until the amount had been ascertained and that contention was sought to be supported by citing cases relating to unliquidated damages. Swinfen Eady L.J. who distinguished the cases so cited, observed (at page 512) :

"Here there is a debt, uncertain in amount, which will become certain when the accounts are finally dealt with by the insurance committee. Therefore, there was a "debt" at the material date, though it was not presently payable and the amount was not ascertained."

9. Phillimore L J dealing with the contention that the sums sought tot be attached not being ascertained at the time, cannot be attached, observed (at page 515) :

"No doubt, these debts were not presently payable, and the amounts were not, on April 9, 1914, ascertained in the sense that no one could say what the result of the calculations would be, but it was certain on that date that a payment would become due from the committee to the doctors out of the balance of the moneys in the hands of the committee for 1913...."

10. Then, Bankes L J observed (at page 517) :

"Dr. Sweeny fulfilled that condition, and a debt arose though the amount of it was not ascertained on April 9, 1914, and was not then payable."

11. In *Seabrook Estate Co. Ltd. v. Ford* [1949] 2 AII ER 94 (KB), while dealing with the question whether the money in the hands of a receiver for debenture-holders was not a "debt" owing or accruing as would make it not liable to attachment, Hallett J endorsed the proposition laid down by Rowlatt J in *O'Driscoll v. Manchester Insurance Committee* [1915] 3 KB 499 (CA) (at page 96):

"....Where a debt is established in presenti, it not sufficient objection to say that the exact amount of the debt will be the subject of a calculation which has not yet been made and, it may be, cannot yet be made."

12. Again, in *Dawson v. Preston* [1955] 3 AII ER 314 (QB), the question was whether the sum representing damages payable to a legal aid fund could be attached by a creditor of a legally aided plaintiff, Ormerod J observed (at page 318) :

".... that is merely a question of ascertaining the debt which has to be paid over to the assisted person and does not prevent that debt from being an existing debt at the material date."

13. The connotation of the word "debt" having come up for consideration before a Full Bench of the Calcutta High Court in *Banchharam Majumdar v. Adyanath Bhattacharjee* [1909] ILR 36 Cal 936 [FB], Jenkins C J defines the word "debt" thus (at page 940):

"... I take it to be well established that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation."

14. Then, Mookerjee J quotes with approval, the following passage from the judgment of the Supreme Court of California in *People v. Arguello* [1869] 37 Cal 524 (at page 941) :

"Standing alone, the word `debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds :

solvendum in presenti and solvendum in futuro.... A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt or does not become a debt, until the contingency has happened."

15. Our Supreme Court in *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, had to resolve the question whether the liability to pay Income Tax Act became a debt owed by him on March 31, 1957, the valuation date at the close of the previous year, or could not become a debt till the passing of the Finance Act on April 1, 1957, which provided for quantification of such tax. There, the argument of Mr. Palkhivala was that since the liability to pay tax arose by virtue of the charging section, that is, section 3 of the Income Tax Act, not later than the close of the previous year (valuation date), though the quantification of tax payable was postponed till the Finance Act was passed, it was a tax liability in presenti existing on the valuation date and hence it was a debt owed by the assessee on the said date. The argument of Mr. A V Viswanatha Sastri, learned counsel for the Revenue, on the other hand, was that the expression "debt" owed being an obligation to pay an ascertained amount, such obligation involving the payment of Income Tax arose only on the passing of the Finance Act and that, therefore, on the valuation date, no debt was owed by the assessee to the Department. In resolving the said controversy, the Supreme Court, after referring to various decisions of courts adverted to hereinbefore dealing with the meaning of the word "debt" found under various statutes, has elucidated the meaning of the word "debt" in general and the meaning of the word "debt" in section 2(m) of the Wealth-tax Act in paragraph 24 of its judgment, thus (at page 780) :

"We have briefly noticed the judgments cited at the Bar. There is no conflict on the definition of the word `debt'. All the decisions agree that the meaning of the expression `debt' may take colour from the provisions of the concerned Act : it may have different shades of meaning. But the following definition is unanimously accepted :

`a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation " debitum in praesenti solvendum in futuro."

The said decisions also accept the legal position that a liability depending upon a contingency is not a debt in praesenti or in futuro till the contingency has happened. But if there is a debt, the fact that the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only the quantification of the amount. In short, a debt owed within the meaning of section 2(m) of the Wealth-tax Act can be defined as a liability to pay in praesenti or in futuro an ascertainable sum of money."

16. The said meaning which our Supreme Court has ascribed to the word "debt" generally, and the word "debt" in section 2(m) of the Wealth-tax Act can, in our view, be ascribed, unhesitatingly, to the word "debt" in clause (e) of section 433

of the Act inasmuch as there is nothing in that clause which circumscribed such meaning.

17. What now remains to be seen is whether the liability imposed on a common carrier u/s 8 of the Carriers Act to make good the loss to the owner on account of short delivery of goods entrusted for carriage and enforceable against it in the manner provided for u/s 9 thereof, is a debt within the meaning of the word "debt" found in clause (e) of section 433 of the Act.

