(2007) 05 MP CK 0007

In the Madhya Pradesh High Court

Case No : Company Petition No. 2 of 2003

M/s Babulal Kanhaiyalal and Sons APPELLANT

Vs

M/s Suraj Bhan Oils Pvt. Ltd. and Another RESPONDENT

Date of Decision : 16-05-2007

Acts Referred:
Companies Act, 1956 — Section 433(e), 434(1)(a)

Citation : (2007) 2 MPJR 164

Hon'ble Judges : S. Samvatsar, J

Bench : Single Bench

Advocate : Ankur Mody and Mr. Vijay Sundaram, for the Appellant; Nandita Dubey, for the Respondent

Final Decision : Dismissed

Judgement

S. Samvatsar, J.

This petition is filed by the petitioner u/s 433 (e) of the Companies Act, 1956.

It is alleged that during the year 2000-01 the respondent company purchased and sold oil through the present petitioner which is carrying on the business of brokerage. As per the terms of the contract, petitioner is entitled to receive brokerage and for the aforesaid year, he is entitiled to receive an amount of Rs. 2,53,918/- from the respondent company towards the brokerage. He has submitted bill to that effect, copy of said bill is Annexure P/2. In the year 2001-02 the respondent company again purchased and sold oil through the petitioner and for that year, the petitioner is entitled to brokerage of Rs. 5,70,000/- copy of the bill is Annexure P/3. Thus, according to the petitioner, he is entitled to recover an amount of Rs. 8,24,818/- from the respondent company. Copy of the statement is Annexure P/4. Petitioner served the respondent with a notice dated 16/08/2003 and as the respondent company failed to pay the dues payable to the petitioner, even after service of notice, it should be deemed that the respondent company is unable to pay the debts and therefore, winding up order should be passed against the respondent company u/s 433(e) of the Companies Act.

Respondent company has filed reply to the show cause notice wherein it has denied that no statutory notice u/s 434(1)(a) of the Companies Act has been served upon the respondent company. Respondent company has appeared before this Court only after getting information from the advertisement in local newspaper "Dainik Bhaskar" published on 18/06/2004. Respondent company in its reply has specifically denied the allegations of the petitioner that the petitioner has to recover an amount of Rs. 8,24,818/- as alleged by the petitioner. Respondent company has also denied acknowledgment of the notice.

It is also averred in the reply that the respondent company is earning profits and therefore, it cannot be presumed that the company is unable to pay the debts. In para 9 of its reply, it is stated that the worth of the company is more than Rs. 207.57 lacs on 31/03/2002 and Rs. 226.98 lacs on 31/03/2003. The company has a fixed assets of Rs. 302.95 lacs on 31/03/2002 and of Rs. 313.42 lacs on 31/03/2003 and current assets of the company is 335.07 lacs on 31/03/2002. Liabilities of the company are around Rs. 123.09 lacs as on 31/03/2002 and Rs. 183.49 lacs on 31/03/2003 which shows that the assets of the company is increasing and its debts are decreasing. The share capital of the company is Rs. 63.89 lacs and not Rs. 5 lacs as asserted by the petitioner. Thus, the company has more assets than its liabilities and therefore, it cannot be inferred that the respondent company is not in a position to pay the debts.

At the time of hearing, respondent company pointed out that the copy of the agreement referred by the petitioner in the petition is not filed by him. The respondent company has specifically denied the claim of the petitioner. It is pointed out by the counsel for the respondent company that the respondent has not signed the bills Annexures P/2 and P/3 and thus, it never admitted the claim of the petitioner. Thus, according to the counsel for the respondent, there is a bonafide dispute about the entitlement of the petitioner.

The Apex Court in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., has laid down the grounds on which winding up order should be passed against a company. The Apex Court has laid down that in a case of petition for winding up of company on the ground of indebtedness, two rules are well settled, first if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. In a case where the debt is undisputed, the court will not act upon a defence of the company that the company has the ability to pay the debt but the company chooses not to pay that particular debt. Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. The principles which the court acts are first that the defence of the company is in good faith and one of substance, secondly the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

Thus, as per this judgment of the Apex Court, when the company raises a bonafide dispute on which it is likely to succeed, winding up order should not be passed.

The Apex Court in the case of Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, has considered the phrase "unable to pay its debts" and held that order u/s 433(e) of the Companies Act is discretionary. There must be a debt due to the company and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date. The inability referred to in the expression "unable to pay its dues" in Section 433 (e) should be taken in the commercial sense. In that, it is unable to meet current demands. It is "plainly and commercially insolvent, that is to say that its assets are such and its existing liabilities are such, as to make it reasonably certain so as to make the court feel satisfied that the existing and probable assets would be insufficient to meet the existing liabilities." The machinery for winding up will not be allowed to be utilised merely as a means for realizing debts due from a company.

Thus, in the aforesaid judgment, the Apex Court has laid down that no winding up order should be passed in a case where the court is satisfied that existing assets of the company are more than its liabilities; provisions of winding up u/s 433(e) of the Companies Act should not be utilised merely for realizing the debts due from the company.

Another judgment of the Apex Court is in the case of Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , wherein the Apex Court has considered the nature and applicability of Section 433(e) of the Companies Act and the Apex Court in the aforesaid judgment has again held that the expression "unable to pay its debts" should be interpreted in a commercial sense and the machinery of winding up is not to be permitted to be utilised merely as a means for realizing the debt.

Shri Ankur Mody, the learned counsel for the petitioner, on the other hand, relying upon the judgment in the case of KTS (Singapore) PLC Ltd. Vs. Associated Forest Product (Pvt.) Ltd., [1996] 85 Comp. Cas. 190 submitted that as the company has not submitted its reply to the notice Annexures P/4 and P/5, it should be presumed that the company is unable to pay its debts.

After perusing the aforesaid judgment relied upon by the learned counsel for the petitioner, I find that the facts of the said case are quite distinguishable. Moreover, when the Apex Court has laid down the principles for deciding whether the company is unable to pay its debts, such expression is to be interpreted in a commercial sense and winding up proceedings should not be utilised for recovery of the petitioner.

In the present case, I find that from the balance sheet submitted by the petitioner, the assets of the company are much more than its liabilities. The respondent company has net worth of more than 302.95 lacs on 31.3.2003 while its liability for the year 2003 is Rs. 183.49 lacs. Thus, the assets of the company are much more than its liabilities.

Moreover, in the present case, petitioner has not filed any proof as to its entitlement for receiving the amount from the respondent Company. Copy of the agreement is not filed on record. Copies of the bills Annexures P/2 and P/3 filed by the petitioner show that the bills are not signed by the respondent company which shows that the claim of the petitioner was never admitted by the respondent company.

In such circumstances, I do not find this case fit for passing winding up order. Hence, this company petition is dismissed without any order as to costs.