
(1979) 06 BOM CK 0006

In the Bombay High Court

Case No : Company Petition No. 710 of 1978

Maharashtra Small Scale Industries Development Corporation	APPELLANT
Vs	
Trawlers P. Ltd.	RESPONDENT

Date of Decision : 29-06-1979

Acts Referred:

Companies Act, 1956 — Section 434(1)

Citation : (1980) 50 CompCas 674

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : I.M. Chagla, for the Appellant; Aspi Chinoy, for the Respondent

Judgement

Mrs. Sujata Manohar, J.—This is a petition by the Maharashtra Small Scale Industries Development Corporation for the winding up of the respondents-company on the ground that the respondents are unable to pay their debts and are commercially insolvent. The petitioners are creditors of the company for a sum of Rs. 6,33,548.23. They had served a statutory notice on the respondents dated April 20, 1978, and thereafter filed the present petition. The respondents have opposed the admission of this petition.

2. The dispute between the petitioners and the respondents centres around certain contracts placed by the Directorate-General of Supplies and Disposal for the construction of a number of boats some time in the year 1971-72. The contracts were placed by the Directorate with the petitioners who in turn placed the contracts with the respondents-company. To enable the respondents to carry out the contracts, the petitioners from time to time advanced various amounts to the respondents. Thereafter, an agreement was arrived at between the petitioners and the respondents dated September 3, 1975, whereunder it was agreed that the petitioners had lent and advanced to the respondents a sum of Rs. 3,40,600. It was also agreed that the respondents would repay to the petitioner-corporation the loan amount by adjusting the amount of the bills payable by the petitioners to the respondents for the work done by the

respondents for the petitioners. Those adjustments were to be made by the petitioners from the bills and in any case the entire advance was to be fully repaid not later than August 31, 1976. The respondent-company has not repaid the loan amount to the petitioners. It seems that the respondents-company has been for a long time in financial difficulties and from its own admission it is apparent that it has no finances to complete the contract work. The company, therefore, has, from time to time, negotiated with the petitioners and various banks for obtaining finance. Under one such financial arrangement, it seems that the petitioners were requested by the banks concerned not to adjust their dues as against the bills of the company until the contract work was completed so that the company would have working finance to complete their contracts.

3. Mr. Chinoy who appears for the company strongly relies upon this arrangement and argues that the company is not liable to pay any amount to the petitioners until the contract work is completed. He has urged that the debt is not due to the petitioner-corporation. At the highest he argues that it is a contingent or in the alternative a prospective liability and hence the petition should not be admitted. This submission does not appear to be correct. Under s. 434(1)(c) of the Companies Act, the company is liable to be wound up if it is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. Hence, it is open to the court to take into account the claim of the petitioners - assuming that it is a prospective claim - in considering whether the company is able to pay its debts or not. In considering this question, one has to first look at the latest balance-sheet and the profit and loss account of the company. Mr. Chinoy has produced for my inspection the last available balance-sheet of the company as on September 30, 1976. He has frankly stated to the court that the accounts for the subsequently years could not be audited as the fees of the auditors could not be paid. If one looks at the last balance-sheet as on September 30, 1976, it becomes apparent that the company is in a hopelessly insolvent position. The company's current liabilities far exceed its current assets. It has large carried forward losses. It has also taken large amounts of secured and unsecured loans. Its current liabilities are to the tune of Rs. 10,28,866.01, unsecured loans to the tune of Rs. 2,49,409 while secured loans are of Rs. 11,58,506.63. The value of its current assets is Rs. 8,61,715.19 and fixed assets, Rs. 1,56,053.47. Its carried forward losses are to the tune of Rs. 14,55,503.32. The company has ceased to function from January 10, 1978, when it declared a lock-out because the company was unable to pay wages to its workmen. It is quite clear that the company is not in a position to complete its contracts with the petitioners and/or the Directorate unless it borrows further large amounts from outsiders. In respect of the contracts that the company has entered into with the petitioners and the Directorate-General of Supplies and Disposal, there are 24 boats lying unfinished in the yard of the company. Mr. Chinoy has argued that the assets which the company would realise, i.e., the payment that the

company would get after it completes these contracts in respect of the 24 boats should also be taken into account in considering the financial position of the company. But, in the present case admittedly, the company is not in a position to complete these contracts since it has no finances to do so. If the company wants its prospective recoveries to be included, then one would also have to include the debts which the company will have to incur in order to complete the contracts and receive the payments on completion of these contracts. Hence, this aspect cannot be taken into account.

