
(1980) 11 CAL CK 0015
In the Calcutta High Court
Case No : F.M.A. No. 158 of 1978

Martin Burn Ltd.

APPELLANT

Vs

Bhagirath Murarka

RESPONDENT

Date of Decision : 26-11-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Contract Act, 1872 — Section 70

Citation : (1982) 52 CompCas 127

Hon'ble Judges : Ramendra Mohan Datta, J;Chandan Kumar Banerji, J

Bench : Division Bench

Advocate : Bimal Chatterjee, for the Appellant;

Final Decision : Allowed

Judgement

Ramendra Mohan Datt, J.—This appeal arises from the judgment and order dated March 30, 1978, passed by Roy Chowdhury J. on the petition for winding up the appellant-company. The learned judge admitted the petition and inter alia, directed advertisement to be issued. The further order was that if the company would pay Rs. 8,50,000 together with interest at the rate of 18% per annum from February 1, 1977, until payment and also the assessed costs of sixty gold mohurs before May 31, 1978, the winding-up petition would remain permanently stayed and in default the advertisement was to be published as directed. Regarding the remaining portion of the claim for Rs. 1,50,000, the order was that the petitioning-creditor would be at liberty to take appropriate steps. The learned judge held that the said portion of the claim was bona fide disputed by the company. The effect of the last portion of the order was that the winding-up petition as to the part of the claim to the extent of Rs. 1,50,000 was directed to be permanently stayed.

2. The petitioning-creditor's claim in the petition is for about Rs. 10 lakhs as money lent and advanced to the company at its request for the purpose of its business on the terms and conditions, inter alia, that the said amount would be

repayable by the company to the petitioning-creditor on demand with interest at the rate of 2% per mensem. Such interest "was to be paid by the company to the petitioning-creditor every month and month by month and in the event of non-payment of interest as aforesaid the same would form part of the principal and would carry further interest at the same rate. In other words, the compound interest as aforesaid would be payable. There is no writing in respect of the said agreement except that the petitioning-creditor has referred to four cheques, the first three of which were drawn in favour of Martin Burn Ltd. and the last one was in favour of one Sagar Lines (India) Private Ltd. having its registered office at the same address where the registered office of Martin Burn Ltd, is situate. It is stated that in terms of the said agreement the petitioning-creditor lent and advanced the said sum of Rs. 10 lakhs to the company. Regarding the first cheque the same was drawn not by the petitioning-creditor but by one Francis Klein & Co. Ltd. for a sum of Rs. 5 lakhs. The said cheque was dated January 31, 1977. The next two cheques were also of the same date but both were drawn by the petitioning-creditor in favour of Martin Burn Ltd. The respective amounts were for Rs. 2 lakhs and for Rs. 1,50,000. The total amount of the said three cheques was Rs. 8,50,000. The fourth cheque was drawn by the petitioning-creditor in favour of Sagar Lines (India) Private Ltd. and the same was for a sum of Rs. 1,50,000.

3. The definite case as made out in the petition for winding up was that pursuant to the terms and conditions of the agreement, the petitioning-creditor lent and advanced the sum of Rs. 10 lakhs to the company and the company received the same from the petitioning-creditor and by the notice u/s 434 also the same definite assertion was made to the aforesaid effect. The notice, however, was silent about the alternative case as made out in the petition u/s 70 of the Indian Contract Act where it was stated that the said sum was paid by the petitioning-creditor not intending to do so gratuitously and the company had enjoyed the benefit thereof and, accordingly, the company was liable to compensate the petitioning-creditor to the extent of the said sum of Rs. 11,57,205.02. In the petition, the said sum of Rs. 11,57,205.02 has been shown to have been arrived at on the basis of calculation at the compound rate of interest up to September 15, 1977.

