

(1999) 02 KAR CK 0027
In the Karnataka High Court
Case No : Original Side Appeal No. 23 of 1998

M/s. Mitsugen Glazes Limited, Bangalore	APPELLANT
Vs	
M/s. Varkey Overseas Trading Company Private Limited, Bangalore and Another	RESPONDENT

Date of Decision : 25-02-1999

Acts Referred:

Companies Act, 1956 — Section 433 (e), 434

Citation : (2001) 103 CompCas 117 : (1999) ILR (Kar) 3354 : (1999) 3 KarLJ 321

Hon'ble Judges : K.R. Prasad Rao, J; Ashok Bhan, J

Bench : Division Bench

Advocate : Sri T.S. Amar Kumar, for the Appellant; Sri Thomas V. Peter, for the Respondent

Judgement

Ashok Bhan, J.,

1. This appeal has been filed against the order dated 23rd October, 1998 passed by the Company Judge in Co. P. No. 138 of 1992 connected with Co. P. No. 35 of 1993 directing the appellant-Company to be wound up.
2. M/s. Mitsugen Glazes Limited, appellant-Company (hereinafter referred to as "the appellant") is a Public Limited Company incorporated under Companies Act, 1956 as Company limited by shares. The share capital of the Company is Rs. 1 crore divided into 10,00,000 equity shares of Rs. 10/- each. The Company was established with the object to carry on business of manufacturers, designers, assemblers, merchants, dealers, buyers, sellers, exporters and importers of all kinds of ceramic articles required for domestic and industrial use, like glazed tiles, washbasins, sanitary ware, switch-fuse units, electric insulators and porcelain ware.
3. Appellant appointed Varkey Overseas Trading Company Private Limited (hereinafter referred to as "the respondent") as their dealer for promotion and

sale of ceramics glazed tiles proposed to be manufactured by the appellant-Company and in this regard a memorandum of understanding dated 16-8-1989 was entered into between the appellant and the respondent. As per memorandum of understanding, the appellant was expected to commence commercial production of ceramic glazed tiles in the month of October 1989 and time was agreed to be the essence of the contract. As per the terms of memorandum of understanding, respondent was required to deposit a sum of Rs. 15,00,000/- with the appellant as a security deposit which was refundable at the time of termination of the arrangement with interest at 7% p.a. If there was any delay in refund of the same, then the appellant-Company was liable to refund the same along with interest at 21% p.a. for such delayed period of payment.

4. Respondent complied with all the obligations under the agreement, including the deposit of Rs. 15,00,000/- with the appellant. Appellant did not commence the production of ceramic glazed tiles in the month of October 1989 or at any time thereafter. Respondent after waiting for considerably long period, finally wrote a letter on 2-8-1990 intimating the appellant terminating the agreement. Respondent sought the refund of the security deposit paid by it to the appellant. Termination of agreement was accepted by the appellant and it agreed to refund the security deposit to the respondent. In spite of oral requests and lengthy correspondence the appellant did not return the amount together with interest and therefore the respondent caused issue of a notice to the appellant through their Advocate on 22nd July, 1991. A copy of the said notice was attached as Annexure-B to the Company petition. Appellant by way of reply to the said notice wrote a letter on 22nd August, 1991 admitting their liability to pay the entire amount with interest at 21% per annum and sought time to make the payment. Copy of the said reply is attached as Annexure-C.

5. Subsequent to the receipt of the said notice appellant paid a sum of Rs. 1,00,000/- on 30th September, 1991 and another sum of Rs. 50,000/- on 22nd February, 1992. Respondent caused issue of another notice through their Advocate on 13th April, 1992 threatening to initiate winding up proceedings. A copy of the said notice is Annexure-D. Appellant by way of reply on 23-4-1992 admitted their entire liability and wrote to the respondent offering to settle the outstanding amount in instalments of Rs. 50,000/- per month which offer was not acceptable to the respondent and therefore a reply was sent in this regard by the respondent on 1st May, 1992. A copy of the reply sent by the appellant and the further reply by the respondent is Annexure-E and F. Appellant made a further payment of Rs. 1,00,000/- on 4-7-1992. Appellant further assured the respondent to clear the outstanding amount and in this regard issued cheques to the respondent on various dates as follows:

(a) Rs. 2,00,000/- 20-7-1992 (b) Rs. 3,00,000/- 20-8-1992 (c) Rs. 4,00,000/- 20-9-1992 (d) Rs. 4,00,000/- 20-10-1992 (e) Rs. 4,64,969/- 20-11-1992 (f) Rs. 1,04,253/- 20-11-1992 On presentation of the cheques by the respondent the same were returned dishonoured which fact was informed by the respondent

to the appellant.

