
(1995) 11 MAD CK 0065

In the Madras High Court

Case No : Company Petition No. 75 of 1993 and AS No's. 985 and 1090 of 1994

Maruti Udyog Ltd.

APPELLANT

Vs

Hindusthan Photo Film Mfg. Co. Ltd.

RESPONDENT

Date of Decision : 10-11-1995

Acts Referred:

Companies Act, 1956 — Section 433, 434

Citation : (2001) 103 CompCas 960

Hon'ble Judges : Jayasimha Babu, J

Bench : Single Bench

Advocate : P. Seshadri and Mohan Parasaran, for the Appellant; Dalip Singh, for the Respondent

Final Decision : Allowed

Judgement

Jayasimha Babu, J.—This petition for winding up u/s 433(e) and (f) of the Companies Act, 1956 ("the Act") has been filed by the petitioner, Maruti Udyog Ltd., New Delhi, for winding up the respondent, Hindusthan Photo Film Mfg. Co. Ltd., on the ground that despite the statutory demand, the respondent-company has failed to pay the debt admittedly due to the petitioner, the amount of the outstanding debt being Rs. 5 crores together with interest thereon. The rate of interest, according to the petitioner, is 21 per cent per annum while the case of the respondent is that the rate of interest is only 15 per cent per annum.

2. It is admitted that the petitioner-company which was also a public sector company till about a year preceding the date of presentation of this company petition, had advanced large sums of money periodically as and by way of inter-corporate loans to the respondent-company commencing from 16-4-1984, the first such loan being a sum of Rs. 5 crores. An Agreement dated 22-12-1985, was entered into between the parties which provides, inter alia, for repayment of the loan in part or full to the petitioner within 30 days from the date of demand, 15 per cent of the loan to be repayable to the petitioner at 15 days notice, and the rate of interest to be at 15 per cent per annum compounded quarterly with

additional 5 per cent being the penal interest if the amount remained outstanding for a period of 10 days after the due date. The petitioner-company appears to have advanced even larger sums of money to the respondents thereafter, over a period of about 7 years, the peak having been reached on 18-6-1990, on which date the amount advanced by the petitioner to the respondent stood at Rs. 65 crores. The respondent-company repaid in part, and in instalments, the amounts borrowed by it, however, leaving a balance of Rs. 5 crores as at the end of November, 1992. Between 1-8-1990 and November, 1992, a sum of Rs. 25 crores was repaid.

3. Though the respondent had promised to repay the balance of Rs. 5 crores before 31-3-1993, the amount was not paid. Thereafter, the respondent promised to clear the outstanding before September, 1993. Even by that date, the amount remained unpaid. This company petition came to be filed in March, 1993. Though this petition has been pending in this Court for well over two years, the respondent has so far failed to pay all or any part of this admitted debt of Rs. 5 crores or any part of the interest accrued thereon.

4. The respondent after entering appearance filed a counter-affidavit dated 26-8-1994, sworn to by its chairman and managing director. In that counter-affidavit, the amounts borrowed by the respondent from the petitioner from 1984-85 as also the payments made up to 1-4-1993, have been set out. It shows that the sum of Rs. 5 crores remains outstanding as on 1-4-1993. The respondent has also claimed that it has paid a sum of Rs. 78.54 lakhs as excess interest.

5. In the counter-affidavit of the chairman of the respondent-company, there is not even a commitment to repay within a specified period. It is only asserted therein that the company is commercially viable; that it had made profits during the years 1988--1992; that the company employs 3,500 workers; that the company is engaged in the manufacture of photo sensitized goods, which are meant for taking "X"-rays; that the company is a wholly-owned Government of India undertaking, the share capital of the respondent being held by the President of India; that the accounts of the company are audited by the Comptroller and Auditor-General, and placed before the Parliament from time to time, and that the petition is filed only to exert pressure on the respondent to enforce payment at an exorbitant rate of interest.