4. The correspondence disclosed on behalf of the petitioning-creditor and as annexed to the petition would show some discrepancy as regards the terms and conditions of the contract as pleaded in the petition. By his letter dated May 4, 1977, Murarka wrote to the company as follows :

" Dear Sir,

Attention : Shri Romen Mukherjee

We have paid Rs. 10,00,000 (ten lakhs) only in two instalments, first Rs. 8,50,000 (eight lakhs fifty thousand) only on 31st Jan., 1977, and second Rs. 1,50,000 (one lakh fifty thousand) only on 8th Feb., 1977. The above money will

be paid back to us by 31st May, 1977. This money was given to you as a temporary loan bearing interest of 2% per month (i. e., 24% yearly).

You have failed to pay this money together with interest on due date. Please make money together with interest available to us as early as possible, failing which we will have to take proper action. Thanking you,

Yours faithfully,

Bhagirath Murarka.

Receiver's signature

(Sd.) 4-5-77 "

5. We have been told that the date 31st May, 1977, as mentioned in the first paragraph of the letter should be read as 31st March, 1977. This letter would show that the agreement contained another term, viz., that the money was repayable by 31st March, 1977, and not "on demand "as pleaded in the petition. Secondly, the amount of interest payable was simple interest and not compoundable month by month. This letter was not replied to and the learned judge has made a lot of comments for such silence. The next letter was dated July 20, 1977, written by Mr. R. L. Gaggar, advocate of Murarka, to the company to the following effect:

" Dear Sir,

Clients: Messrs. Bhagirath Murarka of No. 7, Lyons Range, Calcutta-1.

I have been instructed by my clients aforesaid to write to you as follows:

My clients at your request had lent and advanced to you a sum of Rs. 10,00,000 (rupees ten lakhs) for the purpose of your business repayable on demand together with interest thereon at 2% per mensem. The interest to be accrued thereon, was agreed to be paid every month and month by month and it was agreed that in the event of non-payment the same shall form part of the principal and it shall carry further interest thereon at the same rate.

In spite of the repeated demands, you have failed and neglected to make payment of the said sum of Rs. 10,00,000 and the interest thereon as agreed or any portion thereof.

In the premises, I have been finally instructed by my said clients to call upon you to make payment of the said sum of Rs. 10,00,000 together with all arrears of interest either to my clients direct or to me as their solicitor, and advocate.

Should you fail to make payment as aforesaid, my client's instructions are to take appropriate legal proceedings against you for realisation of the claims including that of your winding-up after the expiry of three weeks from the date of receipt of this notice, and needless to say that, in that event, you shall be held liable for all costs and consequences arising therefrom.

Please treat this notice as notice u/s 434 of the Companies Act, 1956.

Yours faithfully,

R. L. Gaggar."

6. Regarding payment of interest at compound rate this letter is consistent with the statements made in the petition.

On August 10, 1977, the company replied as follows :

" Your Letter No. RLG/2471/77 dated the 20th July, 1977, has been handed over to me by my clients, Messrs. Martin Burn Ltd., with instructions to reply as follows :

My clients are surprised to note the contents of your letter as they never requested your clients to lend and advance nor did your clients lend and advance to them the alleged sum of Rs. 10 lakhs for the alleged purpose on the alleged terms and conditions or at all. Consequently, there was no question of any demand being made by your clients to mine, far less repeated demands for payment of the said sum or any failure on the part of my clients to repay the same. Your demand in the fourth paragraph and the threat in the penultimate paragraph of your letter are absolutely unwarranted and uncalled for. If your clients desire to resort to litigation with their speculative claim they will do so at their own risk as to the consequences thereof.

Yours faithfully,

S. K. Mullick."

7. There was no explanation in this letter as to why the previous letter was not replied to but at the hearing of the application before the court below after inspecting the said letter the company admitted the receipt thereof but stated that the same was not traceable in their records and that was why the same could not be replied to. On August 16, 1977, Mr. R. L. Gaggar in reply to the said letter dated August 10, 1977, wrote as follows :

"Dear Sir,

Your clients : Messrs. Martin Burn Ltd.

