

(1977) 06 MAD CK 0021

In the Madras High Court

Case No : Original Side Appeal No. 38 of 1975 in C.P. No. 45 of 1972

Shadiram and Sons

APPELLANT

Vs

Southern Aviation Private Ltd.

RESPONDENT

Date of Decision : 15-06-1977

Acts Referred:

Companies Act, 1956 — Section 433

Citation : (1978) 48 CompCas 570 : (1978) 91 LW 276

Hon'ble Judges : Suryamurthy, J; Ramaprasada Rao, J

Bench : Division Bench

Advocate : C. Harikrishnan, for the Appellant; T. Raghavan, for the Respondent

Final Decision : Dismissed

Judgement

Ramaprasada Rao, J.—This appeal is directed against the judgment and decree of Sethuraman J., who refused to wind up a company which was sought to be wound up on an application filed by the appellant as petitioning creditor on the only ground that the respondent-company is unable to pay its debts. The appellant-firm is a partnership. It seeks the winding up of a private limited company. The promoters of the company were S. K. Somani and his wife, Hemalatha. His two brothers, N. K. Somani and M. K. Somani, are the directors of the respondent-company. They vacated at one particular point of time since they did not have the requisite qualifications to hold the office. The case of the petitioning creditor as disclosed in the petition is as follows: In or about January, 1971, S. K. Somani, one of the promoters of the respondent-company started a business under the name and style of "Shadiram and Sons" as guardian of his minor son. This firm at some point of time, due to certain civil proceedings between S. K. Somani and his brothers, was converted into a partnership. Accordingly, a partnership was formed with the wives of the two brothers and the minor son of S. K. Somani who was admitted to the benefits of the partnership. This partnership came into effect on April 1, 1971. Even on a fair appreciation of the constitution of the partnership firm and the private limited company, it is

fairly clear that one is telescopicable into the other and some of the members of the family or their wives were interested either in the partnership or in the private limited company. There were transactions between the private limited company and the partnership firm. It is claimed that a sum of Rs. 4,47,511.58 was payable by the company together with interest at 12 per cent, per annum and a statutory demand was made as against the company for repayment of the same and as the reply thereto by the company was not satisfactory, the appellant came up with an application u/s 433 of the Companies Act for winding up of the company u/s 433(e) of the Act. The debt is not in dispute by the company but their case is one of discharge. They would say (and this was their case even in the reply to the statutory notice as is seen from exhibit R-16) that a sum of Rs. 1,50,000 was paid by the company to one Hanuman Steel Traders for the supply of M. S. Plates and B. P. Sheets to the partnership firm (petitioning creditor); a further sum of Rs. 46,000 was paid to the Calcutta branch of the petitioner-firm towards their dealings which that branch had with them; and by payment of a sum of Rs. 2,51,511.28 to Hemalatha Somani, the wife of one of the promoters of the company in adjustment of certain inter se transactions to which we shall presently refer, no amount as claimed was due. The petition for winding up was thus opposed mainly on the ground that the debt was no longer subsisting as according to the company it has been discharged by payment to the creditors of the partnership or to those who are interested in getting monies from the partnership and thus there is a dispute which is obviously bona fide as regards the existence of the debt itself. The appellant-firm did not let in any evidence but chose to cross-examine S. K. Somani who was examined on behalf of the company. The main case of the petitioning creditor is that the plea of discharge is a myth and a falsehood. The learned judge who went into the question found that the evidence did not make out prima facie the substratum of their objections, and on a fair appreciation of the oral and documentary evidence let in, it could not be said that there was no bona fide dispute as regards the debt claimed by the petitioning creditor and that in those circumstances the winding up of the company cannot be ordered as in his judicial discretion he felt it inequitable to do so. The question is whether the plea of discharge which has been raised by the respondent-company, the sum and substance of which had been accepted by the learned trial judge, is acceptable.

2. One of the circumstances in which a company may be wound up by the court as provided in Section 433 of the Companies Act is that the company may be wound up by the court if the company is unable to pay its debts. Here also a judicial discretion is vested in the company court while effacing corporate existence of a company. The word " debt " used in Sub-clause (e) has to be understood in a practical and pragmatic sense. As the assistance of the company court cannot be sought for realisation of the debts due to a creditor or for its enforcement under the guise of a petition for winding up, caution should be observed in a case where the main objection to the petition to wind up is that the debt is disputed. A given case might present a slight complication if the debt is

