(1995) 12 AP CK 0033

In the Andhra Pradesh High Court

Case No : Company Petition No. 4 of 1995

Percept Advertising and Another — APPELLANT

Vs

Secunderabad Health Care Limited — RESPONDENT

Date of Decision : 29-12-1995

Acts Referred:

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

Citation : (1998) 91 CompCas 591

Hon'ble Judges : S. Dasaradha Rama Reddy, J

Bench : Single Bench

Advocate : Rakesh Sanghi, for the Appellant; S. Chandra Sekhar, for the Respondent

Judgement

S. Dasaradha Rama Reddy J.

1. The petitioner have filed this petition for winding up the respondent-company u/s 439(1)(b) read with section 433(e) and 434(1)(a) of the Companies Act, 1956 (for short "the Act"). The petitioners are engaged in the business of providing advertising and promotional services as advertising advisers and advertising agents. In the course of business in February and March, 1993, the petitioners were appointed and retained as advertising agents by the respondent-company, for successfully promoting the public issue of the respondent-company and also other allied activities. Pursuant to the appointment the petitioners had executed various assignments, i.e., publication in newspapers and magazines, press releases, press conferences, hoardings and advertisements for which various bills were raised which were acknowledged by the respondent. An amount of Rs. 9,58,966 was due in respect of outstanding bills to both the petitioners as on October 19, 1994. To the reminder dated October 19, 1994, issued by the petitioners, the respondent replied on October 22, 1994, stating that the amount shown as outstanding is not correct and that the bills need to be reconciled. The petitioners deputed their accounts personnel along with the documents for effecting reconciliation but were always turned back by the

respondent on some pretext or the other. Thereupon the petitioners issued legal notice on November 30, 1994, u/s 434 of the Act, to which a reply was given by the respondent on December 20, 1994, disputing its liability. As this denial of the liability is only an afterthought, the petitioners have filed this petition.

2. On February 17, 1995, notice before admission was ordered and the respondent filed a counter stating that the petitioner-companies were appointed for specific works and they were required to submit proper estimates for approval of the respondent-company and after due approval and authorisation they were to execute these specific works. The allegation that all such promotional activities that have been undertaken by the petitioners have been approved and sanctioned by the respondent is denied. The respondent has been requesting the petitioners to correct the bills submitted by them and though they promised to do so, the petitioners were evading the same. It is also stated that as per the records of the respondent-company an amount of Rs. 2,90,318 and Rs. 29,000 is payable to the first and second petitioners, respectively. The respondent is possessed of sufficient and adequate funds to pay the same. But as the petitioners were persisting in making false and inflated claims, the said amount was withheld and the respondent wanted to pay the same in full settlement of the claim after the petitioners reconciled the accounts. The managing director further says in the counter that as early as on October 22, 1994, the petitioners were informed about this and that the alleged approved estimates upon which the outstanding has been claimed have been suppressed and withheld by the petitioners. The action of the petitioners in filing this petition is a gross abuse of the process of the court and a mala fide action to pressurise the respondent-company to pay for advertisements which have not been authorised by the respondent-company, to cause harassment and to tarnish the fair image of the respondent-company, which was started by young entrepreneurs who have invested huge monies and devoted all their time and energy to make the hospital project a success.

3. The petitioners have filed a reply admitting the absence of a formal written agreement but asserting that the respondent-company has retained the petitioners as its advertising agents. It states that every bill raised by the petitioners was duly received and acknowledged by the respondent and the dispute sought to be raised now is without substance. The reply further says that the details of the bills which are disputed and the reasons for the same are not disclosed by the respondent either in its counter or in its reply to the legal notice.

