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(1999) 09 KAR CK 0001

In the Karnataka High Court

Case No : Company Application No. 684 of 1998 in Company Petition No. 9 of 1998

M. Abdul Rauf APPELLANT

Vs

Vintage Hotels Pvt. Ltd. (In Liquidation) and Others RESPONDENT

Date of Decision : 17-09-1999

Acts Referred:
Companies Act, 1956 — Section 434

Citation : (2000) 102 CompCas 175b

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : A.C. Krishnamurthy, for the Appellant; S.V. Bhat, for creditors, Thomas V. Peter, for Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

M.F. Saldanha, J.—This is an application filed by the company M/s. Vintage Hotels Private Ltd. praying for setting aside of the winding up order dated December 4, 1998. The application has been hotly contested and a large number of documents have been filed by the respective parties but I shall confine this order to the points that are strictly germane. The reason is because if there are disputes between the parties which are required to be examined by any other forum then anything said in this order should not be to the advantage of one or to the prejudice of the other.

2. The admitted position is that the original winding up petition was filed by the company by the name of M/s. B. P. L. Telecom Ltd. A notice was published in the papers when the petition came to be admitted and as far as this public notice is concerned, the petitioner-company admits it came to its attention. They pointed out that after the notice was received that the company negotiated with the creditor and arrived at a complete settlement and it is contended on behalf of the company that on payment of the settled amount the original petitioner being discharged, informed the company that an application would be filed before the

court for withdrawal of the petition. Pursuant to the publication of the notice, five other creditors approached this court. they contended that notices u/s 434 of the Companies Act had been served but the company had denied the liability and since the debt was outstanding they were entitled to pray for an order of winding up. What happened was that in the month of November, 1998, when B. P. L. Telecom who were the original petitioners applied to the court for withdrawal of the petition there were already before the court five other creditors and consequently, this court permitted B. P. L. Telecom to withdraw from the proceedings as their claim had been discharged and kept the proceedings pending since there were other undischarged creditors. I hasten to add that this is within the framework of the law because the object of advertising is in order to bring all the creditors before the court in that very proceeding. This is specifically indicated in the notice itself. The respondent-company against whom the public notice is published is, therefore, put on specific notice of the fact that the High Court has virtually summoned all creditors in the winding up proceedings and that it is not confined only to the original creditor. This is an important aspect of the law which one needs to take into account because Mr. Krishna-murthy, learned counsel who represents the applicants advanced the submission that his clients genuinely and bona fide believed that the proceeding had come to an end because the party who had approached the High Court namely B. P. L. Telecom Ltd. had settled the dispute and has been paid up and that the original petitioner had also shown to the representatives of the company an application which they would file before the High Court for withdrawal of the proceedings. Learned counsel submitted that in this background, the company proceeded under the assumption that the winding up proceedings had been withdrawn and had come to an end and that the company need not appear before the High Court as there was no outstanding dispute. His submission is that the non-appearance before the High Court was for a valid and a bona fide reason and this was not a case of default nor had the company ignored the High Court notice.

3. As far as this last aspect of the matter is concerned, I need to clarify that the public notice that is issued emanates from the High Court and it is directed specifically to the respondent-company against whom the relief has been asked for and that if the respondent-company had any valid defence, it was legally obliged to appear before the High Court and plead that defence and if the company has discharged the debt and there is nothing outstanding it is still equally obliged, and this is a requirement of law, that the company must appear before the High Court and pointed out to the satisfaction of the High Court that all debts have been discharged or disputed, or that the disputes have been settled. If this is not done, the company cannot be said to have acted bona fide or in good faith because the notice published clearly indicates to the company that all outstanding creditors will be before the High Court and if the company has settled with one of them, the company will still have to face the proceeding vis-a-vis the others. The correct position in law in this background is that it cannot be said that the company had acted bona fide or that the conduct of the

