

(1984) 08 BOM CK 0026

In the Bombay High Court

Case No : Appeal No. 84 of 1983 in Company Petition No. 221 of 1977 and
Appeal No. 135 of 1983 in Company Application No. 170 of 1983 in
Company Petition No. 221 of 1977

Modern Dekor Painting Contracts P. Ltd.

APPELLANT

Vs

Jenson and Nicholson (India) Ltd.
 Jenson and
Nicholson (India) Ltd. Vs Modern Dekor Painting Contracts P.
Ltd.

RESPONDENT

Date of Decision : 04-08-1984

Acts Referred:

Companies Act, 1956 — Section 433, 434(1), 439, 439(1), 441(2)

Citation : (1983) MhLj 485

Hon'ble Judges : K. Madhava Reddy, C.J;D.M. Rege, J

Bench : Division Bench

Advocate : H.V. Chande and T.S. Manohar, in Appeal No. 84 of 1983 and V.V. Tulzapurkar and N.S. Dastur, in Appeal No. 135 of 1983, for the Appellant; H.V. Chande and T.S. Manohar, in Appeal No. 135 of 1983 and V.V. Tulzapurkar and N.S. Dastur, in Appeal No. 84 of 1983, for the Respondent

Judgement

Rege, J.—Since these two appeals arise out of the same Company Petition No. 221 of 1977, they are being disposed of by a common judgment.

2. Appeal No. 84 of 1983 raises a short question whether a winding-up petition against a company which was maintainable when filed, being for a debt not barred at the date of the petition, ceases to be so maintainable if at the hearing of the petition the said debt was barred by limitation.

3. This is an appeal against the judgment and order of Desai J. dated January 14, 1983, on a preliminary issue raised in a winding-up petition filed by the respondents, Jenson and Nicholson (India) Ltd. (hereinafter called "the petitioner company"), against a company called Modern Dekor Painting Contracts P. Ltd. (hereinafter called " the company ").

4. The preliminary issue raised was ;

" Whether the debt or claim of the petitioner on the basis of which a winding-up order is sought, should be a subsisting debt at the date of the hearing of the petition or is it enough that it subsisted at the date of presentation of the petition. "

5. The learned judge answered the issue as under:

" In the opinion of the court, the debt or "claim of the petitioners on the basis of which a petition for winding up is presented and winding-up order is sought, should not necessarily be a subsisting debt at the date of the hearing of the petition and it is enough that it subsisted at the date of the presentation of the petition."

6. It was this finding of the learned judge that was being challenged in this appeal.

7. Basic facts relevant for the determination of the issue are not in dispute. The petitioner company filed a petition for winding up of the company on the ground u/s 433(e) of the Companies Act, 1956, viz., that it was unable to pay its debts because of non-compliance with the statutory notice dated September 9, 1976, as provided u/s 434(a) of the Companies Act. It is not disputed that the debt, on the basis of which the petition was filed, was within the period of limitation at the date of the filing of the petition on March 25, 1977, and, therefore, the petition when filed was maintainable. However at the time the petition came up for hearing in January, 1983, the said debt was barred by limitation.

8. On these facts, it was contended by the learned counsel for the company that on a proper reading of certain provisions of the Companies Act, in spite of the petition being so maintainable at the date of its filing, it would cease to be so maintainable if at the date of the hearing of the petition, the debt was barred by limitation. According to him; therefore, in this case, the debt on which the petition was based being admittedly barred by limitation at the date of the hearing of the petition, the court should dismiss the same.

9. On the other hand, it was contended by the learned counsel for the petitioner company that there was nothing in the provisions of the Companies Act to warrant such a contention and on a plain and proper reading of the said provisions of the Companies Act, the interpretation sought to be placed thereof by the learned counsel for the appellant company cannot even implied be spelt out.

10. To appreciate these contentions, we may first refer to the following relevant provisions of the Companies Act, 1956.

11. Section 433 of the Companies Act provides for the circumstances under which a company may be wound up by the court. They are :

" A company may be wound up by the court,--

(a) if the company has, by special resolution, resolved that the company be

wound up by the court;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting ;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two ;

(e) if the company is unable to pay its debts;

(f) if the court is of opinion that it is just and equitable that the company should be wound up.