My clients : Messrs. Bhagirath Murarka.

With reference to your letter dated 10th August, 1977, I have since received instructions from my clients to reply thereto as follows:

There was nothing in my letter dated July 20, 1977, that should have surprised your clients. It is no use denying that my clients never lent and advanced or that your clients had never requested for lending and advancing the said sum of Rs. 10 (ten) lakhs as alleged or at all. No amount of denial on the part of your client would absolve them of their liability.

However, in view of the attitude adopted by your clients, my clients are now left with no alternative other than to take appropriate legal proceedings in this regard which please note.

Yours faithfully,

R. L. Gaggar. "

8. The next letter was dated August 24, 1977, written by Mr. S.K. Mullick, advocate for the company, addressed to Mr. R. L. Gaggar as follows:

" Dear Sir,

Your clients : Messrs. Bhagirath Murarka.

I acknowledge receipt of your letter No. 2825/77 dated the 16th August.

In reply, my clients repeat what have been stated in my letter to you of the 10th August and deny all allegations to the contrary contained in your letter as incorrect and imaginary. No amount of assertion on the part of your clients will alter the position.

My clients have no liability whatsoever to your clients. Should your clients still feel that they have lent and advanced the amount mentioned in your letter to my clients they are at liberty to produce before my clients for their inspection whatever evidence they have in their possession in support of their allegations contained in your letter.

Yours faithfully,

S. K. Mullick."

9. From the aforesaid facts as disclosed in the petition and in the annexures thereto it transpires that the petitioning-creditor's entire claim is against the company but the company has totally denied the liability thereof. It was the question of a claim based on a contract which has been denied by the company. Accordingly, the winding-up court has to proceed cautiously and see for itself whether the contract as pleaded in the petition has been clearly established or not. It is true that the first letter dated May 4, 1977, which was admittedly received on behalf of the company, was not replied to but that by itself should not be considered as conclusive of the fact of the agreement, if an acceptable explanation was given by the company, even though at a later stage. The winding-up court should have examined the documents carefully and seen, for itself whether it was fully consistent with the petition on the basis whereof the same was to be admitted and advertisements were to be directed. The letter dated May 4, 1977, is not quite consistent with the fact as disclosed in the petition. It was the definite case of the petitioning-creditor in the petition that the said sum of Rs. 10 lakhs was lent and advanced to the company at its request and for the purpose of the business of the company. One of the definite terms of the agreement was that it was repayable on demand but that was not

the case made out in the said letter. The letter says that the said sum of Rs. 10 lakhs would be paid back by 31st March, 1977, i. e., it was not payable on demand but was payable on the expiry of a particular date. In the next place, another very vital term of the agreement was that the interest to be accrued would be paid by the company month by month and every month and in case such interest would not be paid, the same would form part of the principal and would carry further interest thereon at the same rate, i. e., it would be compoundable every month if month by interest would not be paid. This is yet another vital clause in the agreement which is silent in the said letter. The company court should be cautious enough to consider that such a huge sum was being lent and advanced to a limited company without being backed by any correspondence or any document evidencing the same. Accordingly, it should be the duty of the company court to take into consideration those very vital facts concerning the discrepancies before taking into account the fact that such a letter was not replied to and before thinking of rejecting any explanation of the company that the said letter was not traceable in the file and as such was not replied to. Furthermore, the alternative case as made out in the petition u/s 70 of the Indian Contract Act is not to be found in any of the correspondence entered into by and between the parties and that fact was not taken note of by the learned judge;