4. Mr. Chinoy has disputed the debt of the company on the ground that the petitioners are not entitled to recover any amount from the company until or before the contract is completed. He has relied upon the minutes of the meeting held on November 18, 1975, for this purpose. In this connection Mr. Doctor, who appears for the petitioners, has rightly pointed out that, at the meeting, the petitioners had merely agreed not to adjust their claim against the bills. They had not given a go-by to the agreement of September 3, 1975, whereunder the loan amount had to be repaid in any event before August 31, 1976. Hence, in any event, on August 31, 1976, the amount of the loan has become payable by the company to the petitioners. He has further pointed out that the petitioners had agreed with the banks not to press for dues until the completion of the contract and that there was no such agreement between the petitioners and the company. It is true that the averments made by the company in their affidavit in reply to the effect that nothing is due and payable by the company until the completion of the contracts have not been properly denied by the petitioners in their affidavit in rejoinder. The substance of para. 20 of the affidavit filed on behalf of the petitioners in rejoinder seems to suggest that the petitioners had acceded to the request made by the banks. But this argument need not be examined any further in view of the provisions of s. 434(1)(c) of the Companies Act. The question whether a debt is due at the date of filing of the petition is relevant in a case where the company is deemed unable to pay its debts under s. 434(1)(a) and is sought to be wound up only on that ground. Under s. 434(1)(a), the company is deemed unable to pay its debts if a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand 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. Here, apart from non-compliance with the statutory notice, even under sub-s. (1)(c), the company is liable to be wound up.

5. Mr. Chinoy has next argued that the company has a valid counter claim against the petitioners for a sum of Rs. 23,21,806. This appears to be a counter-claim as and by way of damages for various acts and omissions of the petitioners. The particulars of this counter-claim are set out at Ex. 3 to the affidavit in reply on behalf of the company. I am not satisfied that the counter-

claim has any substance. It appears to have been filed purely with a view to meet the claim of the petitioners in this petition. Hence, at this stage. I have not attached much importance to this counter-claim. A mere examination of the heads of damages set out at Ex. 3 would go to show that the main grievance of the company appears to be that the petitioners did not advance sufficient amounts to them by way of loans as and when the company required them. Such a counter-claim be an answer to a petition for winding up. Mr. Chinoy has strenuously urged that the company is at present in financial difficulties because of the default of the petitioners in not lending them monies as required by the company. I am not satisfied that the petitioners have committed any defaults.

6. He has next pointed out that the company is in financial difficulties on account of factors beyond its control which are set out in the company's affidavit in reply. This is not a ground for not winding up a company which is commercially totally insolvent. He has also urged that public interest requires that the company should survive, apparently because the company is engaged in the activity of constructing boats for the Navy. The company seems to be under the impression that its existence is so vital that the Government institutions, banks, etc., must advance to it large amounts of money it to survive. In my view, it would be totally contrary to public interest to allow such a company to survive. The company is in grave financial difficulties. Its capital base is extremely small. It has, therefore, incurred heavy debts for which there are no prospects of recovery at all. In a case like this, the court has no alternative but to admit the petition for winding up.

7. Mr. Chinoy has lastly urged that the petitioners have filed this petition mala fide with the intention of capturing the boat-yard of the company. In support of his contention he has urged that the petitioners knew that the debts were not presently payable. There is no substance in this argument either. There are 24 boats which are lying unfinished with no prospects of their completion. Under such circumstances, it is disingenuous on the part of the company to urge that the petitioners should wait till after the completion of the contracts when they fully knew that there are no prospects of completing the contracts.

8. The petition is accordingly admitted. The petition should be advertised in the Indian Express, Bombay Samachar and the Maharashtra Government Gazette.

9. Hearing of the petition is fixed for August 22, 1979.

10. Mr. Doctor states that the petitioners will not advertise the petition for a period of one week from today.