

(2000) 11 MAD CK 0039

In the Madras High Court

Case No : O.S.A. No's. 69 and 70 of 2000 and C.M.P. No's. 5072 and 5073 of 2000

NEPC Agro Food Ltd. and Another

APPELLANT

Vs

Hindustan Thompson Associates Ltd.

RESPONDENT

Date of Decision : 14-11-2000

Acts Referred:

Companies Act, 1956 — Section 443

Citation : (2002) 111 CompCas 169

Hon'ble Judges : C. Nagappan, J;A.S. Venkatachalamoorthy, J

Bench : Division Bench

Advocate : C.A. Sundaram, for K. Banumathi, for the Appellant; Arvind P. Datar, for Chitra Narayan, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Venkatachalamoorthy, J.—The respondent in the above appeals filed two company petitions, viz., C. P. No. 17 of 1997 against

NEPC Micon Limited, Chennai, the appellant in O. S. A. No. 70 of 2000 and C P. No. 18 of 1997, against NEPC Agro Foods Limited,

Chennai.

2. Pending the company petitions, a learned single judge of this court, passed a common interim order, appointing a commissioner (a chartered

accountant) to verify the extent of amount payable by the appellants herein to the respondent.

3. The respondent in Company Petition No. 18 of 1997 has filed the appeal, viz., O. S. A. No. 69 of 2000. Similarly, the respondent in Company

Petition No. 17 of 1997, has filed the appeal in O. S. A. No. 70 of 2000. Inasmuch as a common interim order passed by a learned single judge

of this court, these two appeals can be disposed of by a common judgment.

4. It is unnecessary to set out every detail with regard to the case of the respective parties in both the appeals in view of the fact that the only question/issue arises for consideration, viz., whether the learned single judge is right in passing the order now appealed against.

5. As far as O. S. A. No. 69 of 2000 is concerned, the respondent filed the company petition under Sections 433(e), 433(b), 434(i)(a) of the

Companies Act, 1956, read with Section 439(1)(b) of the said Act, praying the court to wind up the appellant-company as per the provisions of

the Companies Act, 1956. Admittedly, the respondent was appointed as advertising agent of the appellant in the year 1994. The respondent

claiming that the appellant failed to pay the amount due towards the services rendered by it, issued a statutory notice dated November 22, 1996,

to the appellant, calling upon it to pay a sum of Rs. 1,11,67,630.89 as principal with interest thereon at 24 per cent per annum, amounting to Rs.

20,12,314 as on September 15, 1996.

6. Briefly, in the company petition, the case of the respondent is that the appellant received the statement of accounts from the respondent with

clarification thereon and accepted the same without demur and hence, the amount due to the respondent is undisputed and that the appellant will be

deemed to be commercially insolvent for non-payment of the same and liable to be wound up as per the provisions of the Companies Act, 1956.

7. The appellant inter alia resisted the petition, contending that the appellant is liable to pay the just claims as and when it is established and further

that the petitioner was at fault in not furnishing the original bills and supporting documents as agreed. The appellant also raised a plea in the counter

statement that there is no question of the appellant group companies being liable to pay a sum of Rs. 3,77,62,680.46 towards principal and further

assuming without conceding that the appellant is liable to pay to the respondent, the liability of the appellant arises only after the obligation of the

respondent is performed, viz., furnishing the original bills and supporting documents. In the counter statement, in several places, the appellant

reiterated its stand that unless the obligation of the respondent is performed, i.e., furnishing original bills and supporting documents as agreed to by

the appellant, the question of making payment by the appellant to the

respondent does not at all arise. In paragraph No. 15 of the counter statement, the appellant has contended that it is not liable and responsible to pay any amount much less the amount mentioned in paragraphs Nos.

8 and 9 of the company petition and the petitioner is relying on certain documents to impute liability on the respondent and in order to prove that

the oft-repeated allegations made by the petitioner that the claim made by the petitioner against the respondent-company is undisputed and

admitted by the appellant-company in various documents filed along with the petition are absolutely false.