4. Pursuant to the direction given by me on August 16, 1995, the petitioners on August 21, 1995, have filed office copies of the bills, (i) PB/Hyd/167, dated March 25, 1994, for Rs. 2,57,760, (ii) PB/Hyd/176, dated April 4, 1994, for Rs. 2,97,890, and (iii) PB/Hyd/177, dated April 5, 1994, for Rs. 2,52,990, respectively, which were referred to in the reminder dated June 7, 1994, issued by the first petitioner to the respondent. I also directed the petitioners to file originals of the media estimates referred to in para 7 of the counter which are

said to be in the possession of the petitioners. But the petitioners in the additional reply-affidavit stated that the said estimate which is merely a price-list containing the rates charged by different periodicals and newspapers for publication slots had been furnished by the petitioners to the respondent at the inception to enable them to know the rates chargeable and that it was retained by the respondent and was neither meant to be handed back nor in fact handed back to the petitioners as it was only a quotation of the rates chargeable and that the petitioners are not privy to the markings, additions and interlineations made thereon. The respondent filed additional affidavit in answer to the additional reply stating that the media estimate is submitted for the respondent''s approval for the work to be undertaken by the petitioners and categorically denying that it has retained the originals. The respondent has also earlier filed the statement of account with the petitioners showing an amount of Rs. 2,90,518 and Rs. 28,362.55 as due by it to the first and second petitioners, respectively. Along with the statement of account, it has also filed a statement of the bills submitted by the petitioners which were rejected by it and also an office copy of the media estimate which contains endorsements and interlineations against various items. Bill No. 167 dated March 25, 1994, which was raised by the first petitioner for Rs. 2,57,760 was shown to have been passed for Rs. 1,03,680 with the remark "Hindu + Business was not authorised and single Ad. in Deccan Chronicle, Eenadu Andhra Jyothi". Similarly, Bill No. 176, dated April 4, 1994, for Rs. 2,97,890 was passed for Rs. 2,00,390 with the remark "Hindu rate Rs. 700 (Rs. 780 claimed). Dainik Bhaskerct and Economic Times not authorised". Similarly, Bill No. 177, dated April 5, 1994, for Rs. 2,52,990 was passed for Rs. 1,08,540 with the remark "Economic Times and Indian Express not authorised. Hindu double billing." The respondent has also filed its balance-sheet as at March 31, 1995, according to which the general reserve is at Rs. 2,45,661 and surplus in profit and loss account is at Rs. 11,05,097.

5. The question for consideration is whether the defence of the respondent resisting the liability claimed by the petitioners is bona fide ?

6. It has been held by the Supreme Court in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., :

"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 ... Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (see A Company, In re [1894] 2 Ch 349). 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 (see Tweeds Garages Ltd., In re [1962] Ch. 406; [1962] 32 Comp Cas 795). The principals on 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."

7. This was reiterated in a recent case Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , where a petition for winding up was not admitted since the relationship of creditor and debtor did not exist and the same was the subject-matter of arbitration which was pending adjudication and the defence raised was a substantial one.

8. The respondent has a prima facie case in denying its liability and its defence is bona fide. Of course, it is not necessary for me to pronounce upon this aspect finally as this is not the proper forum. As can be seen from the narration of facts stated above, the petitioners have to raise bills on the respondent only after the work and estimate is approved by the respondent. It is the specific case of the respondent that the petitioners have raised bills on the respondent even for the work not approved and it is not without substance. For instance three bills Nos. 167 dated March 25, 1994, 176 dated April 4, 1994 and 177 dated April 5, 1994, which were raised for Rs. 2,57,760, Rs. 2,97,890 and Rs. 2,52,990 respectively were passed only for Rs. 1,03,680, Rs. 2,00,390 and Rs. 1,08,540, respectively by giving reasons. The original of the media estimate which contains the endorsement of the respondent, which must be in the normal course with the petitioners, has not been produced by them. The respondent has disputed it as early as on October 22, 1994, and also in reply to the statutory notice issued u/s 434 of the Act. Hence, it is not possible to hold that the debt claimed is definite, ascertained or undisputed, Counsel for the petitioners has cited the decisions in G. Claridge and Company Ltd. Vs. Nav Bharat Investments Ltd., , In Re: United Western Bank Ltd., , Premier Vegetable Products Ltd. v, United Asian Bank [1980] 50 Comp Cas 680 (Raj), In Re: T.P. Shau and Sons Pvt. Ltd., , In Re: Wastinghouse Saxby Farmer Ltd., , Paramount Enterprises Vs. Reechem P. Ltd., and Northern India Iron and Steel Co. Ltd. Vs. Haryana Ispat (P.) Ltd., .