13. Section 434(1), so far as is relevant, provides:

" 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; "

14. Section 439(1) provides:

"An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section,--...

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

(c) by any contributory or contributories; or....."

15. Section 441(2) provides that:

"In any other case, the winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up."

16. Lastly, Section 447 provides I

" An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory."

17. The whole argument of the learned counsel for the appellant company centred round the expression "unable to pay its debts" appearing in Section 433(e) of the Act as one of the grounds of winding up a company. His, contention was that under the said ground, the debt which the debtor company was said to be unable to pay, must be a debt which was a recoverable debt, that is, a

debt which was due and payable and not barred by limitation at the date of hearing.

18. In our view, on a plain reading of the above-stated provisions ,of the Companies Act, the said contention of the learned counsel cannot be accepted.

19. It is not disputed that to maintain a petition for winding up on the ground of inability to pay the debt, the debt must be recoverable, i.e., due and payable and not barred by limitation at the date of the petition. This was so because u/s 439, quoted above, one of the persons, inter alia, entitled to file a petition for winding up was a creditor and in order, that a person could qualify himself to be a creditor, he must be able, to satisfy the court that at the date of the petition, there was a debt ascertainable or due and payable to him which he could claim.

20. However, there was nothing in the said Section 433 to hold that to maintain a petition, the debt must also continue to be so recoverable even at the date of the hearing of order, else the petition was not maintainable. On the contrary, if we examine the sections quoted above, they indicate otherwise.

21. Firstly, examining Section 433, it is clear that excepting Clause (I) which was an omnibus clause enabling the court to pass a winding-up order in its discretion on just and equitable grounds, the conditions mentioned in Clauses (a) to (e) were specific and were required to exist only at the date of the petition in order to maintain the same. In so far as the ground in Clause (e) was concerned, viz., "company being unable to pay its debts", the position was made further clear by the provisions of Section 434. That section provides for cases where the company was deemed to be unable to pay its debts. One of such cases in Clause (a) was non-compliance with the statutory notice to pay the debt that was due at the date of the notice and not at the date of the hearing of the petition. In that connection, reference may be made to the decision of a single judge of this court in the case of Maharashtra Small Scale Industries Development Corporation v. Trawlers Pvt. Ltd. [1979] Tax LR 2116: [1980] 50 Cop Gas 674, where the court, while dealing with the expression " then due", as appearing in Section 434(1), held that in cases where the company is unable to pay its debts, the question whether the debt is due at the time of filing of winding-up petition was relevant.

22. Similarly, u/s 441, the effect of the winding-up order was to relate it back to the date of the petition and the winding-up was deemed to commence from the date of the presentation of the petition. If that were so, then the question whether the debt was barred by limitation or not would be of relevance only at the date of the petition and not thereafter.

23. u/s 447, the winding-up petition was to operate in favour of all the creditors and contributories of the company as if it had been made on the joint petition. The said provision particularly showed that once the petition was properly maintainable at the date of the petition, it was as if it was a joint petition by all the creditors and the same cannot cease to be maintainable thereafter, on the ground that the debt of the creditor filing the petition has subsequently at the

date of the hearing become time-barred. If that were so, the said provisions of Section 447 would be rendered completely nugatory, for, by the time the petition came up for hearing, more often than not, his debt would have become barred by limitation.

24. In our view, therefore, there was nothing in the said provisions of the Companies Act to enable us to hold that the petition for winding up which was properly maintainable when filed ceased to be so maintainable if, at the date of the order, the debt on which the petition was based had become barred by limitation.

25. Further, it may be pointed out that the question as to the debt being barred-by limitation can only arise u/s 439 qua the creditor to qualify himself to file a petition as a creditor, for, under the said provisions, he was required to satisfy the court that the debt on which the petition was based was due and payable at the date of the petition. However, in considering whether the debtor company was unable to pay its debt as required u/s 433(e), no such question would arise. It is well settled that in case of debts barred by limitation, what was barred was the remedy but the debt was not wiped off. In that event, the inability of the debtor company to pay its debt which existed at the date of the petition would equally continue to exist even thereafter till the hearing of the petition in spite of the debt being barred by limitation at that time.