6. Respondent in the circumstances, finally called upon the appellant through their Advocate's notice dated 29th August, 1992 to pay a sum of Rs. 21,54,879/- and in default the appellant was notified that winding up proceedings would be initiated against it. Copy of the statutory notice and postal acknowledgment have been attached as Annexure-J and K. Appellant failed to make the payment of Rs. 21,54,879/- despite statutory notice. Respondent thereafter filed Co. P. No. 138 of 1992 claiming u/s 433(e) read with (f) read with Section 434 of the Companies Act, 1956 (for short, "the Act") for winding up of the appellant-Company.

7. Appellant in its written statement basically admitted the factual matrix but denied its liability to pay interest at the rate of 21% per annum. According to it it was liable to pay interest at the rate of 7% per annum only. It was also stated that the appellant has the intention to repay the amount but due to certain difficulties it could not pay back the amount for the reasons beyond its control; that efforts were being made for raising additional loans from financial institutions such as ICICI to clear the debt of the respondent, Learned Single Judge being of the opinion that no valid defence was put forth by the appellant and there was no appearance on behalf of the appellant on the date of hearing in Court in spite of service, admitted the petition and ordered publication of the notice in both the petitions. Aggrieved against, these appeals are filed.

8. On 19th January, 1998 while issuing notice regarding admission a Bench of this Court stayed the operation of the order of Single Judge subject to the appellant depositing a sum of Rs. 20,00,000/- in this Court within two weeks. The appellant has not deposited the sum of Rs. 20,00,000/-.

9. Counsel for the appellant contended before us that Single Judge has not given reason in support of the conclusion arrived in his order of winding up the Company. According to him inability to pay by itself is not sufficient to order winding up of a Company. Further, it has to be shown that the debtor had failed to make the payment without reasonable excuse.

10. It is true that learned Single Judge has not given the facts in detail but it cannot be said that the order is not a speaking order. From the correspondence exchanged between the parties which has been attached to the petition it is clear that the appellant had not disputed his liability to pay the amount.

11. Learned Single Judge has observed that the appellant has not put forth any valid defence. From the perusal of the written statement filed by the appellant coupled with the perusal of the correspondence exchanges between the parties, it is evident that the appellant had never disputed his liability to pay the amount. He had even agreed to clear the debts with 21% interest. He had given postdated cheques starting from 20th July, 1992 to 20th November, 1992 totalling to a sum of Rs. 18,69,222/-, the details of which have been referred to in the earlier part of the judgment which on presentation were returned

dishonoured. From this it is clear that there was an admitted liability outstanding against the appellant. Statutory notice under the Companies Act was issued requiring the appellant to clear this admitted liability which he failed to do. Section 434 of the Act provides that the Company would be deemed to be unable to pay its debts to whom the Company is indebted in a sum exceeding Rs. 500/- then due, if it neglects to pay the amount or to secure or to compound it to the reasonable satisfaction of the creditor within three weeks of the service of the registered notice creating a demand upon the Company to pay the same. Inability to pay its debt under sub-clause (e) of Section 433 is a circumstance in which the Company can be ordered to be wound up. The liability being admitted and payment not made within three weeks of the service of the notice as provided u/s 434 of the Act was a sufficient ground for ordering winding up of the appellant-Company. Liability of the principal amount is admitted. Only dispute was regarding the rate of interest. In one of the letters appellant had agreed to pay the entire amount along with interest at the rate of 21%. As per the memorandum of understanding in case of default, the appellant was required to pay 21% interest. It has to be held that the appellant was liable to pay the admitted liability along with interest at the rate of 21%.

12. For the reasons stated above, we do not find any merit in this appeal and the same is dismissed with costs which are assessed at Rs. 2,000/-.

13. Counsel appearing for the official liquidator stated that he did not take over the assets of the Company because of the interim stay granted by this Court on 19th November, 1998. Stay granted was conditional subject to payment of Rs. 20,00,000/- within two weeks which he failed to do and the official liquidator should have taken over the assets of the Company after the expiry of two weeks as the appellant had failed to comply with the conditional order of stay granted by this Court. Although the petition was admitted, advertisement was not carried in the newspaper. We now direct that official liquidator to take charge of all the assets of the Company and thereafter proceed in accordance with law. As there were two winding up petitions a common advertisement be published for which the costs would be shared by the respondents who were the petitioning creditors as per the direction of the Single Judge.