6. Surprisingly, in this counter-affidavit of the chairman of the company, even after admitting that the sum of Rs. 5 crores was outstanding and due to the petitioner as on 1-4-1993, it is stated at para. 8 "... Furthermore, the respondent-company had paid the principal and what remains is only the interest which is also disputed by the respondent". Again at para. 12, it is stated, "... Furthermore, the company is being funded by the Central Government, and in the current budget the Central Government has allocated a sum of Rs. 40 crores. The funds are yet to be released by the Government and in the event of the Government releasing the fund, the company would be in a position to pay some

amount to the petitioner assuming that any amount is due to the petitioner herein". The assertion that no amount is repayable towards principal, after stating that the amount outstanding is Rs. 5 crores and the alleged excess payment towards interest is Rs. 78 lakhs, and the vague promise of "some" amount to be paid to the petitioner "assuming" that "any amount" is due to the petitioner is indicative of the recalcitrant attitude of the respondents.

7. While the chairman of the respondent-company has asserted that the company is wholly owned by the Government of India, the Chief Manager (Finance) of the respondent-company in his affidavit filed on 6-4-1995, has stated that "Government of India holds 50 per cent of the paid-up share capital of the petitioner". One is left to wonder as to which one of those two assertions is correct. The endeavour of the respondent has been to assert that because the Government of India has a major role in the affairs of the company, a petition for winding up of the company even if it be at the instance of an admitted creditor to whom the company had earlier repeatedly promised the repayment within a time frame, but had failed to fulfil the promise, should not be entertained by the Court.

8. The respondent-company was not forthcoming about its current financial position and it was only after an oral direction was issued by this Court that affidavits sworn to by its Chief Manager (Finance) on 3-3-1995 and 6-4-1995, showing the recent financial position of the company were filed. In the affidavit filed by the chairman, a rosy picture was sought to be presented about the financial position of the company by stating that the company had earned a profit of Rs. 698 lakhs in 1988; Rs. 756 lakhs in 1989; Rs. 797 lakhs in 1990; Rs. 198 lakhs in 1991 and Rs. 291 lakhs in 1992. The financial position of the company at the end of the year 1992-93 was not set out in the affidavit, even though the affidavit was filed more than 15 months after the closure of that financial year. It is only in the affidavit of the Chief Manager (Finance) dated 3-3-1995, and the further affidavit of that office dated 6-4-1995, that the disclosure is made that the company suffered a loss of Rs. 115.54 crores in the year 1992-93. The paid-up capital of the respondent-company in the year 1992-93 was Rs. 153.18 crores and its reserve and surplus were Rs. 22.84 crores. Its net assets as at the end of that financial year were Rs. 176.02 crores. As against this, the loss incurred during the year 1992-93 was at Rs. 115.54 crores before providing for depreciation and tax. The net worth, as at the end of 1992-93 had come down to Rs. 40.22 crores, as found by the Comptroller and Auditor-General in his report on the company's accounts for that year. The net worth per rupee of capital according to that report, had rapidly declined from Rs. 1.02 in 1990-91 to Rs. 0.26 in 1992-93.

9. Even in the affidavits filed by the Chief Manager (Finance), in March and April, 1995, the financial position of the company as at the end of the year 1993-94 has not been disclosed. It is stated that the annual general meeting for the year 1993-94 was conducted in December, 1994, and had been adjourned to a later date as the accounts for the year 1993-94 are not complete. It is indeed

surprising that the accounts for the financial year 1993-94 remained incomplete for more than a year after the end of that accounting year. There is no explanation forthcoming for such extraordinary delay in finalising the accounts in the two affidavits filed by the company finance manager.

10. The failure on the part of the respondent to furnish any financial data concerning the company for the financial year 1993-94 and the period subsequent to 1-4-1994, in the circumstances must be regarded as deliberate. The respondent has failed to furnish such information apparently because its financial position has worsened. This conduct of the respondent again raises considerable doubts regarding the credibility of the claim made by the respondent, regarding its solvency and its true net worth. The respondent-company appears to have adopted a very casual approach to the winding-up petition instituted against it by the petitioners, merely because the respondent-company's share in substantial numbers are held by the Government of India. This approach on the part of the respondent deserves to be deprecated.

