

(2003) 09 AP CK 0048

In the Andhra Pradesh High Court

Case No : CA No. 658 of 2003 in CP No. 120 of 2002

Sanghi Spinners (I) Ltd.

APPELLANT

Vs

Ahmedabad Electricity Co. Ltd.

RESPONDENT

Date of Decision : 22-09-2003

Acts Referred:

Companies (Court) Rules, 1959 — Rule 99
Companies Act, 1956 — Section 557, 557(1)

Citation : (2003) 6 ALD 666

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : K. Raji Reddy, for the Appellant; M. Dhananjay Reddy, for the Respondent

Judgement

1. The respondent in C.P. No. 120 of 2002, namely M/s. Sanghi Spinners (India) Limited, has filed this application u/s 557 of the Companies Act, 1956 (for short "the Companies Act") read with Rules 9 and 11(b) of the Companies (Court) Rules, 1959 (for short "the Companies Rules") praying this Court to appoint an Advocate as Chairman to call for the Meetings of the Creditors and Contributories of the applicant to ascertain their wishes along with the value of debt owed by the applicant to them and to submit a report.

2. On the ground that the applicant herein failed to discharge their debt which arose, out of a contract, the respondent herein, namely M/s. Ahmedabad Electricity Company Limited, filed C.P. No. 120 of 2003 before this Court praying for winding up of the applicant. The applicant contested the matter and also let in evidence, and while the matter is at the juncture of arguments, the present application was moved. For the sake of convenience, the parties shall be referred to as arrayed in this application.

3. Heard the learned Counsel for the applicant and the learned Counsel for the respondent.

4. The learned Counsel for the applicant would submit that the respondent alleging that the applicant is unable to pay its debt in a sum of Rs. 1,75,867-00 which works out to Rs. 3,51,86,792-00 along with interest, has filed the company petition for winding up of the applicant. The applicant submits that there are certain disputes with respect to the work awarded by them to the respondent and executed by the respondent, and though they initiated arbitration proceedings for resolution of the disputes, and each of the parties have chosen their Arbitrators, who in turn chose the Chairman of the Arbitral Tribunal, for the reasons best known to the respondent, the nominee of the respondent vacated his office, and consequently, the respondent withdrew from the arbitration proceedings itself. The applicant submits that the alleged debt of the respondent is only an unsecured debt, and there are other unsecured creditors, to whom the applicant has to pay an amount of Rs. 13.30 crores for the materials supplied by them. This apart, it is stated that the applicant has also taken loans from six secured creditors namely, ICICI, IDBI, Common Wealth Development Corporation, London, Punjab National Bank, State Bank of India and the Laxmi Vilas Bank to the tune of Rs. 356.86 crores, and as against the said monies, the applicant as on 31-3-2001 has fixed assets to the tune of Rs. 354.10 crores, apart from other reserve and current assets to the tune of Rs. 6.57 crores. The learned Counsel for the applicant submits that there are about 1000 employees working in the applicant, and if any extreme order of winding up of the applicant is passed, the most sufferers would be the secured creditors and the families of about 1000 employees. Considering the miniscule debt of the respondent in relation to the whopping fixed assets available with the applicant, the learned Counsel submits that it would not be difficult to clear the debt of the secured creditors and the unsecured creditors, including that of the respondent. The learned Counsel for the applicant purporting to rely on the balance sheets of the applicant for the years ending 31-3-1999, 31-3-2000 and 31-3-2001, submits that the sales figures and the figures relating to reserves and surplus funds, present a clear picture that the applicant is doing substantial business, and given an opportunity to operate for a couple of years, it would turn out to be a promising company. The learned Counsel for the applicant submits that the respondent by filing company petition for winding up of the applicant is indulging in arm-twisting methods to recover its alleged dues, which arise out of a contract between the parties, and even if it is assumed that the applicant is liable to pay the amount claimed by the respondent, since disputed questions of fact are involved, the same need adjudication either by the Arbitrator or by a competent civil Court having jurisdiction. The learned Counsel for the applicant in support of his contention that company petition cannot be maintained for recovery of a disputed debt, placed reliance on the judgment of the Apex Court in *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, . The learned Counsel for the applicant, thus having regard to the fact that the interest of the secured creditors who have advanced loans to the applicant and that of the families of 1000 employees who are working in the applicant, would be most affected if any extreme order of winding up of the

applicant is passed, the learned Counsel submits before any such extreme order is passed by this Court, it is necessary that a Meeting of the Secured Creditors is convened for ascertaining their wishes, so that their interest is well protected.

