(2008) 11 GUJ CK 0028

In the Gujarat High Court

Case No : C.P. No. 210 of 2002

Satellite Television Asian Region Ltd. and Another APPELLANT

Vs

Kunvar Ajay Designer Saree P. Ltd. RESPONDENT

Date of Decision : 14-11-2008

Acts Referred:

Companies Act, 1956 — Section 433, 434, 454
Criminal Procedure Code, 1973 (CrPC) — Section 82(1), 82(2)
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 120B, 406, 409, 420

Citation : (2009) 148 CompCas 62

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : C.L. Soni, for the Appellant; S.N. Soparkar and Vaibhavi Parikh, for the Respondent

Judgement

K.A. Puj, J.—The petitioner-company, namely, Satellite Television Asian Region Ltd., and Star India P. Ltd., have filed this petition under Sections 433 and 434 of the Companies Act, 1956, for the recovery of an amount of Rs. 19,91,78,218. being the charges for telecasting company''s commercial on Star channels along with interest as well as finance charges of Rs. 2,04,72,314 thereon till November 30, 2002, thus aggregating to Rs. 21,96,50,532.

2. The brief facts giving rise to the present petition are that the first petitioner is engaged in the business of telecasting entertainment and other programmes and also commercials on various satellite television channels. Star India P. Ltd., the second petitioner is an independent representative in India for procuring the advertisements to be broadcast on Star channels being run by the first petitioner. The second petitioner accordingly procures instructions for advertisements from advertisers for telecast on Star channels belonging to the first petitioner. On October 25, 2001 and December 24, 2001, the respondent-company entered into two agreements with the second petitioner for booking of commercial slots for telecasting its products on Star channels. As per the agreements, the respondent-

company agreed to pay the invoice amounts within 30 days and in case of delayed payments interest at the rate of 2 per cent, per month. In pursuance of the above agreements, the respondent-company''s commercials were telecast on Star channels on selected dates, times and during selected programmes from November, 2001 to June, 2002. After telecast of the advertisements, the second petitioner raised invoices from time to time for total amounts of Rs. 19,91,78,218.

3. In June 2002, the respondent-company issued post-dated cheques in favour of the second petitioner towards clearing of outstanding dues, out of which, the first five cheques were honoured, but the next two cheques were dishonoured and the next cheque drawn by the respondent-company in favour of the second petitioner for Rs. 1.10 crores was also dishonoured by the bankers of the respondent-company in June 2002.

4. After filing of a criminal complaint by the second petitioner against the respondent-company u/s 138 of the Negotiable Instruments Act, 1881, a director of the respondent-company had a meeting with the second petitioner on August 14, 2002, at which the respondent-company agreed to pay a sum of Rs. 19.87 crores in full and final settlement of its dues in respect of advertisements telecast on Star network up to June 2002. This was also recorded in the letter dated August 19, 2002 (annexure D to company petition). On September 2, 2002, the director of the respondent-company had another meeting with the second petitioner and while confirming that a sum of Rs. 19.87 crores was owed by the respondent-company to the second petitioner in respect of advertisements telecast up to June 30, 2002, the payment schedule was revised as under:

(a) Rs. 4 crores to be paid by December 31, 2002 ;

(b) Rs. 15 crores to be paid by 20 equal monthly instalments of Rs. 75 lakhs each commencing from September 2002 ; and

(c) The final instalment would be of Rs. 87 lakhs and odd amount.

5. This revised payment schedule as indicated at the meeting on September 2, 2002, was incorporated in the respondent-company''s letter dated September 3, 2002 (annexure E to the petition) to the second petitioner. However, on September 27, 2002 (annexure F to the petition), the respondent-company informed the second petitioner that due to financial problem as well as dull market we are unable to pay Rs. 75 lakhs in September month for which we will give you rupees one crore each (75 lakhs + 25 lakhs) for the months October, November and December, 2002. Towards the above liability, the respondent-company sent demand drafts aggregating to Rs. 25 lakhs along with the letter dated October 16, 2002 (annexure G to the petition). While sending these drafts, of Rs. 25 lakhs, the respondent-company stated in the said letter that, the balance of Rs. 75 lakhs will be cleared before the end of this month (October, 2002) as mentioned in the letter dated September 27, 2002.

