

(1999) 07 KAR CK 0060
In the Karnataka High Court
Case No : Company Petition No. 58 of 1997

R.K. Arora and Sons Private Limited, Calcutta	APPELLANT
Vs	
Pampasar Distillery Limited, Chitwadgi, Hospet, Bellary District	RESPONDENT

Date of Decision : 02-07-1999

Acts Referred:

Citation : (1999) 5 KarLJ 549

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : M/s. Khaitan and Company, for the Appellant; M/s. Kesvy and Company, for the Respondent

Judgement

1. I have heard the learned Counsel representing the petitioner as also the respondents on merits. As the order sheet will indicate, there was a suggestion at one stage that the parties should resolve the matter but the Counsel informed me that this was not possible. That aspect has therefore been totally ignored by me and after hearing both the learned Counsel, the Court has decided the preliminary issues raised purely on merits.

2. The petitioners contend that they had supplied a total of 1,81,650 empty bottles to the respondents as per the details set out in the petition. It is their case that the respondents have made payment for 84,770 bottles and that the payment for the remaining part of the consignment is outstanding. The usual averments have been made that despite demands etc, that the respondents have failed and neglected to make the payment and therefore after serving a statutory notice the present petition has been filed. The respondents have contested the petition. They have taken up the plea which is really undisputed, that the order was placed for 60,000 bottles and that the respondents kept supplying more quantities which are in excess of the contracted consignment which is also borne out from the record which is produced before me. They informed the petitioners that they had only asked for 60,000 bottles whereupon the petitioners requested

the respondents to accept the additional quantity and the respondents as a result of what they had been asked to do took delivery of the excess quantity. It is emphasised on behalf of the respondents by their learned Counsel, which again is borne out from the documents produced before me, that the respondents informed the petitioners that they would make payments for the additional quantity as and when those bottles were used by them. Learned Counsel submits that this was nothing more than a helpful obligation and that it does not fasten any liability in law to make payment for the additional part of the consignment. She also points out to me that it is undisputed that the respondents have paid for the contracted 60,000 bottles and that the bona fides of the respondents cannot be disputed because they have made payment for more than the quantity of 60,000 bottles because they did have occasion to use some additional quantity. The point raised is that after the petitioners were asked to take back the balance unused quantity if they have failed to do so, that the respondents cannot be held liable for the payment.

3. There is one other aspect which assumes some importance namely that the petitioners asked the respondents for the "C" forms for the entire quantity and the "C" forms were not restricted to 60,000 but were issued for the full quantity of 1,81,650. Respondents' learned Advocate clarifies that since the bottles had been supplied at a concessional rate of tax and since the request came from the petitioners to issue the "C" forms that these were issued as per their request in order to facilitate the completion of the assessment and it is her contention that this gesture cannot again fasten liability to pay as far as the respondents are concerned. On this crucial aspect of the transaction the petitioners' learned Counsel vehemently submitted that the acceptance of the consignments, the assurance in writing that the payments would be made when the bottles are utilised and lastly issuance of the "C" forms is conclusive proof of the finality of the transaction and that the respondents cannot resile from that position for whatsoever reason. In the course of the arguments, respondents' learned Counsel submitted before me that assuming without admitting that there was an offer to pay for the additional part of the consignments that this was conditional on the respondents using the bottles. She states that the correspondence exchanged indicates that the bottles did not meet with the specifications of the respondents and that the respondents themselves have discontinued that particular product as a result of which the bottles are lying unused for the last several years and they are willing even as of now to return the bottles to the petitioners. In sum and substance, the plea that is raised is that not only has a dispute been raised but that it is a bona fide dispute and that having regard to the well-settled position in law that the Court must dismiss the winding up petition if it pertains to a disputed claim, this Court must refer the parties to a Civil Court for adjudication.

4. The petitioner's learned Counsel has vehemently refuted the last part of the submission. She has contended that even though the respondents have tried to raise a dispute that there are no triable issues that really arise in this case and

that consequently, in keeping with the well-settled position as now obtains in law, that the entire issue is capable of resolution without resorting to recording of evidence or trial and that consequently, no reference to a Civil Court is warranted.