5. The respondent resisted the application. It is contended by the learned Counsel appearing on behalf of the respondent that the present application at the instance of the applicant is not maintainable. He would contend that even though notice of admission of the company petition in Form-48, as required under Rule 99 of the Companies Rules was advertised in two daily newspapers, namely "Eenadu" and "Deccan Chronicle" on 9-11-2001, duly indicating the date of hearing of the company petition as 4-12-2001, none of the secured creditors of the applicant have chosen to enter their appearance or contest the matter. An application u/s 557 of the Companies Act, 1956, according to the Counsel for the respondent, would be maintainable only at the instance of the creditors or contributories of the company sought to be wound up, and not by the company which itself is sought to be wound up, and even such an application at the instance of the creditors or contributories, would be maintainable under Clause (b) of Sub-section (1) of Section 557 of the Companies Act, only when they satisfy the condition precedent embodied in Clause (a) of Sub-section (1) of Section 557, namely they have to prove their wish by placing sufficient evidence, and inasmuch as none of the secured creditors has entered their appearance nor contested the matter nor placed any material either supporting or opposing the company petition, the learned Counsel submits that the question of convening a meeting of the secured creditors of the applicant for the purpose of ascertaining their wishes, does not arise, and in support of this contention, the learned Counsel for the respondent, placed reliance on the judgment of the Bombay High Court in Deccan Farms and Distilleries Ltd v. V.L. Bhanji, (1979) 49 CC 321. As none of the secured creditors entered their appearance nor contested the matter nor placed any material either supporting or opposing the company petition, within the time prescribed in the notice advertised in Form-48, the learned Counsel for the respondent submits that, if at this belated stage, the application as prayed for by the applicant is allowed, it would amount to condoning the delay and allowing the secured creditors to have their say, which cannot be permitted. The applicant has filed this application only with a view to drag on the proceedings.

6. In reply to the contentions advanced on behalf of the respondent, the learned Counsel for the applicant submitted that publication of notice of admission of the petition in Form-48, as required under Rule 99 of the Companies Rules, has nothing to do with convening of meeting of creditors or contributories u/s 557 of the Companies Act. Section 557 of the Companies Act, gives absolute discretion to the Court to call for meetings of the creditor or contributories to ascertain their wishes before any order of winding up is passed. He submitted that the judgment of the Bombay High Court in Deccan Farms and Distilleries Ltd. v. V.L. Bhanji, relied upon by the respondent, has no relevance to the case on hand inasmuch as the said judgment sought to introduce new provisions, giving rise to

counter claims and competing claims, which does not find place in Section 557 of the Companies Act.

The principal question that falls for consideration in this application is whether in the given facts and circumstances of the case, before proceeding to adjudicate a petition filed for winding up of a company, is it mandatory for this Court to ascertain the wishes of creditors or contributories of the company which is sought to be wound up, and if so, whether this Court is obligated to direct convening of the meetings of the creditors or contributories of the company sought to be wound up?

7. It may be noticed that the Company Petition was admitted on 1-10-2001, and the publication of notice in Form-48 in newspapers, as required under Rule 99 of the Companies Rules, was deferred to enable the parties arrive at a settlement. As no settlement was arrived at, this Court on 29-10-2001, directed the respondent to take out paper publication of the notice. In pursuance thereof, the respondent took out paper publication of the notice in Form-48 on 9-11-2001, as required under Rule 99 of the Companies Rules, in two newspapers, namely "Eenadu" and "Deccan Chronicle", duly intimating the date of hearing of the Company Petition on 4-12-2001, and making it clear that any creditor, contributory or other person desirous of supporting or opposing the making of an order on the said petition should send to the petitioner of his advocate notice of his intention signed by him or the advocate with his name and address so as to reach the petitioner or his advocate not later than five days before the date fixed for hearing of the petition. It was further made clear that any affidavit intended to be used in opposition to the petition should be filed in Courts and a copy served on the petitioner or his advocate, not less than five days before the date fixed for hearing. Though notice in Form-48 was published as far back as on 9-11-2001, it may be noticed that despite lapse of nearly more than one and a half year, neither the secured creditors nor the unsecured creditors, who have advanced loans and supplied material to the applicant, to the tune of Rs. 356.86 crores and Rs. 13.30 crores respectively, have entered their appearance to contest the company petition or chosen to file any affidavits either supporting or opposing the company petition. In the absence of any appearance made by the secured and unsecured creditors of the applicant to contest the company petition or file affidavits either supporting or opposing the company petition, can it still be said that before proceeding to consider a petition for winding up of a company, the wishes of the creditors or contributories of the company, are required to be ascertained by convening a meeting.

8. To consider this question, it becomes necessary to examine the provisions of Section 557 of the Companies Act, 1956, which deals with meetings to ascertain wishes of creditors or contributories. The said section reads thus:

557. Meetings to ascertain wishes of creditors or contributories :--(1) In all matters relating to the winding up of a company, the Court may--

(a) have regard to the wishes of creditors or contributories of the company, as proved to it by any sufficient evidence;

(b) if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs; and

(c) appoint a person to act as Chairman of any such meeting and to report the result thereof to the Court.