8. The respondent in O. S. A. No. 70 of 1997, filed C. P. No. 17 of 1997 against the appellant in that appeal, u/s 433(e) of the Companies Act,

1956, read with Section 439(1)(b) of the said Act, praying the court to wind up the company, on the ground that it failed to make the payments

due to it.

9. Here again, it is the case of the respondent that it was appointed as advertising agent of the appellant-company in the year, 1993, and that for

the services rendered by it, the appellant was liable to pay a sum of Rs. 1,52,43,258.98 with interest thereon at 24 per cent per annum, amounting

to Rs. 36,31,954.59 as on November 15, 1996. The specific case set out in the company petition by the respondent is that it made repeated

demands to the appellant-company to clear all the outstanding dues since February, 1996, and finally by letter dated June 21, 1996, the appellant-

company sent a reply, saying that its accounts department is looking into the total outstanding to ascertain the amount that has to be paid and

thereafter, the appellant gave commitment to settle the entire outstanding as per the schedule prepared. The said schedule of payment, in fact, was

acknowledged by the respondent, by its letter dated January 24, 1996. However, the appellant did not comply with the undertaking and by letters

dated August 3, 1996, and August 12, 1996, attempted to evade its undisputed liability by stating that the amount shown as outstanding from the

NEPC group companies is exaggerated.

10. The appellant resisted the company petition, inter alia, contending that the claim of the respondent that the appellant acknowledged the receipt

of the statement of accounts, supporting bills and voucher without demur,"" is false. The appellant opposed the claim of the respondent by

contending that the respondent did not furnish the original bills and supporting documents received by it from the various medias namely newspaper, television, etc., to show the extent of commission received by it despite several demands made by the appellant-company as evidenced by the letters sent by the appellant. It is further contended by the appellant in the said counter statement that the respondent without complying with the said demand, has come forward with the winding up proceedings against the appellant-company for the alleged non-payment of the false and inflated claim, only with a view to give pressure to the appellant-company to make them to submit to their unjust and dishonest claim, and that unless the obligations of the respondent, viz., furnishing the original bills and supporting documents received from various medias along with the bills of the respondent as per terms and conditions of the agreement dated August 10, 1993, are performed, the question of the respondent paying the bills raised by the respondent does not arise.

11. The learned single judge after considering the matter thought it fit to pass the order impugned in these appeals. In the said order, the learned judge has observed that though in the normal course, the court would not have passed that order, considering the case being an exceptional one, in the sense that the respondent has produced the confirmatory statements of accounts given by the officers of the appellant-company as also a statement in the handwriting of the director of the respondent-company, setting out the amounts to be paid by the respondent and the dates on which such amounts are to be paid, and passed the order, appointing an auditor to verify the extent of amount payable by the appellants to the respondent as evidenced by the documents produced by both the parties.

12. Being aggrieved by this order, the appellants have preferred these appeals.

13. Before this court, learned counsel for the appellant contended that for the company court to invoke the jurisdiction, first of all, it must satisfy that there is a relationship of a creditor and debtor and that some ascertained amounts are due by the debtor to the creditor. If the company which is sought to be wound up disputes the liability, then the company court loses jurisdiction.

14. Secondly, it was contended that the learned single judge has proceeded to pass the impugned order, assuming that the appellants have no

defence and are not disputing their liability to pay the amount.

15. Thirdly, it was also contended that the learned single judge while passing the impugned order has not considered the explanations given by the appellants with regard to the two reasons on the basis of which the learned single judge passed the order, appointing an auditor to verify the accounts.

16. The next submission was that inasmuch as the respondent in spite of the appellants persistent requests/demands that the appellants must be provided with all documents including the bills received by the appellant-company from the advertising media, viz., newspapers, etc., the company petition has to be dismissed, in fact, for the lapses on the part of the respondent.