6. As the respondent-company did not release the balance payment, the second petitioner sent a statutory notice dated October 18, 2002, to the respondent-company u/s 434 of the Companies Act, 1956, calling upon the respondent-company to pay Rs. 20.25 crores including Rs. 19.87 crores being the outstanding dues and Rs. 37 lakhs and odd amount being the interest accrued thereon up to September 30, 2002. The notice stated that in case of the respondent-company''s failure to pay the said amount within 21 days from the date of receipt of the notice, the second petitioner shall file a winding up petition against the respondent-company. The above notice was received by the respondent-company on October 21, 2002, but it neither complied with nor replied to the said notice. Therefore, the petitioners filed the winding up petition on November 20, 2002. This petition came up for preliminary hearing on November 25, 2002, before this Court and notice was issued making it returnable on December 17, 2002. On December 14, 2002, advocates of the petitioner issued a public notice in two Gujarati newspapers. Being aggrieved by the said public notice, the respondent-company filed Company Application No. 407 of 2002, before this Court contending that even before the hearing of the show-cause notice issued on the company petition, the petitioners published a notice of winding up of the respondent-company in the newspapers without directions of the company court. Therefore, besides harming reputation of the respondent-company it amounted to abuse of the process of the court requiring summary dismissal of the company petition with exemplary costs. The petitioners resisted the application by filing reply pointing out that Mr. Suresh Chand Agarwal, managing director of the respondent-company had a long meeting with the second petitioner on December 3, 2002, when the representatives of other advertising agencies and TV channels were also present. During the said meeting, it was stated by the said director that they were expecting loans from the banks and financial institutions against mortgage of the company''s assets. The petitioners, therefore, deemed it necessary to inform the members of the public about the claim of the petitioners against the respondent-company so that the future multiple legal proceedings can be avoided and, therefore, with a bona fide and genuine intention, the petitioners issued the above public notice dated December 14, 2002, in two Gujarati newspapers. It was submitted that the notice was informative and cautionary in nature, that the respondent-company had admitted its liability and thereafter failed to discharge the same and was also facing proceedings u/s 138 of the Negotiable Instruments Act and, therefore, there was no defamation of the respondent-company. It was also submitted that reference to the winding up petition was not a notice of winding up, as alleged.

7. After hearing learned Counsel for the parties, the learned company judge by judgment dated April 25, 2003 (Satellite Television Asian Region Limited. Vs. Kunvar Ajay Desiner Saree (P) Ltd., dismissed the winding up petition on the ground that the advertisement dated December 14, 2002, was an abuse of the process of the court. Being aggrieved by this order of the learned company judge

the petitioners filed O. J. Appeal No. 51 of 2003. This OJ Appeal was allowed by the Division Bench of this Court vide its order dated September 5, 2007 (Satellite Television Asian Region Ltd. v. Kunvar Ajay Designer Saree P. Ltd. [2008] 144 Comp Cas 293 (Guj)), and it was held in that order that it cannot be said on the basis of the material of the company petition that the petitioners and the petitioning creditors had any groundless or baseless claim or that the winding up petition was filed to coerce the company into admitting the groundless claim. In fact, the respondent-company had already admitted the claim of the petitioner and the petitioning creditors to the tune of Rs. 19.87 crores in their correspondence prior to the statutory notice. The Division Bench has, thereafter, restored the Company Petition No. 210 of 2002 to the file of the learned company judge and directed to proceed to hear and decide the said company petition at the admission stage on merits as expeditiously as possible after giving one opportunity to the respondent-company to file its affidavit-in-reply.

8. After this restoration, the company petition was placed for hearing on September 20, 2007, and this Court observed that without prejudice to the rights as may be available to the respondent-company, for carrying the matter before the higher forum the respondent-company may file the affidavit on merits, if it so chooses latest by October 17, 2007. On the contrary, it was stated before the court on that day that the respondent-company has challenged the order of the Division Bench passed in O. J. Appeal No. 51 of 2003 on September 5, 2007 (Satellite Television Asian Region Ltd. v. Kunvar Ajay Designer Saree P. Ltd. [2008] 144 Comp Cas 293 (Guj)), before the hon''ble Supreme Court in SLP (Civil) No. 3465 of 2007 and the said SLP was dismissed by the hon''ble Supreme Court.

9. In the above view of the matter and in absence of affidavit-in-reply filed by the respondent-company and since the debts of the petitioners have not been disputed, this Court has passed an order of admission of advertisement on April 4, 2008. The petitioner was directed to issue public advertisement in all the editions of Times of India and Navbharat Times and as far as State of Gujarat is concerned, all the editions of Gujarat Samachar and publication of advertisement in the Official Gazette is dispensed with.

10. Pursuant to the above order of admission and advertisement, the advertisement of the company petition, in the prescribed format was published by petitioner No. 2 in the following newspapers on the following dates:

Newspaper

Edition

Publication date

Times of India

Delhi

18th April, 2008

Times of India

Mumbai

18th April, 2008

Times of India

Kolkata

18th April, 2008

Times of India

Hyderabad

18th April, 2008

Times of India

Banglore, Mysore

18th April, 2008

Times of India

Ahmedabad, Surat

18th April, 2008

Times of India

Lucknow

18th April, 2008

Times of India

Pune

18th April, 2008

Times of India

Chandigarh

18th April, 2008

Times of India

Chennai

18th April, 2008

Times of India

Mangalore

18th April, 2008

Times of India

Nagpur

18th April, 2008

Navbharat Times

Delhi

18th April, 2008

Navbharat Times

Mumbai

18th April, 2008

Gujarat Samachar

Ahmedabad

18th April, 2008

Gujarat Samachar

Baroda

18th April, 2008

Gujarat Samachar

Bhavnagar

18th April, 2008

Gujarat Samachar

Surat

18th April, 2008

Gujarat Samachar

Rajkot

18th April, 2008

11. Pursuant to the aforesaid advertisement, one Mr. Ram Niwas Hukam Chand Gupta filed his objections dated April 28, 2008, wherein it is stated that Mr. Suresh Agarwal, Mrs. Anju Suresh Agarwal, Mr. Subhash Agarwal and Mr. J. P. Agarwal are owners of group companies, namely, (a) Kunwar Ajay Designer Sarees P. Ltd., (b) Kunwar Ajay Foods P. Ltd., (c) Poonam Industries Ltd., (d) Bharatiya Silk Trading Co., (e) Hindustan Silk Trading Co., etc. They were managing the day-to-day affairs of these companies through board of directors.