26. Even otherwise, if the contention of the learned counsel were to be accepted and the petition which was maintainable at the date of its filing was to become not maintainable because of the debt becoming barred by limitation at the date of the hearing, over which he has no control, the same would for no fault of his work to the great prejudice of the creditor. It was, therefore, not possible to give such an interpretation to the expression "unable to pay its debts" appearing in Section 433(e).

27. To get over this difficulty, the learned counsel contended that, in that case, the petitioner company should file a suit to save limitation as is done in cases of insolvency petitions under the Presidency Towns Insolvency Act. In support, reliance was placed on a decision of a single judge of this court (Tulzapurkar J., as he then was) in the case of Bhimji Nanji and Co., In Re: Bhimji Nanji and Co., As we will presently point out, the said decision which was under the provisions of the Presidency Towns Insolvency Act, instead of supporting the contention of the learned counsel for the company, would lend support to the view that we are taking, by bringing in contrast the specific provisions of the Presidency Towns Insolvency Act on the question, as against the provisions of the Companies Act with which we are concerned.

28. In that case, arising under the Presidency Towns Insolvency Act, the question for determination before the court was in the same form as before us viz :

" Whether the debt, on the basis of which the petition for adjudication was presented and the adjudication order was sought should be a subsisting debt at

the date of the hearing of the petition or is it enough that it subsisted at the date of the presentation of the petition ? "

29. The decision of the court turned on the interpretation of the specific provisions of Section 13(2) of the Presidency Towns Insolvency Act, which provided, *inter alia*, that: " At the hearing the court shall require proof of (a) the debt of the petitioning creditor." It was clear from the judgment that only because of the said specific provision requiring the creditor to give proof of debt at the bearing of the petition, that the court held that the debt on which the petition was based was required to be subsisting at the date of the hearing and not merely at the date of the petition. In the course of the judgment, the court pointed out by referring to a decision of the Madras High Court in *Venkarama Aiyar v. Buran Sheriff* ILR [1926] 50 Mad 396, the distinction between the said provisions of the Presidency Towns Insolvency Act, as against the corresponding provisions in Section 24(1) of the Provincial Insolvency Act which did not contain any such specific provisions. The judgment of the court suggests that in the absence of the said specific provision, the-finding of the court would have been otherwise. No such or similar provision was to be found in the Companies Act and if analogy was necessary, the case under the Companies Act would stand on the same footing as under the Provincial Insolvency Act where such a proof of debt at the hearing was not required. The said decision, therefore, cannot support the contention of the learned counsel for the appellant company. It was only because of the said specific provisions of the Presidency Towns Insolvency Act that the creditor preferred to file a suit for the recovery of the debt during the pendency of the petition to keep alive the limitation.

30. That apart, as pointed out by the learned counsel for the petitioner-company, the Supreme Court in the case of *Harinagar Sugar Mills Co. Ltd. v. M. W, Pradhan* [1966] 36 Com Cas 426, has recognised that a petition for winding up was one of the legitimate methods for realising the amount due. In that case; the court was concerned with the question whether a receiver appointed by the court can maintain a winding-up petition for realisation of a debt due to the property of which he was appointed a receiver. There, the court *aforecited* with approval the observations in *Palmer's Company Precedents* Part 11, 1969 edition, p. 25, to the effect that "winding-up petition was a perfectly proper remedy for enforcing payment of a just debt", and held that filing a winding-up petition was a mode of execution which the court gives to the creditor against a company unable to pay its debts. In that view, there was no question of the creditor, filing a winding-up petition, being driven to file a suit pending hearing of the petition with a view to keep alive the debt becoming barred by limitation. In fact, if the winding-up petition were to be a legitimate mode of recovery of the just debt due and payable by the company at the date of the petition, then no question of the debt on which the petition was based becoming barred by limitation at the date of the order would ever arise.