10. It is true that the sum of Rs. 10 lakhs was paid by the petitioning-creditor but the primary question was to whom was it paid ? Two of the cheques for Rs. 2,00,000 and Rs. 1,50,000, respectively, were no doubt drawn by the petitioning-creditor in favour of the company and the same were encashed by the company but that by itself is not enough to conclude that the contract was with the company and the money was paid to it for its business. There are further facts which have been revealed by the affidavit filed on behalf of the company and the same should have been carefully considered if the real transaction was to be appreciated from the prima facie point of view. The learned judge himself has found out that the last of the four cheques for Rs. 1,50,000 was not paid by the petitioning-creditor in favour of the company but in favour of another limited company by the name of Sagar Lines (India) Private Ltd. The learned judge has satisfied himself that the company has bona fide disputed the said amount. In other words, the sum of Rs. 1,50,000 which formed part of the entire sum of Rs. 10 lakhs was found not payable by the company. That being so, a part of the petition for winding up, which was based on the very same contract for the sum of Rs. 10 lakhs, could not have been accepted by the court below. It follows, therefore," that the company's defence to that extent was acceptable as bona fide. If the court below had carefully considered the petition and the annexures thereto it would have found out that several versions touching the agreement were sought to be made out therein and the agreement mentioned therein could not be prima facie accepted for the purpose of admission of the winding-up petition and in directing the advertisements in respect thereto. Under such circumstances, the winding-up court had enough materials before it to consider if

such a petition was an abuse of the process of the court before considering the question whether the defence raised by the company was a bona fide one or not or disclosed highly dishonest intention of the company.

11. Now, coming to the defence raised on behalf of the company, the court below ought to have accepted the same in the light of the background which has been stated on behalf of the company that on or about January 14, 1977, Bhagirath Murarka became a shareholder of the said Sagar Lines (India) Private Ltd. by taking 100 equity shares of that company. The same was approved by the board of directors of that company at a meeting held on that date. At a further meeting of the said Sagar Lines (India) Private Ltd. held on January 28, 1977, the managing director thereof reported to the board of directors that the said Bhagirath Murarka had agreed to advance a loan of Rs. 10 lakhs to the aforesaid company for acquisition of the vessel, TAMIL ANNA, by Sagar Lines (India) Private Ltd. It was also resolved that the offer of loan was to be accepted and that interest on such loan at the rate of 18% per annum was to be payable to the said petitioning-creditor, Bhagirath Murarka, from the date of receipt of the amount by Sagar Lines (India) Private Ltd. On or about January 31, 1977, the appellant-company received a letter from Sagar Lines (India) Private Ltd. under the signature of the secretary of Sagar Lines (India) Private Ltd. along with 3 cheques for a total sum of Rs. 8,50,000 which were enclosed therewith. It was mentioned in the said letter that the said three cheques had been just received by Sagar Lines which had wrongly been drawn in favour of the appellant-company. It was stated that Sagar Lines required the amount immediately for payment to be made by it in connection with the purchase of a ship, M.V. TAMIL ANNA, and as such requested the appellant-company to arrange for a banker's draft of the said amount in favour of the United Commercial Bank in lieu of the said cheques to enable Sagar Lines to remit the amount to the State Bank of India, Madras, for credit to the joint account of Sagar Lines with Poompuhar Shipping Corporation Ltd., the seller of the said ship, on the very same day. It was mentioned that the matter was extremely urgent and the company was requested to comply with the said request of Sagar Lines. Pursuant thereto, on the very same day, the company addressed a letter to Grindlays Bank Ltd., Calcutta, requesting them to issue a pay order for Rs. 8,50,000 in favour of United Commercial Bank and to hand over the same in the course of the day to the bearer of the said letter, Mr. A.K. Biswas, and to debit the company's current account with the amount together with the charges of the Grindlays Bank Ltd. According to the appellant-company on the very same day, i. e., on January 31, 1977, Grindlays Bank Ltd. issued a pay order as requested by the appellant-company and debited the company's current account with the sum of Rs. 8,50,003 (Rs. 8,50,000 being the value of the pay order and Rs. 3 being the bank commission). On the very same day, the company forwarded to Sagar Lines (India) Private Ltd. the said pay order for Rs. 8,50,000 along with its covering letter. The company produced all its documents, papers, books of account, to satisfy the court below that the amount was shown in the company's books in