11. Mr. Dalip Singh, the learned counsel for the respondent, urged that the petition should not be admitted, as in his submission, the only course open to the petitioner is to institute a money suit against the company for recovering its dues. It was submitted that the petition for winding up at the instance of a creditor of the company can be entertained by the Court only when it is demonstrated that the company is unable to pay its debts. Inability to pay should be in the sense of not mere temporary inability on account of any resources crunch or any unforeseen factors which have an adverse impact upon the finance of the company in the short run, but should be a permanent inability in the immediate future to meet its obligation including contingent obligations. The counsel further submitted that the order of winding up being a discretionary order, while considering the petition for winding up, it is necessary for the Court to take into account the interest of all the creditors of the company as also of the workmen employed in the company. It was further submitted that it is necessary to take all these factors into account even at the stage of admission of the petition, as even an order of admission would have an adverse impact on the functioning and the future prospects of the company.

12. Mr. Mohan Parasaran, the learned counsel for the petitioner, submitted that the Companies Acts in India as also the Companies Act in England after which the Indian Act is modelled, have always recognised the right of a creditor to seek winding up of the company which is but an artificial legal entity, and whose right to exist is limited by the provisions of the Companies Act. Since the Companies Act specifically provides for winding up of the company at the instance of an unpaid creditor whose debt had remained outstanding despite statutory notice, and which debt continues to remain unsatisfied without any reasonable cause, the petitioner is entitled to seek the winding up of the company. It was further submitted that even though the creditors and workers are also entitled to be heard before the winding up is ordered, such hearing can only be after the

petition is advertised when all those having an interest in the company will have the opportunity to oppose or support the petition for winding up. The counsel also submitted that the financial condition of the respondent-company has deteriorated to such an extent that its net asset value has fallen drastically in a single year. The huge loss it suffered in 1992-93 considered along with the non-disclosure of the figures for the subsequent period would indicate that the company is commercially insolvent. There can be no excuse for not repaying an admitted overdue liability except sheer inability to make the payment.

13. Section 433(e) of the Act provides that any company may be wound up, inter alia, on the ground that the company is "unable to pay its debts". Section 434 sets out the circumstances in which the company is deemed to be unable to pay its debts. Section 434 reads thus :

"Company when deemed unable to pay its debts.--(1) A company shall be deemed to be unable to pay its debts-

(a) 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;

(6) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) 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.

(2) 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 authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm."

14. Failure to compound, or secure the debt to the satisfaction of the creditor who had given the requisite statutory notice is deemed to be "inability to pay". The company's liability to pay is, therefore, required to be demonstrated by: (a) actual payment or (b) by compounding the debt to the creditor's satisfaction or (c) securing the debt to the satisfaction of the creditor. Needless to say the debt must be real and lawfully due, and the claimant's status as creditor clearly established. The Court is not bound to wind up the company merely because a creditor who is eligible to maintain a petition for such a relief, has chosen to petition the Court. The Court will have to exercise its discretion having regard to all the facts and circumstances of the case brought out before it, before deciding whether the company should be wound up.

15. Though the normal mode of enforcing a money claim is by instituting a suit in the civil court, or filing a claim before a special Tribunal in cases where such a remedy is provided, the Companies Act has conferred a right on the unpaid creditor to apply for winding up on the ground of the company's inability to pay its debts. The fact that the creditor can maintain a civil action, cannot, therefore, be the sole ground for rejecting his petition for winding up. The Act which enables the companies registered under the Act to limit the liability of their members, has at the same time, afforded protection to the creditors to seek the winding up of the companies which are unable to pay their debts. The shareholders of the company are not personally liable for the debts of the company and the fact that the shares are held by the Government does not afford any greater security to the creditor.

16. Persons claiming to be creditors cannot merely on the ground that their claim is against a company, petition for winding up the company to enforce their claim, even when the liability of the company for meeting such claim is bona fide disputed. In the oft-quoted words of Buckley: "It is well-settled that winding up petition is not a legitimate means of seeking to enforce payment of the 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 scandalous abuse of the process of the Court". This statement of Buckley was approved by the Supreme Court in the case of *Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami* [1965] 35 Comp. Cas. 456 and has been quoted with approval in several subsequent decisions rendered by the Apex Court. Such approval was reiterated in the recent case of the *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, .