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company can be condoned for having not appeared before the High Court. On the other hand I take note of the fact that we are dealing with a corporate body and not an individual. In the case of individuals where genuine and bona fide problems arise and the individual commits a default. The consideration would be entirely different but in the case of a corporate body which is aware of the publication of the notice and which does not appear before the High Court at any stage between June when the notice was published and December when the order was passed, this court would be doing injustice if any such grounds are to be upheld. As I have repeatedly had to point out in several such proceedings, there are two or more parties before the court and if a court bends over backwards showing indulgence to one of them the court is doing injustice to the opposite party which is at the receiving end. This is a consideration which no court can overlook-Mr. Krishnamurthy submitted that we have before the court a peculiar position whereby the original institutor of the winding up proceeding has moved out by way of the settlement with the company and that we are left with another set of creditors who were never in the picture when the original proceedings was filed and his submission is that in such a situation the court ought to have directed the newly impleaded petitioners to issue fresh notice to the company so that the company could have been on guard or so that the company could have had specific notice of the claims which have now come before the court. I do not see the justification for such a plea because I have already pointed out that the original advertisement makes it more than explicit that the proceeding is not confined to the original petitioner but that the sole purpose of advertising is in order to bring before the court all persons who claim to be creditors and in this background the company is more than aware of the fact that all other outstanding creditors irrespective of whether the company accepts their claims or not will appear before the court and if the company chooses in such a situation, still not to appear it is not obligatory for the High Court to dilate the litigation by directing fresh notice because the scheme of the law does not provide for such multiplicity of proceedings. A submission was canvassed on behalf of the applicants that non-issuance of fresh notice at this point of time in the changed circumstances could be construed as being in breach of the principles of natural justice but I am afraid that this is really a misreading of the legal position because the original notice is a composite notice and does not require to be repeated.

4. Learned counsel then submitted that the number of documents that have been produced by both the parties would itself indicate to the court that there is a serious contest between the parties and his submission was that where an application is made for the setting aside of an ex parte order one of the considerations before the court is as to whether it is a vexatious application only to play for time or whether it is a genuine application asking for an opportunity to place before the court a valid defence. The applicants'' learned counsel submitted that there is a serious dispute with regard to not only the liability but also the genuineness of some of the documents which the respondents/claimants

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are relying upon and in this background, his submission was that it is only fair that the applicants be afforded an opportunity even if they are to be put to terms and penalised for their non-appearance. Digressing slightly, it is worthwhile to record that at a recent study done on the working of the legal system the shocking fact was revealed that 39.7 per cent. of judicial time is virtually wasted in reviews, recalls and setting aside all of which are compounded by remands and even retrials on some occasions resulting in a virtual "legal circus". The comparative figures for U. S. A. are 0.9 per cent. Canada 0.5 per cent. U. K. 0.8 per cent. and South Africa 0.6 per cent. It is high time we shed this laxity that is responsible for sending the litigation in circles and that lawyers and litigants are reminded that in all these situations it is the defaulter who is benefiting and the aggrieved opposite party that is at the receiving end. Indulgence to one is injustice to the other. The scheme of the law provides for one and only one opportunity and if the message goes out loud and clear that there will be no second chance, all these games will stop. Unfortunately for too long the courts have been overindulgent in accepting all sorts of lame excuses leading to the confidence in certain quarters that litigation can be turned into an endless game. If the system has to be justice oriented, all this will have to be stopped.

5. As far as the merits aspect of the case goes, I do not propose to say a single word because this is not the stage at which a court can enter into any form of evaluation on the merits with regard to the respective claims. I am precluded from going into that aspect of the matter on the legal ground that the stage for this exercise has already passed. I have held that where the company consciously remains absent from the proceedings it virtually means that the company leaves it to the court to pass whatever orders the court finds necessary and once those orders are passed, it is not open to the applicant to ask for any post mortems. This being the position, there is no warrant for an argument to be put forward that the company has a valid defence because learned counsel who represents the respondents vehemently submitted that the sole purpose of filing a set of counter documents was in order to satisfy this court that there is no substance in the plea canvassed by the company that it has a valid defence. I am only recording the pleas put forward by the two sides in order to indicate that the application for setting aside on these grounds has been vehemently opposed on the plea that this head of argument is baseless.

6. The basic tenet that I need to apply in this proceeding is the question as to whether the company has put forward valid and genuine grounds for non-appearance and for the reasons that have been set out in this order, that question is required to be answered in the negative. That being the factual position, the legal consequences are that this court would be doing violence to the law if discretion is wrongly exercised and the order in question is recalled or set aside. It is for this reason that Company Application No. 684 of 1998 fails and stands dismissed. I need to add here that the doctrine of finality applies to judicial proceedings but that maxim seems to have been long since forgotten by the legal profession, judging from the casualness with which applications for

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review and remand are addressed to the court. This judgment is a firm reminder that parties will have to function in a time-bound and professional manner.

7. The petitioners had been directed to deposit a sum of Rs. 5,000 with the official liquidator. The time period for depositing the amount both as far as the petitioners and the K. S. F. C. are concerned is extended by a period of three weeks from the date of receipt of this order. The petitioners to advertise the petition in the local edition of The Hindu within a period of two weeks from that date. Copies of the order to be furnished to the learned advocates forthwith.

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