the suspense account and was not credited in the name of Bhagirath Murarka. It is true that both Romen Mukherjee, the managing director of the company, and the secretary of the company were also connected with the said Sagar Lines (India) Private Ltd. but it could not at the same time be denied that the two were separate and distinct legal entities and, accordingly, that by itself would not be enough to conclude that the agreement was entered into not with Sagar Lines (India) Private Ltd. but with the appellant-company. If the learned judge of the court below had been patient enough to consider both the versions carefully it could not have been difficult for the learned judge to come to the finding that the company's defence was a bona fide one and the petitioning-creditor's petition was an abuse of the process of this court. The learned judge not only admitted the petition but gave direction for payment of the entire sum of Rs. 8,50,000 with interest thereon at the rate of 18% per annum from February 1, 1977, until payment and the assessed cost of 60 G.M. before May 31, 1978, and in default of such payment the winding-up petition was directed to be advertised as aforesaid. The learned judge, it appears, has not allowed 24% interest with compound rate as claimed in the petition. The learned judge did not think of directing security to be furnished for the said amount so that there remained no option to the company but to pay up the said sum of Rs. 8,50,000 in order to save the company.

12. After the appeal was preferred an admitted letter being a letter dated 7th June, 1977, written by the petitioning-creditor to Sagar Lines (India) Private Ltd. came to light. The appellant-company wanted to rely thereon and, accordingly, made an application for additional evidence to be adduced. The appeal court made an order on January 28, 1980, whereby leave was granted to the appellant-company to file a supplementary paper book containing the copy of the said letter dated June 7, 1977, addressed to M/s. Sagar Lines (India) Private Ltd. by the respondent, Bhagirath Murarka. Leave was also granted to the appellant-company to take necessary steps for issuance of a subpoena to be served on M/s. Sagar Lines (India) Private Ltd. in terms of prayer (b) of the petition before the appeal court. The question of admissibility of the said letter was left open to be determined at the hearing of the appeal.

13. We have heard the legal arguments of both the parties regarding the admissibility of this document being the letter dated 7th June, 1977. The authenticity and the correctness of the said document is not disputed on behalf of the petitioning-creditor but what is contended by Mr. Bimal Chatterjee, appearing on his behalf, is that the same is not admissible in evidence at this stage under the provisions of Order 41, Rule 27 of the CPC, as amended by the Act of 1976. It is contended that the two companies have common directors and common secretary. Romen Mukherjee, the managing director of Martin Burn Ltd., is personally interested in the other company and so is the secretary, who is the secretary in both the concerns. Accordingly, the provisions of Order 41, Rule 27(1)(aa) would not apply. It is contended that due diligence has not been exercised in this case in not producing the said document in time. I have gone

into the facts as disclosed in the affidavit filed in that connection and I am satisfied that the said letter was not available at the time the said application was heard before the court below and the same had since been traced and, accordingly, the same had been sought to be relied on and made available before the appeal court. In any event, it is unlikely that such a vital document would not be produced before the trial court if the same would have been available at that time. Had that been produced that would have clinched the issue and the order of the court below might have been different from what was made by it. In any event, the nature of the document is such that it is considered by the appeal court itself that this should be made available to it to enable it to pronounce the judgment herein and, accordingly, the appeal court in this case should allow this document in the interests of justice to be produced before it. On this ground also this document becomes admissible in evidence by the appeal court.

14. On behalf of the petitioning-creditor the books of account and the balance-sheets were sought to be produced by the company. That was so done and the appeal court is, accordingly, entitled to look into the same as well as an additional piece of evidence before it. Neither the books of account nor the balance-sheets would show that Bhagirath Murarka, was a creditor of Martin Burn Ltd. The cheque received and encashed were kept in the suspense account and the proceeds thereof were made available to Sagar Lines (India) Private Ltd.