(2) When ascertaining the wishes of creditors, regard shall be had to the value of each creditor's debt.

(3) When ascertaining the wishes of contributories, regard shall be had to the number of votes which may be cast by each contributory.

9. Clause (a) of Sub-section (1) of Section 557 of the Companies Act provides that that in all matters relating to winding up of a company, the Court may have regard to the wishes of creditors or contributories of the company, as proved to it by any sufficient evidence, and Clause (b) thereof provides that, if the Court feels that it is necessary to ascertain those wishes, it may direct calling, holding and conducting of the meetings of the creditors or contributories, in the manner directed by the Court, and Clause (c) provides for appointment of a person to preside over the meetings as Chairman and to report the result thereof to the Court. While sub-sections (2) and (3) of Section 557 of the Companies Act provide that while ascertaining the wishes of creditors, regard shall be had to the value of each creditor's debt and the number of votes which may be cast by each contributory.

10. Though the provisions of Section 557 of the Companies Act appear to be discretionary in nature, and is an ancillary power given to the Court, the same shall be exercised only if one satisfies the condition precedent embodied in Clause (a) of subsection (1) of Section 557. It may be noticed that before the Court proceeds to exercise its power under Clause (b) of Sub-section (1) of Section 557 of the Companies Act and directs calling of a meeting of the creditors or contributories, the creditors or contributories have to satisfy the condition precedent as found in Clause (a) thereof, namely they have to prove their wishes by placing sufficient evidence before the Court, and unless and until the creditors or contributories, prove their wishes by placing sufficient evidence before the Court, and satisfy the condition precedent embodied in Clause (a) of Sub-section (1) of Section 557, no order directing convening of meeting under Clause (b) thereof, can be made.

11. That being the position, we may consider whether, in the given facts and circumstances of the case, the applicant is entitled to maintain this application, and whether the applicant has made out any strong case, obligating this Court to exercise its discretionary power and convene a meeting of the creditors. A reading of the provisions of Section 557 of the Companies Act, would make it

abundantly clear that the Court "shall have regard to the wishes of creditors or contributories" of the company, as proved to it by any sufficient evidence. The phrase "shall have regard to the wishes of creditors or contributories" connotes that there should be wishes of the creditors or contributories before the Court for it to have regard. In the instant case, there is no proved wish of any of the creditor or contributory of the company placed before the Court by sufficient evidence, and when no creditor or contributory of the company has come forward to place his wish, leave alone by proving by sufficient evidence before the Court, the question of calling for their meeting to ascertain their wishes, does not and cannot arise.

12. There can be no doubt that the discretion conferred upon the Court by Section 557 of the Companies Act, is unfettered, but such discretion, as is well settled by a plethora of decisions of the apex Court as well as this Court, shall be exercised by the authority, in whom such discretion is vested, judiciously and with circumspection, and only in the furtherance of the interests of justice.

13. In *Ramlal Keemthi v. K. Laxman Bapuji*, 1961 (1) An.WR 221, a Division Bench of this Court, considering the language employed in Section 557 of the Companies Act, held that it was well within the powers of the Court to direct that a meeting be held for the purpose of ascertaining the wishes of the creditors in all matters bearing on the winding up of the Company.

14. The word "may" appearing in Section 557 of the Companies Act, indicates that the power conferred on the Company Court is discretionary. While interpreting similar word "may" used in Section 433 of the Companies Act, a Division Bench of the Mysore High Court in *D.S. Adi v. S.G. Monsor Transport Company*, 1966 (36) Comp Cases 606, held that it disentitled any person from claiming, as of right, that the Court should necessarily exercise the discretion conferred upon it. As such, mere filing of an application and seeking a direction from this Court, that a meeting of the creditors should be held, does not automatically cast an obligation or a duty on the Court to call for such a meeting.

15. In *Focus Advertising Private Limited v. Ahoora Blocks Private Limited*, 1975 (45) CC 534 the Bombay High Court held that, if it was satisfied that, for just and valid reasons, it is necessary to call for and hold such a meeting, the Company Court would be entitled to exercise its discretion and direct that such a meeting of the creditors should be convened.

16. In *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, , it was held by the Apex Court as under:

Another rule which the Court follows is that if there is opposition to the making of the winding up order by the creditors, the Court will consider their wishes and may decline to make the winding up order. u/s 557 of the Companies Act, 1956, in all matters relating to the winding up of the Company, the Court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered though perhaps the Court may attach greater weight to the views of the

creditors. The law on this point is stated in Palmer's Company Law, 21st Edition Page 742 as follows: "This right to a winding up order is, however, qualified by another rule viz., that the Court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the Court in its discretion may refuse the order". The wishes of the creditors will, however, be tested by the Court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would no benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case.