18. u/s 8 of the Carriers Act, the liability of a common carrier to the owner for the loss of the goods entrusted for carriage is fastened whenever the goods remain undelivered or short delivered to the owner. Though no exact amount may be claimed by the owner as the liability of the common carrier- towards the undelivered goods or short-delivered goods, the liability to pay the amount arises on the date when short delivery or non-delivery is found. The fact that the exact amount of the liability of the common carrier to the owner arising u/s 8 of the Carriers Act has to be ascertained or determined or quantified, does not make such liability any the less a debt since the "debt" takes within its ambit the existing liability of a person to pay a sum of money to be ascertained or determined or quantified subsequently as held by the Supreme Court in *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, From this, it follows that the liability of the respondent-company to the petitioner arising on account of short delivery of goods entrusted to it for carriage could be regarded as a "debt" within the meaning of clause (e) of section 433 of the Act. As the meaning we have ascribed to the word "debt" in clause (e) of section 433 of the Act takes within its ambit the existing liability of a company, though the amount of such liability has yet to be ascertained, determined or quantified, we find it difficult to subscribe to the view expressed by the learned single judge in his order under appeal that the liability of the respondent- company to the petitioner for short-delivered goods cannot become a debt unless the amount of such liability is ascertained in a suit to be filed by the petitioner in that regard.

Re. Point (ii).- An application to the court for winding up of a company shall be by a petition presented under sub-section (1) of section 439 of the Act, among others, by any creditor as is specified in clause (e) thereof. According to the learned single judge, the petitioner could not have filed the petition for winding up of the respondent-company since it could not be a creditor within the meaning of the word "creditor" in section 439 of the Act. But, we find it difficult to agree with the view expressed by the learned single judge in the matter. The general meaning of the word "creditor" is, as found in the third edition of Stroud's Judicial Dictionary, volume I, at page 680, a person to whom a debt is payable. The word "creditor" in clause (b) of sub-section (1) of section 439 of the Act, could, therefore, be understood as a person to whom a debt is payable inasmuch as there is nothing in the context of the word "creditor" used in clause (b) of sub-section (1) of section 439 of the Act which requires the word "creditor" to be

understood differently. While dealing with point (i), we have held that the liability of the respondent-company to the petitioner arising on account of short delivery of goods entrusted to it for carriage, could be regarded as a "debt" within the meaning of the word "debt" in clause (e) of section 439 of the Act. It is, therefore, a "debt" payable by the respondent-company to the petitioner. This situation makes the petitioner a "creditor" of the respondent-company. Hence, we are of the considered view that the petitioner, who had entrusted the goods to the respondent-company for carriage, becomes a "creditor" of the latter for short-delivered goods within the meaning of the word "creditor" in the section 439 of the Act. When the petitioner is a "creditor", the petition for winding up presented by it against the respondent-company becomes maintainable. Thus, our answer to point (ii) is in the affirmative.

19. Our answers to the points which have arisen for our consideration being in the affirmative resulting in disagreement with the views expressed in the said regard by the learned single judge, what order has to be made in this appeal has now to be seen.

20. Under clause (e) of section 433 of the Act, a company may be wound up by the court if the company is unable to pay its debts. Clause (a) of sub-section (1) of section 434 of the Act declares that a company shall be deemed to be unable to pay its debts if a creditor, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served a notice of demand on the company, by causing it to be delivered at its registered office by registered post or otherwise, requiring the company to pay the sum so due and the company has, for three weeks thereafter, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Sub-section (2) thereof provides that the demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorized on his behalf. As has been pointed out earlier while dealing with the facts of the present case, the petitioner wrote to the respondent-company a letter dated April 26, 1983, calling upon the latter either to deliver immediately the undelivered steel materials or to pay their value (cost) being Rs. 5,88,724.01. As the respondent-company did not respond to that letter, the petitioner, by its letter dated May 26, 1983, called upon the respondent-company to remit the value of the undelivered steel materials, as mentioned in its earlier letter. Ultimately, the petitioner got issued to the respondent-company a lawyer's notice dated September 6, 1983, demanding from it remittance of a sum of Rs. 5,88,724.01 being the value of the undelivered steel materials making it clear that that notice had been issued u/s 434 read with section 438 of the Act. As there was no response from the respondent-company to the said lawyer's notice, the petition had been filed seeking from this court an order for the winding up of the respondent-company for the reason of its inability to pay its debts. Thus, there is a demand made by the petitioner to the respondent-company for payment of a debt exceeding Rs. 500 and notice of such demand has been duly served upon the respondent-

company as provided for u/s 434 of the Act. There is no compliance with the demand for a period far exceeding that provided under the said provision. Thus, the respondent-company must be deemed to be a company which is unable to pay its debts. If so, the respondent- company is liable to be wound up on the ground available under clause (e) of section 433 of the Act.

21. In the result, we allow this appeal, set aside the order of the learned single judge, allow the company petition and order that the respondent-company be wound up.