9. In G. Claridge and Company Ltd. Vs. Nav Bharat Investments Ltd., , it was held by the Bombay High Court that the question whether there is a bona fide dispute or not will necessarily depend on the facts and circumstances of each particular case; that a detailed examination at the preliminary stage of admission should be avoided and that if the petitioner makes out a prima facie case, then the court should exercise its discretion. There is no dispute about this proposition. In that case on the company''s own admission that a sum of Rs. 17,510.76 was due and payable, the winding up petition was admitted.

10. In United Western Bank Ltd., In re [1978] 48 Comp Cas 378, it was held by the Bombay High Court that disputes which appear to have been created or manufactured for the purpose of creating pleas to cover up the liability for payment of the debt can never be considered to be bona fide and will be of no avail in resisting a winding up petition. There is again no dispute about it. On the facts of that case, the company was rightly ordered to be wound up since the eight bills of exchange which were drawn for valuable consideration upon the

company in favour of the petitioners, were accepted by the company, which, when presented on maturity, failed to pay on the ground that the petitioners owed considerable amounts to the company and that the acceptance of the bills was conditional.

11. The next decision is Premier Vegetable Products Ltd. v. United Asian Bank [1980] 50 Comp Cas 680 (Raj). The same proposition was reiterated in this case by the Rajasthan High Court and as the company which had taken delivery of the goods supplied by the petitioner admitted its liability to the bank and showed its liability in the balance-sheet, it was held that the dispute about the debt is not bona fide.

12. In In Re: T.P. Shau and Sons Pvt. Ltd., the company accepted the supply of goods without any objection and never raised any objection to the bill at any point of time and in fact asked the supplier''s representative to call for payment and it is only after the statutory notice was served that the company had set up a document alleged to have been sent under certificate of posting, on a date which was a public holiday, alleging that the goods were not according to specification and seeking thereby to dispute the claim. In those circumstances the winding up petition was held to be a proper remedy by the Calcutta High Court.

13. In In Re: Wastinghouse Saxby Farmer Ltd., , it was held that for the first time, the company while admitting the liability to pay some of the bills, denied its liability with respect to some others on the ground that in collusion and conspiracy with some employees of the company the creditor had committed fraud upon the company in delivering indigenous material although the contract was for sale of foreign made material and also inflated the amounts of the said bills, showing therein larger quantities of goods than had actually been delivered. In those circumstances the Calcutta High Court held that the dispute sought to be raised appeared to be not only absurd and highly improbable and if it was encouraged to be taken in the winding up petition, it would be disastrous and open the floodgate of fraud and collusion as a defence which companies could set up to defeat the bona fide claims of creditors and that the dispute was defamatory and injurious to the business reputation of traders and merchants. In those circumstances, the petition was admitted.

14. In Paramount Enterprises Vs. Reechem P. Ltd., , the company in its reply to the statutory notice had not taken any specific objection with regard to the terms of the contract and it is only for the first time in the counter to the winding up petition that it has taken the stand that the machinery was not erected as per its order. In those circumstances, this court held that it was a fit case for admission.

15. In Northern India Iron and Steel Co. Ltd. Vs. Haryana Ispat (P.) Ltd., the correctness of the statement of accounts, filed as part and parcel of the winding up petition was not doubted by the respondent and the demand made through the statutory notice had not been disputed. The respondent had, instead, sought

time from the petitioner to allow it to make the payment in easy terms as it was facing financial difficulties. Under these circumstances, the Punjab and Haryana High Court held that it was a fit case for admission. There, the single judge having found that the defence which was sought to be raised by the company to the claim of the creditor was without any basis, dismissed the petition directing the company to deposit a certain sum within a period of four weeks. Allowing the appeal the Division Bench held that the petition ought to have been admitted.

16. Thus, the question of admitting the petition for winding up depends upon the facts of each case. In the instant case, the respondent has paid its admitted liability of Rs. 2,90,518 in favour of the first petitioner and Rs. 28,362,55 in favour of the second petitioner by way of demand drafts on August 11, 1995, in the court and handed over to the counsel for the petitioners. The respondent-company has produced the balance-sheet which shows that as on March 31, 1995, it has got general reserves of Rs. 2,45,661 and surplus in its profit and loss account to the tune of Rs. 11,05,097.

17. For the above reasons, I see no ground to admit the petition, which is accordingly dismissed with costs. It is open to the petitioners to establish their claim, if so advised, in the appropriate forum.