31. A short reference may be now made to two decisions considered by the

learned judge in his judgment. They were: (1) of the Punjab High Court in the case of Ramchand Puri v. Lahore Enamelling and Stamping Co. Ltd. [1960] 30 Com Cas 514, and (2) of the Allahabad High Court in the case of J.A. Dixit Vs. Official Liquidator, . In both the said decisions, the question before the courts was as to the material date for determining limitation in respect of the debt claimed before the liquidator by a creditor of the company ordered to be wound up at the time of settling the list of creditors which was quite different from the question before us. The Punjab High Court relying on the provisions of the Companies Act referred to above and of the corresponding provisions of the Provincial Insolvency Act which were considered by the court to be analogous, has taken the view that for admission of the claim in liquidation, the date to be considered for the period of limitation was the date of the petition and not the date of the winding-up order. On the other hand, the Allahabad High Court took a contrary view by holding that for admitting the claim in liquidation, the date to be considered for limitation was not the date of the petition but the date of the order. The learned judge while pointing out that to a certain extent he was not called upon to decide that question preferred the view of the Punjab High Court to the view of the Allahabad High Court. In view of the difference in the nature of the question involved in the said decisions as against the one before us, the said decisions will have no application to the issue before us. On the ambit of the preliminary issue before us, we do not feel called upon to deal with the question that was before the courts in the said decisions and, therefore, we do not propose to express any opinion on the said question. In that view of the matter, we do not propose to deal in detail with the said decisions.

32. The learned counsel for the appellant company has also relied in support of his contention on Rule 151 and Form 66 of the Companies (Court) Rules, 1959, However, the said rule as well as the form has no application to the question at issue as they also relate to the proof of the claim or debt before the liquidator.

33. We may, however, point out that the learned judge in his judgment although holding as above, has relied on certain observations at p. 642 of the report in the affirmed decision of a single judge of this court in Bhimji Nanji's case [1969] 71 Bom LR 638 made in reference to the provisions of the Presidency Towns Insolvency Act, and in passing observed:

"The fact that he has not preserved his claim against the bar of limitation by filing a suit may be a factor which the court may take into account as a matter of exercise of discretion but it cannot be an absolute bar."

34. While agreeing with the ultimate conclusions of the learned judge, we are not able to subscribe to the said view of the learned judge. In our view, although u/s 433(f) of the Companies Act, the court had a discretion to pass an order of winding up on just and equitable grounds, the other grounds not existing, the court was not entitled in making an order under that clause to take into consideration as one of the circumstances the fact that the debt was barred by limitation at the date of order, or that the Creditor had not preserved his claim

against the bar of imitation by filing a suit, if in law, the petitioner was not required to do so.

35. In the view that we are taking, therefore, the appeal would stand dismissed with no order as to costs.

Appeal No. 135 of 1983:

37. This appeal is against the court's order rejecting the petitioner company's application for amendment of the petition by averring certain facts and based thereon alleging a new ground of winding up u/s 433(f) of the Companies Act, viz., the court is of the opinion that it was just and equitable to wind up the company.

38. Initially, in the petition, the only ground for winding up the company that was pleaded was u/s 433(e), viz., " the company was unable to pay its debts " as the company had failed to comply with the statutory notice of demand u/s 431(1). The application, for amendment filed at the bearing of the petition averred that on certain facts stated therein, the substratum of the "company had gone and, therefore, asked for a winding up order u/s 433(f) of the Companies Act. The petitioner company claimed in the affidavit in support of the application that it came to know about the company's position for the first time only from the additional affidavits Of the company's managing director dated July 17, 1981, and July 20, 1981, in support of the Company's Application No. 197 of 1981 dated July 20, 1981. From the order of the learned judge, it appears that; according to him, there were no special circumstances that would entitle the company to oppose the application and he would have ordinarily granted the said amendment but for the fact that he felt that, in view of the Division Bench decision of this court (Nagpur Bench) in the case of Associated Biscuit Co. P. Ltd. v. T. L. Nambiar [1978] 48 Comp Case 481 taking a contrary view, with which he was bound, the matter was not res integra.

