
(1978) 02 MAD CK 0021
In the Madras High Court
Case No : Company Petition No. 2 of 1976

N. Ramamoorthy

APPELLANT

Vs

Nellai Metal Rolling Mills P. Ltd.

RESPONDENT

Date of Decision : 14-02-1978

Acts Referred:

Companies Act, 1956 — Section 433(3)

Citation : (1979) 49 CompCas 553

Hon'ble Judges : Suryamurthy, J

Bench : Single Bench

Advocate : N.S. Varadachari and P.B. Ramanujam, for the Appellant; V. Shanmugam and Riaz Ali Khan, for the Respondent

Final Decision : Dismissed

Judgement

Suryamurthy, J.—This is a petition for winding up the Nellai Metal Rolling Mills P. Ltd. A promissory note has been executed by P. S. M.

Ramasubramaniam and P. S. M. Mahadevan on January 10, 1975, for an alleged consideration of Rs. 50,000. The company consisted of 6

directors, namely, P. S. M. Ramasubramaniam, P. S. M. Mahadevan, P. S. M. Lakshmanan, P. S. R. Muthukrishnan, Srimathi Meenakshi Ammal

and Srimathi R. Sarada, as may be seen from exh. R-8. Subsequently, all the shares of the company were purchased by Shanmughavel, Ponniah

and Velayutha Nadar on June 26, 1975. Alleging that the company is not able to repay the promissory note amount despite demands, this petition

has been filed to wind up the company under the provisions of Section 433(3) of the Indian Companies Act.

2. This petition is resisted by the present directors of the Nellai Metal Rolling Mills P. Ltd., inter alia, on the ground that the promissory note has

been created by Ramasubramaniam and Mahadevan in collusion with the petitioner, that no consideration has passed for the promissory note, that the amount was not borrowed by or on behalf of the company, that the company did not have the benefit of the loan, that the loan was not entered in the books of accounts maintained in the course of the business by the company and that in the trial balance-sheet given to them this liability has not been shown as owing by the company and the petition is lacking in bona fides and is an abuse of the process of the court.

3. Oral evidence has been adduced by both the parties. It is not necessary to consider the oral evidence led by both parties in order to decide the question whether the company should be wound up. The promissory note, exh. P-1, is alleged to have been executed on January 10, 1975, for a consideration of Rs. 50,000 received in cash by Ramasubramaniam and Mahadevan. In exh. P-1, Ramasubramaniam and Mahadevan have described themselves as partners of Messrs. Nellai Metal Rolling Mills P. Ltd., and not as directors and even this description would appear to be merely for the purpose of identification and not for the purpose of stating the capacity in which they were incurring the loan. At the end of the recitals in the promissory note it is also stated that ""the amount is taken for running our above business"". They were certainly not running Messrs. Nellai Metal Rolling Mills P. Ltd. as partners. Therefore, the last sentence in exh. P-1 appears to be a deliberate mis-statement of facts. In the books of accounts admittedly maintained in the regular course of business by the Nellai Metal Rolling Mills P. Ltd., prior to the purchase of its assets by Shanmugavel, Ponniah and Velayutha Nadar there is no entry about the receipt of the sum of Rs. 50,000 as loan on behalf of the Nellai Metal Rolling Mills P. Ltd. This amount has not been brought into the assets of the company and used for the benefit of the company.

4. Before the transfer of the company to the aforesaid three persons, a trial balance-sheet (exh. R-2) has been given to them by the ex-directors including Ramasubramaniam and Mahadevan. In this trial balance-sheet also the debt payable under exh. P-1 has not been shown as a liability which the company had to discharge.

5. The ex-directors have executed exh. R-9, an indemnity bond, stating that apart from the liability set out in the trial balance-sheet, there was no

other liability and if there was any such liability they would indemnify the present proprietors of the company for any loss that they may sustain.

6. The promissory note, exh. P-1 itself, has not been executed on behalf of the company by Ramasubramaniam and Mahadevan acting as directors

of the company. By Article 25 of the articles of association of Nellai Metal Rolling Mills P. Ltd., Tirunelveli, the directors may from time to time

raise or borrow any sums of money for and on behalf of the company. "" Directors "" mean all the directors and not merely two or more of them.

Similarly, by Article 40 the company may have a common seal and the directors have to provide for the safe custody thereof and the seal cannot

be applied to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors who shall

sign every instrument to which the seal shall be affixed in their presence. In the instant case, there is no evidence to show that any such authority

was given to Ramasubramaniam and Mahadevan by any resolution of the board of directors to use the seal by affixing the same on exh. P-1. It is

well established that all persons dealing with a company are affected with notice of its memorandum and articles of association.

7. The learned counsel for the petitioner contends that to a notice dated July 5, 1975, no reply has been given by the company and that, therefore,

his claim should be deemed to have been admitted. There is no substance in this contention. This notice was served on P. S. M. Mahadevan

purporting to represent the company, after his shares were purchased by the present directors and after he had parted with his interest in the

company. Therefore, the contention that the notice was served on the company represented by its ex-director is a preposterous contention. In any

event, there is a bona fide dispute regarding the genuineness of the promissory note, exh. P-1, relied on by the petitioner and its binding nature on

the company. The Supreme Court has laid down in Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, thus :

It is well settled that "a 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 a scandalous abuse of the process of the court. At one time, petitions founded on disputed debt were directed to stand over till the

debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was

dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court

may decide it on the petition and make the order" (vide Buckley on the Companies Acts, 13th edn., page 451).

We are satisfied that the debt, in respect of which notice was given u/s 434 was bona fide disputed by the appellant-company. The appellant-

company had received legal advice and it had acted on it. On the facts it seems to us clear that the appellant-company did not dispute the debt in

order to hide its inability to pay debts.

8. That is the position here. There can be no possibility of doubt that the respondent-company and its present directors have got the necessary

means to pay the debt claimed by the petitioner if he can only establish that the company is liable to pay the debt. In the circumstances the ratio of

the decision of the Supreme Court is applicable to the instant case on all fours. This petition is, therefore, dismissed with costs. Counsel's fee Rs.

500.