17. In the instant case, except the workers, there is no opposition to the winding up of the company from any of the secured or unsecured creditors or contributories of the company nor is there any wish proved before the Court by any of the creditors or contributories of the company by placing sufficient evidence. Had any of the creditors or contributories come before the Court by proving their wish before the Court by placing sufficient evidence, then the applicant would have certainly been justified in requesting this Court to exercise its discretionary power. In the absence of any wish proved by sufficient evidence placed before the Court by the creditors or contributories of the company, which is a pre-requisite for exercising the discretionary power vested in the Court by Clause (b) of Sub-section (1) of Section 557 of the Companies Act, the question of this Court exercising its discretionary power to call for meeting of the creditors of the company, does not arise.

18. In *Deccan Farms and Distilleries Ltd. v. V.L. Bhanji*, the Bombay High Court while dealing with Section 557 of the Companies Act, considered the competing claims of the creditors who supported the winding up proceedings and those who opposed them, and held:

These cases provide a guideline for considering the competing interest of the creditors. The rule is that if there is opposition to the making of the winding-up order by the creditors, the Court will consider their wishes and may decline to make the winding up order. This rule finds place in Section 557 of the Companies Act, 1956. The wishes of the creditors are to be examined by the Court. The Court has to see whether the case of the creditors opposing the winding up is reasonable and whether there are matters which should be inquired into and investigated if a winding up order is made. The Court can consider the wishes of the creditors "as proved before it by sufficient evidence" as laid down by Section 557. A fact is said to be "proved" when after considering the matters before it, the Court either believes it to exist or considers its exercise so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The creditors who wish that their wishes should be regarded have to place the necessary evidence before the Court. They have to

point out reasonable grounds in order to enable to Court to ascertain whether the grounds are good. Either the material should be on record or the creditors should place it on affidavit or in some other satisfactory manner to enable the Court to determine the competing wishes and make a judicial choice at the hearing. If this is not possible to decide at the hearing, the Court can direct that a meeting of the creditors be called and held in such manner as laid down in Clauses (b) and (c) of Section 557(1) of the Companies Act, 1956.

19. In the instant case, as noticed earlier, despite taking out paper publication about the admission of the company petition in newspapers as far back as on 9-11-2001, though the applicant claims to have taken loans from six secured creditors to the tune of Rs. 356.86 crores and is liable to pay an amount of Rs. 13.10 crores to unsecured creditors who have supplied material to them, none of the six secured creditors and other unsecured creditors, have chosen to enter their appearance either to support or oppose the company petition, nor have they filed any affidavits or material to establish their claims, to enable the Court to ascertain their wishes, before proceeding to consider the petition for winding up of the applicant. When none of the secured creditors and unsecured creditors of the applicant have come forward expressing their wishes either supporting or opposing the company petition and have evinced no interest in the matter, it is not known how the applicant can maintain this application to call for meeting of the creditors or contributories to ascertain their wishes.

20. To exercise power u/s 557 of the Companies Act, there should be wishes of the creditors as proved before the Court by sufficient evidence, and in the instant case, no wish is proved by the secured creditors or unsecured creditors, and there are no claims from any quarter, nor is there any material placed on record by any of the creditors to show that they have any interest in the matter. Had any one of the secured creditors or unsecured creditors entered their appearance and proved their wishes before this Court by placing sufficient evidence, then the applicant would have been justified in requesting the Court to call for a meeting of the creditors or contributories to ascertain their wishes, but there is no such wish expressed by any of the secured or unsecured creditors for them to be considered in the meeting. In that view of the matter, it has to be held that this application at the instance of the applicant cannot be maintained.

21. Having regard to the limited scope of this application, namely whether a meeting of the secured and unsecured creditors for ascertaining their wishes, is required to be called for not, I am not inclined to go into the contentions advanced on behalf of the applicant that inasmuch as the debt claimed by the respondent is very small when compared to the large volume of fixed assets available with the applicant, it would be in a position to clear of the debt of the respondent, and that inasmuch as the debt claimed by the respondent arises out of a contract between the parties, disputed questions of fact are involved, and the same require to be adjudicated either by an Arbitrator or competent civil Court having jurisdiction, suffice it to say, these questions including the interest

of the 1000 workers, on whose behalf their Union entered appearance and contested the matter and opposed the company petition for winding up of the applicant, would be considered at the time of hearing of the company petition, and in that view of the matter, reliance placed by the learned Counsel for the applicant on the judgment of the Apex Court in Pradeshiya Industrial and Investment Corporation of U.P. v. North Indian Petrochemicals Limited, need not be examined at this stage.

22. In the above view of the matter, there is no merit in the application and it is accordingly dismissed. No costs.