15. We, accordingly, have no hesitation to admit the said letter dated June 7, 1977, as a piece of additional evidence before us and also to examine the documents and books of account relating to this company as admissible evidence before us and as documents necessary for the purpose of pronouncing judgment in this case. It is recorded that the said Sagar Lines (India) Private Ltd. had been subpoenaed to produce such original document and pursuant to such subpoena the said company had produced such documents in court today.

16. The said letter dated June 7, 1977, is set out below :

" Bhagirath Murarka

7, Lyons Range,

Calcutta-1.

Dated 7th June, 1977.

M/s. Sagar Lines (India) Pvt. Ltd.

Martin Burn House,

I, R. N. Mukherjee Road,

Calcutta-700001.

Dear Sirs,

Re : Loan of Rs. 10,00,000 advanced to you on 31-1-77.

I advanced to you a loan of Rs. 10,00,000 (rupees ten lakhs) by cheque at interest @18%. p.a.

In part payment of the said loan, you gave me a cheque of Rs. 5,00,000 (rupees five lakhs) on 1-4-1977. I am sorry to say that the said cheque issued by you has twice been dishonoured by your bank on 30-5-77 and 31-5-77.

In the circumstances I request you to repay the entire sum of Rs. 10,00,000 (ten lakhs) together with interest thereon within a week from the receipt of this letter failing which please note that I will have no option but to take appropriate proceedings against you in this regard for which you will be entirely responsible.

Thanking you,

Yours faithfully,

For Bhagirath Murarka

by his Constituted Attorney.

(Sd.) P. Murarka."

17. Mr. Bimal Chatterjee contends that this document was signed by Praveen Murarka, the son of Bhagirath Murarka, at a time when Bhagirath Murarka was not in town, and without appreciating the correct position. It is to be noted, however, that this very same Praveen Murarka, who has signed this letter, as a constituted attorney for Bhagirath Murarka also signed and verified the petition for winding up, as well acquainted with the facts and circumstances of the case and as true to his knowledge and as such constituted attorney. It is too late in the day to contend that Praveen Murarka was not fully aware of the correct position. If that should be accepted as the correct position then in such event the petition for winding up could not be relied on except as a piece of gross abuse of the process of this court.

18. The learned judge of the court below in admitting the petition and directing advertisements has taken a very strong view of the conduct of the company as he found that the said Romen Mukherjee and the secretary were functioning in both the companies as common director and common secretary, respectively. But it is to be noted that besides them there are other directors of the said company, who are not directors of Martin Burn Ltd. Regarding meeting the liabilities, the two concerns are distinct and separate legal entities and the liability of one could not be foisted on the other because they have common directors and officers as mentioned above. It is true that at the correspondence stage Martin Burn Ltd. could have come out with the definite and correct position instead of making a general denial in respect of the transaction but in considering the petition for winding up for the purpose of admission and advertisements the court dealing with such matters has to take into account the nature, of the transaction and particularly the agreement which is the foundation of the claim in the petition for winding up. If the learned judge of the court below would have exercised a little

more patience in this matter to get at the real facts and if the said letter dated June 7, 1977, which was subsequently disclosed before the appeal court would have been made available to him at the relevant time, I have no doubt in my mind that the very strong words used by the learned judge in his judgment against the appellant-company would have been more effectively and with greater emphasis hurled against the petitioning-creditor to make his petition an abuse of the process of this court. By reason of the aforesaid, in my opinion, the petitioning-creditor cannot, under any circumstances, reconcile this document, being the letter dated June 7, 1977, with his petition for winding up. That being so, it must be held that the defence made out by the company was a bona fide one and that the petition for winding up was an abuse of the process of the court and, as such, could not have been admitted at all.

19. The result, therefore, is that the appeal is allowed. The petition for winding up is dismissed as an abuse of the process of this court. The security furnished by the order of the appeal court is discharged. All other interim orders are vacated. The petitioning-creditor is to pay the costs of the appellant-company both of the court below and of this court.

C. K. Banerji, J.

20. I agree.