17. It was also contended that Section 443(1)(c) of the Indian Companies Act, though no doubt empowers the court to make any interim order as it thinks fit on hearing a winding up petition, that impliedly such an order should be only for the furtherance of justice that a company court which is exercising substantial jurisdiction is called upon to render as such company court. But, as far as the present case is concerned, the appointment is only to decide the inter se dispute between the appellant and the respondent and to find out whether the appellant is a debtor of the respondent and if so, in what amount. This exercise is only to find out a base for the company court to act.

18. Learned counsel appearing for the respondent, inter alia, resisted the arguments of the appellants and contended as follows :

Learned counsel for the appellant contended that admittedly the only point raised by the appellant is that the respondent has not produced the original bills/vouchers received by it from various medias such as newspapers, television, etc., and in fact, the respondent is willing to place all the materials before the auditor, who has been appointed to verify the accounts.

19. Learned counsel for the respondent further contended that it is not the case of the appellant that it is not liable to pay any amount, but its case is that its liability will arise only on production of those original bills/vouchers, etc., and now that the respondent is willing to place them, the appellant cannot have any objection.

20. Learned counsel for the respondent further contended that the matter was in fact considered for a considerable period by the learned single

judge and only after examining various documents, the learned single judge passed the order, and that it is not necessary that the learned single judge must pass an elaborate order, setting out the reasons why he is prima facie accepting the statement of accounts as well as the confirmatory statements of accounts and also the statement in the handwriting of the director of the appellant-company, setting out the amounts to be paid by the appellants to the respondent. As regards the power of the court u/s 443(1)(c) of the Indian Companies Act, learned counsel for the respondent contended that the court can pass any order which it considers necessary in the interest of justice.

21. Learned counsel for the respondent also contended that the company petition cannot be simply dismissed on the ground that the debtor-company is questioning the liability. It must also be seen whether the defence is one of bona fides and with substance. Only for that purpose, the learned single judge has appointed an auditor to verify the accounts.

22. There is no dispute between the parties that the appellants in both the appeals appointed the respondent as its advertising agent several years back. The claim of the respondent is that in respect of the services rendered, the appellants are liable to pay the amounts indicated in the respective company petitions. There is no dispute between the parties that the agreement was to the effect that in case the respondent gets more than 15 per cent from the advertising media such as newspapers, etc., as commission that amount should be credited to the account of the appellant. It is the case of the respondent that it did not receive any amount as commission above 15 per cent. However, the appellants would not be agreeable until those documents are produced, and according to them, their liability to pay would arise only when those documents are produced and verified.

23. In this context, learned counsel for the respondent contended that assuming for a moment but not conceding that the respondent received 40 per cent commission from the media such as newspapers, etc., even then, the respective appellant-company would be liable to pay huge amounts to the respondent, In fact, the substantial defence raised in the counter statement by the appellants in the company petition is that unless the respondent-company produces all the vouchers as agreed upon, the question of liability on the part of the appellants would not arise.

24. To quote the exact wording in para. No. 13 of the counter statement :

In fact, it is the main grievance of the respondent-company that the petitioner did not furnish the original bills and supporting documents received

from the various medias along with the bills of the petitioner for having effected advertisements in various medias on behalf of the respondent-

company despite several demands made by the respondent-company for a long period as evidenced by the letters sent by the respondent-

company.

25. The learned single judge obviously taking note of this defence and the confirmatory statements of accounts given by the officers of the

appellant-company and also the statement in the handwriting of the director of the appellant-company setting out the amounts to be paid by the

appellant and the dates on which such amounts are to be paid, even though some explanations/objections are given by the appellants with regard to

these documents, to find out whether the defence of the appellant is in good faith and one of substance, thought it fit to appoint an auditor to verify

the accounts. Rightly, in the peculiar circumstances of the case, the learned single judge passed the impugned order and certainly it cannot be

stated that by passing this order, the court has not rendered justice to the appellants and has exceeded its jurisdiction. The respondent has made it

clear before this court that all the original receipts received by it shall be produced before the auditor. The appellants shall be entitled to inspect the

same and the appellants, if they want, may call upon the respondent to furnish xerox copies of the same after inspection or before inspection.