They committed serious financial irregularities of criminal nature'' misappropriating and diverting large funds for their personal interest resulting into these companies going out of business/ market at the cost of unsecured creditors of large amounts. The secured creditors (banks and financial institutions) took physical possession of the mortgaged properties and hypothecated moveable assets. For the deficit, they filed suits in the court for the remaining unsecured outstandings. The worst affected in this process were the unsecured creditors of huge amount. Most of them have taken legal recourse and some have filed criminal cases against the company and the owner directors.

12. It is further stated in the objection letter that the directors of these companies, after the Company Petition No. 210 of 2002 was filed before this Court, started disposing of the assets of the various companies, including, Kunwar Ajay Designer Sarees P. Ltd. In this process, Mr. Suresh Agarwal sold two trade marks, namely, Dandi Namak and Friendly Wash Detergent through agreement for assignment dated January 10, 2002, for a whopping consideration of Rs. 10.75 crores to one M/s. Pinky Advertising Co. P. Ltd., Mumbai. As per this agreement, Mr. Suresh Agarwal was indebted to this company to the extent of Rs. 10.75 crores and he assigned these trade marks in full satisfaction of his debts. This agreement for assignment of trade mark was at the cost of unsecured creditors, who did not get even a penny out of it. This money should have been available for equitable distribution amongst unsecured creditors.

13. It is further stated in the said objection letter that his business firms supplied sarees to this group companies including Poonam Industries Ltd., to the tune of Rs. 6,82,690 and Kunwar Ajay Designer Sarees P. Ltd., to the tune of Rs. 4,69,224. Due to non receipt of payment from them, he filed Criminal Complaint No. 31 of 2003 dated December 6, 2003, before the Judicial Magistrate, First Class, Surat, who passed an order dated December 9, 2003, directing Salabatpura police station for investigation and submission of report. The Salabatpura police station submitted its report No. 2492 of 2004 dated August 10, 2004, to the Judicial Magistrate, First Class, Surat, mentioning therein that an offence has been registered being first Crime Register No. 70 of 2004 under Sections 406, 409, 420 and 120B of the IPC on April 1, 2004. The investigation report mentions that these directors were involved in a cheating to the tune of Rs. 1.80 crores. Warrants were obtained against all the four accused. All the said four accused are absconding. The Judicial Magistrate, First Class, Surat, therefore, directed in his order dated September 29, 2004, that a public notice under Sub-sections (1) and (2) of Section 82 of the Criminal Procedure Code be published in the local newspaper and the accused be directed to remain present before him on November 23, 2004. From this, it is clear that the directors of the company are absconding till date. Under the apprehension that if the company is ordered to be wound up its directors would be absolved from their criminal liability and hence the objection was raised against the winding up of the company. This observation is, however, unfounded as the winding up of the company would not absolve the directors from their criminal liability.

14. Except the above letter no one has come forward to oppose the winding up petition. The facts are so glaring that it hardly desists the court from passing the winding up order. There is no dispute about the outstanding liability of the company. The respondent-company is not only indebted to the petitioner but there are several other creditors secured as well as unsecured. The directors of the respondent-company are absconding. Even they have not come forward to file an affidavit in reply to the present petition. Several criminal complaints are also pending against the directors of the respondent-company. Instances were cited showing that during the pendency of the petition assets of the company were sold out. If the company is allowed to continue nothing remains thereafter and hence it is a fit case to pass the winding up order. Mr. S.N. Soparkar, learned senior counsel appearing with Ms. Vaibhavi Parikh, for the respondent-company could not convince the court that the winding up order should not be passed at this stage. There is nothing on record to suggest that the company is in a position to discharge its financial liabilities.

15. Considering the overall facts and circumstances of the case and celebrated principles of law applicable to the winding up proceedings, the court hereby holds that the respondent-company be wound up forthwith and the official liquidator attached to this Court is appointed as the liquidator of the company. He is hereby directed to take charge of all the assets and properties of the company in liquidation after giving intimation to the directors of the company as well as to the secured creditors, before taking possession of the assets of the company in liquidation or at the time of taking possession of the properties of the company in liquidation. The official liquidator shall take the inventory of the assets, if any, with the help of the approved valuer and apply his seal over the properties of the company in liquidation. He is further directed to issue notice to the directors u/s 454 of the Companies Act, 1956, for filing statement of affairs, immediately after the statutory period is over. The official liquidator is further directed to file a detailed exhaustive compliance report before this Court within three months from today.

16. Subject to the aforesaid direction and observation this petition is accordingly disposed of.