17. In *Palmer's Company Law*, twenty-fourth edition, in Chapter 88, winding up by the Court, at 85-86 the law on this aspect is stated thus :

"...where there is bona fide dispute as to the debt, the company cannot be said to have neglected to pay on statutory demand. Coupled with this is the general principle that a petition for winding up with a view to enforcing the payment of a disputed debt is abuse of process of court, and should be dismissed with costs. Each case ultimately turns on its facts.... Where the debt is not disputed or the claim is substantial, the creditor may present a petition with the object of forcing the company to pay. "Substantial" here means having substance. In such a case pursuit of the claim with personal hostility, even venom and an ulterior motive, do not constitute an abuse of the process of the court. Similarly where the company is proved by other means to be insolvent, or where the dispute is as to amount only an order will be made.... To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. That it must be honestly believed to exist and must be based on substantial or reasonable grounds.... The onus is on the company "to bring forward a prima facie case which satisfies the court that there is something which ought to be

tried either before the court itself or in an action, or by some other proceeding".

18. The Supreme Court in the case of *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P.) Ltd.* [1972] 42 Comp. Cas. 125 has laid down that:

"Two rules are well-settled. First, if the debt is a bona fide dispute and the defence is a substantial one, the Court will not wind up the company....

Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the Company chooses not to pay that particular debt...."

19. In the instant case, the petitioner's status as creditor cannot be questioned at all. The admitted dealings between the parties would clearly show that the respondent has been, and is, a debtor and that the petitioner as a creditor has been advancing large sums of money, from 1984 onwards, and that out of the sums so advanced, a sum of Rs. 5 crores has remained unpaid from the year 1992, although the respondent had repaid substantial sums of money in the course of the year immediately preceding November, 1992. The petitioner's standing as a creditor is thus established. There can be no bona fide dispute as regards the debt or the right of the petitioner to maintain this petition. Though the respondent, after admitting the outstanding of Rs. 5 crores, has claimed that a sum of Rs. 74 lakhs had been paid as excess interest, even assuming that such excess payment has been made towards interest, even then a sum of Rs. 4 crores and twenty-six lakhs is admittedly due. The respondent has contended that the rate of interest is 15 per cent and not at 21 per cent whichever rate is adopted, a sum exceeding Rs. 1 crore has accrued, as interest admitted on the outstanding sum during the pendency of this petition. The company has failed to pay or secure or compound the debt even after the statutory notice. Even though this petition has been pending for over two years, the company has failed to pay any part of the petitioner's dues. It has only made vague promises which have also remained unfulfilled. The company is, thus, not only deemed to be unable to pay its debts, but that such inability is also a fact which has been demonstrated by the company's continued failure to pay the debt even during the pendency of this petition.

20. As to whether or not the other creditors of the company are desirous of supporting this petition will be known when this petition is advertised and when they will become aware of the pendency of the petition. Similarly, the manner in which the interest of the workers is to be protected can also be decided only when this petition is advertised and the workers come forward and set out their case before the Court. It cannot now be assumed that all other creditors of the company are opposed to the winding up of the company. Even if it were to be assumed for a moment that the creditors and workers would be desirous of opposing this petition, nevertheless, the financial position of the company as presented by the respondent showing as it does a loss of Rs. 115 crores in 1992-93 is not such as to infuse confidence in its ability to discharge the debts to

all its creditors, particularly in view of the fact that the financial results of the company's working for the years subsequent to 1-4-1993, have not been disclosed. In the present state of the record, it must be held prima facie that the company is unable to pay its debts.

21. The attitude of the respondent, that it is open to it to refuse to pay, even while it is legally bound to pay is not an attitude that can be appreciated. On principle, to permit such defence would only result in encouraging fraudulent preference on the part of the company in paying the dues to its creditors which is contrary to public policy.

22. I am, therefore, satisfied that the petitioner has made out a case for admission of this petition. This petition is, therefore, admitted.

23. Advertisement of this petition shall, however, be deferred till 1 -1 -1996, to enable the respondent to pay the sum of Rs. 4 crores and Rs. 21.46 lakhs together with interest thereon at 15 per cent from 1-4-1993, as such amounts are due and payable to the petitioner even according to the case set up by the respondent-company.

24. The learned counsel for the parties referred to several rulings which I do not consider it necessary to discuss as, on the facts of this case, I have come to the conclusion that this is a fit case for being admitted, the advertisement of this petition being deferred in the manner indicated above.

25. Petition admitted.