39. It is now well settled that an amendment in pleadings should ordinarily be allowed in order to bring out the real dispute between the parties by compensating the other side with costs unless it deprived the other party of a right already acquired such as limitation or introduced altogether a new cause of action or was frivolous. Further, the question of granting an amendment was to be determined by the court on the facts and circumstances of each case and no hard and fast rule of universal application could be laid down for that purpose. In that view of the matter, we are not prepared to read the said decision of this court (Nagpur Bench), referred to by the learned judge, as laying down a general rule of law that in all cases where once the petition for winding up, made only on the ground u/s 433(e), the company's inability to pay its debt was, admitted, it cannot be amended thereafter by taking an additional ground for winding-up u/s 433(f), i.e., on just and equitable ground. The said decision, therefore, will have to be restricted to the facts of that case only.

40. Firstly, reading Section 433, the ground mentioned in Clause (f) thereof, viz.,

the court's powers to make an order for winding up on just and equitable ground, was distinct from the grounds preceding it which were required to exist at the date of the petition. However, Clause (f) gives the court an additional discretionary power to make a winding-up order, if in its opinion it was just and equitable to do so, without even the said ground being expressly pleaded, by taking into consideration all the circumstances--not only those existing at the date of the petition but also even those subsequent thereto as shown to be existing at the hearing. In that case, if the petitioner by amendment was to plead such facts giving rise to a plea u/s 433(f), it could not be said that he was introducing a new cause of action. And even if that, were so, the petitioners could not be prevented from pleading facts which had come to his knowledge after the petition was admitted and then raise a new ground for winding up u/s 433(f) based on those facts.

41. In the case before the court in the decision, the facts were somewhat different. In that case, although at the hearing of the appeal against the order of the lower court granting amendment, the court held that the petition was to be taken as admitted, rejecting the petitioners' contention to the contrary, the court appeared to take the view that the petition which was only on the ground of inability to pay the debt, as it stood when filed, ought not to have been in the first instance admitted, as the debt on which the petition was based was clearly a disputed debt and that at the date of the petition there was no debt due and payable to maintain the petition. Under these circumstances, the court seems to have felt that the petitioners had by way of an amendment sought to introduce a new ground for winding up u/s 433(f) only on realising the weakness of the original ground. Therefore, under the facts and circumstances before the court in that case, it was possible for the court to take a view that the said new ground u/s 433(f) was sought to be introduced by amendment at the hearing, without having the petition being first admitted. On that ground, only in order to sustain the petition, for if the petition as initially filed were to stand only on the ground u/s 433(e), there was a possibility of the court ultimately holding the same to be not maintainable.

42. However, in this case, the circumstances are different. In this case, the company's failure to comply with the statutory notice as being deemed to be unable to pay its debts, on which the petition was based at the date of admission of the petition, was not disputed. No appeal has been filed against the order admitting the petition on that ground. It was the case of the petitioner company, which is not disputed, that after the admission of the petition, it was only from the facts averred by the company in its affidavits dated July 17, 1981, and July 20, 1981, that the petitioner company became aware, for the first time, of the financial position of the company and, therefore, it had applied for winding up on the ground u/s 433(f) alleging on the basis of the said facts that the substratum of the company had gone. In that event, the petitioner company cannot be prevented from pleading such facts, which though existing, had come to its knowledge subsequent to the admission of the petition, on the basis of which the

court could form an opinion at the hearing whether it was just and equitable to wind up the company. The said facts pleaded by way of an amendment being from the company's affidavits could not be disputed. Such an amendment, in our view, therefore, could not be rejected on the ground that the petitioner company was introducing thereby a new cause of action or on the ground that the company's right to appeal against the order admitting the petition on that ground was lost.

43. In our view, therefore, under the circumstances of this case, the amendment should be allowed. The result, therefore, is that the appeal is allowed. The order of the learned judge is set aside. The petitioner company is allowed to amend the petition in, terms of prayer (a) to, the petitioners' Application No. 170 of 1982 in Company. Petition No. 221 of 1977, Amendment to be carried out within six weeks from today. Liberty to the company to file affidavit in,reply to the amendment if so advised. Under the circumstances, there would be no order as to costs.

44. Oral application by the learned counsel for the company in Appeal No. 84 of 1983 for leave to appeal to the Supreme Court rejected.