5. Respondents' learned Counsel has drawn my attention to a decision of the Supreme Court in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, wherein the Supreme Court has laid emphasis on the well-known principle that where a bona fide dispute is raised, that the Court should refuse to entertain the winding up petition. The same view has been expounded in a decision of this Court in *T. Srinivas v M/s. Flemming (India) Apotheke Private Limited*. In that case, the learned Judge has pointed out that one more ingredient is required to be taken into consideration while assessing whether the dispute is bona fide or not namely the question as to whether it appears to the Court that the claim is not just. Undoubtedly, the entertainment of a winding up petition confers a relatively wide degree of discretion on the Court and the principles on which this discretion is to be exercised are well-defined.

6. In almost all winding up petitions, the respondents would naturally resist entertainment of the petition for an order for winding up by pleading before the Court a defense. That defense may be a simple defense or it may be an involved one but more importantly, merely because "a defense" is pleaded it does not mean that the liability is legally classified as a disputed liability. The law qualifies that it has to be a bona fide dispute and even in such a case there is a fine distinction which the Court is required to make insofar as merely because the defense pleaded is not dishonest or if it is not sham, it does not necessarily follow that it is a bona fide defense. If one is to be guided by the principles enunciated over the years, it is now well-established that a Court is required to embark upon a summary enquiry in winding up petitions and it is only in those of the cases where complicated aspects of liability arise or where it is necessary through the reception of evidence and the process of a trial alone, that the disputed facts can be resolved, that the machinery of the Civil Court becomes a must; consequently the Court will refuse to entertain a winding up petition and refer the parties to a Civil Court. The question that really arises is as to whether in cases that can be resolved through a summary evaluation or enquiry, the Company Court is obliged to refuse to entertain a winding up petition and the answer to this last question is in the negative. Undoubtedly, each petition which is necessarily based on different sets of facts would provide the individual answers regarding the maintainability even when this test is applied. Above all, the time has now come for the Courts to prune the length and course of litigations and to discontinue the hyper- technical approach of redirecting proceedings from one judicial forum to another, which is what sends cases into unending orbit.

7. Coming to the facts of the present case, I do concede that the respondents have sought to dispute the liability in respect of the payment for the balance quantity of bottles. Whether they are liable to pay for them or not does not

require any reception of evidence because the documents relating to the transaction are undisputed and have been produced before this Court. The fact remains that for whatever reason, even if it was out of business cordiality the respondents accepted the entire quantity of bottles over and above what they had contracted for, though they had option to refuse the consignments and they had the option to send back the bottles both of which they did not do. This assumes importance because even at a later point of time they had not given up the position whereby they had accepted the entire quantity and it was only stated that the payment would be made as and when the bottles were used. The normal assumption was that since the respondents were a distillery that they would use the rest of the quantity and that they would make the payment. It is significant that right upto this point of time there was no dispute with regard to the quality or suitability of the bottles. Next we come to the stage when the "C" form was asked for and even at this point of time the respondents issued the "C" form for the full quantity. It would be extremely difficult for the respondents to contend before a Court of law that after "C" forms were issued that the transaction was reversible. At that point of time, the transaction assumed a total stage of finality. This being the position, I fail to understand how and under what circumstances in law the liability to pay can be disputed. Unless there is a situation whereby this aspect is required to be resolved through a trial, it cannot be contended that a reference to the Civil Court becomes necessary.

8. Even in the decision referred to by the respondents' learned Counsel, there is a very clear reference to the fact that the Company Court is required to do an assessment of the nature of the defense pleaded for purposes of deciding as to how valid that defense is and whether prima facie it appears plausible and one which merits serious consideration. If on an examination of the facts and the application of law, there does not appear to be any dispute that survives with regard to the liability, then there is virtually nothing left to resolve through a trial procedure and hence a reference to a Civil Court would be redundant.

9. Having regard to the aforesaid position, this Court is required to hold that the petitioners have made out a good enough case for admission of the petition. The petition is accordingly admitted.

10. Normally, the Company Court would direct that the petition should be advertised which is a necessary consequence of the process of admission. In this case, the respondents' learned Counsel submitted that the respondents are a working company and she submitted that the test as to whether the respondents are financially insolvent is one of the considerations which a Court has to take cognizance of. She submitted that under no circumstances can it be contended that the respondents are unable to pay the amount because they have only pointed out to the Court that according to them they are not required to pay the amount which is why the same has not been done. That aspect of the matter now having been resolved and having regard to the consequences of a winding up petition, I still give the respondents the option to consider their position and

therefore, no directions with regard to the advertisement are being issued at this point of time. The petition to be relisted after four weeks and on the next date of hearing, the Court will hear the learned Counsel on both sides and pass further orders with regard to the advertisement of the petition. To be relisted after four weeks.