26. As mentioned supra, the argument of learned counsel for the appellant that the learned single judge has proceeded on a wrong assumption as if

the appellant is liable to pay certain amounts to the respondent and the only question is what is that amount cannot be accepted. Equally, it cannot

be said that the learned single judge has not considered the explanations/objections with regard to these two documents while passing the

impugned order. The court need not at this stage pass a detailed and reasoned order which is only an interim order and the same has been passed

only to know the correct position and thus to understand the case of the respective parties properly. We refrain from discussing the merits of the

case, as it would affect one party or the other at the time of disposal of the

company petition.

27. Learned counsel for the appellant next contended that Section 443(1)(c) of the Indian Companies Act though empowers the court to make

any interim order that it thinks fit on hearing the winding up petition, that can be understood and only referable to the proceedings pertaining to the

determination of the financial position of the company and to determine whether it should be wound up or not in the interests of the general body of

creditors. According to learned counsel, as otherwise, by appointing an auditor as in the instant case, the company court is converted as a civil

court to resolve civil dispute. We do not see any substance in this contention.

28. Section 443(1) of the Indian Companies Act, reads thus ;

Powers of the court on hearing petition.--(1) On hearing a winding up petition, the court may

(c) make any interim order that it thinks fit.....

29. In the absence of any limitation or restriction in the very section itself or elsewhere in the Act, it has to be only taken that the court can pass any

order it thinks fit and necessary in the interests of justice and in implementing or giving effect to the provisions of the Act. The contention of learned

counsel for the appellant that the impugned order will result in injustice to his client cannot be sustained. After all, the auditor is going to verify the

accounts and submit his report. Such a report in the eye of law, is not a decree passed by a court nor would amount to an acknowledgment of

liability by a debtor. The appellants shall certainly have an opportunity to file their objections. Similarly, the report of the auditor is not binding on

the court. The court will, if satisfied with the objections that may be raised by the appellant, reject the auditor's report. Similarly, the documents

that the appellant is going to produce before the auditor are only to support his own case. At best, if the appellants withhold certain documents, the

auditor will decide and submit his report on the basis of the available documents. In such event, the court may, if the situation warrants, draw an

adverse inference against the appellants and nothing more.

29. In this context, it has to be remembered that the learned company judge earlier appointed a chartered accountant to make a detailed

investigation into the accounts in the light of serious irregularities in the annual account of the appellants and the appellants have not preferred any

appeal against that order, directing detailed investigation into the accounts. Of course, with regard to this, the appellants contend that the court may not direct investigation by an auditor with relation to one particular transaction so as to determine a debtor-creditor relationship between the appellant and respondent is outside the functions of the company court and would amount to exercise of jurisdiction by the civil court, resolving civil disputes.

30. When the appellants have accepted the order of the learned company judge and in that it did not question the appointment of a chartered accountant to make a detailed investigation, we do not think that the present order of the learned single judge will in any way result in injustice.

31. The next contention by learned counsel for the appellant is that inasmuch as a suit for rendition of accounts had already been filed in the company petition, the matter can be properly adjudicated only in the civil court and not in the company court, particularly when the documents have to be marked, and witnesses have to be examined and cross-examined, etc. We do not find any substance in the sense that merely because a suit is filed, the company court will not lose its jurisdiction. If that is so, the Legislature would have made that clear in the enactment itself. Similarly, in every case, the debtor-company can drag on the matter by resorting to this method.

32. There are no merits in these appeals. Consequently, the appeals are dismissed. The connected CMPs. will also stand dismissed.