admitted, but discharge is pleaded. Undoubtedly, in a case where the allegation is that the debtor-company is indebted and is unable to pay its debts, the initial burden is on the petitioning creditor who alleges the existence and reality of such a debt. But when the debtor-company admits the debt and raises a plea of discharge either in part or in whole of the debt claimed, then the burden of proof normally shifts to the debtor-company to prove such a discharge at least to the extent pleaded so as to satisfy the court that the debt as claimed is not due and that, therefore, there is a bona fide dispute by the company regarding the existence of such a debt. In such circumstances it is for the company court to discover through a reasonable lens of investigation whether the plea of discharge is totally unfounded and is utterly baseless and is only a ruse to abuse the winding-up provisions provided for by the statute or whether there is any substratum of truth in it. If on such an enquiry it comes to a reasonable conclusion not by astute reasoning but by a prima facie examination of the evidence and the records produced that the discharge pleaded can be true, then it obviously follows that there is a bona fide dispute regarding the debt as raised by the company. The guiding principles have been well laid down by decided cases and it appears to us that, if, in a particular case, the evidence is such that there is prima facie proof on which the defence of discharge is available, and a reasonable possibility of their success is then in a properly instituted action by the petitioning creditor for recovery of such a disputed debt and, above all, if the plea of discharge is not without any substance but raised in good faith, then it is by now well settled that the court will not wind up that company. In fact, the Supreme Court in *Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami* [1965] 35 Comp Cas 456 (sic) observed as follows :

" If a petitioning creditor in such circumstances is encouraged, then the petition filed by him would be an ostensible one seeking for a winding-up order, but really to exercise pressure and therefore ought to be dismissed, since it may be stigmatised as a scandalous abuse of the process of the court."

3. We shall now examine the three heads under which the plea of discharge is raised. The first item is a sum of Rs. 1,50,000. The company produced a receipt dated May 5, 1971, said to have been executed by a person employed in Hanuman Steel Traders. There is also a reference in this receipt that the payment was towards the cost of iron materials supplied by Hanuman Steel Traders to the appellant-firm. No doubt this receipt was challenged. The appellant did not take the elementary precaution of taking out a subpoena to Hanuman Steel Traders to disprove that he had no transactions with him, nor did he correspond with the said trader to satisfy at least at the threshold that he had no connections with Hanuman Steel Traders at all. Still he would challenge the solemn testimony of one of the directors of the company who went into the box to prove the receipt supported by certain entries in the account books. The attack is made on two grounds. The executant of the receipt has not been proved to be one authorised by Hanuman Steel Traders to receive the amount and that his books of account did not contain any entry regarding the supply of materials by Hanuman Steel

Traders to the appellant-firm. It is in this context we would refer to one particular suggestion made by the counsel for the company when his client was in the witness box. The question was: "What was the nature of the transactions between the firm and the company?" The answer was: "The money required by the firm will be taken from the company and if the company required funds, they will take from the firm's funds. They were more or less current account. Regular transactions were there up-to-date and money was transferred from one to another." This particular suggestion in chief examination was not even adverted to in cross-examination, and no question was put to the witness to show that such was not the practice and that there was no inter-mixing for commercial purpose of the funds of the partnership with that of the limited company. This significant answer by one of the directors of the company establishes that this private limited company which sprung from the partnership-firm or was formed with the common object of benefiting the members of the family, though in the eye of law are two constituent elements yet in practice they were treated as one which enabled the company to have recourse to the money of the partnership and vice versa. But we are unable to agree with the learned counsel for the appellant that because there is no entry in the books of account of the appellant-firm regarding the supply made by Hanuman Steel Traders to them the payment said to have been made by the limited company to the Hanuman Steel Traders cannot be taken into account at all for any purpose. Rightly, therefore, the learned judge observed that it is not disputed that the appellant-firm has been dealing in iron and steel materials and they could have shown by producing their accounts whether the materials were supplied or not. We add that they could have also established by summoning Hanuman Steel Traders to produce their accounts to prove that they had no such commercial dealings with them at all. We, therefore, find that there is prima facie evidence that the company did pay a sum of Rs. 1,50,000 on behalf of the appellant-firm to Hanuman Steel Traders.

4. The next item is a sum of Rs. 46,000 which amount is said to have been sent by the limited company to the Calcutta branch of the appellant-firm. Exhibit R-8 is the letter which supports the company's case. The branch office of the appellant-firm at Calcutta writes to N. K. Somani of Madras as follows:

" We thank you for your letter No. SS/MDS/SK/68 4735 of 24th June, 1971. We await to hear from you regarding Calcutta office.

Torsteel 6mm/10mm/12mm are available in the market at Rs. 1,600 per tonne, ex-godown, Calcutta. Materials have to be lifted by making advance payment. At present there is no commission agent in our view who is interested to take delivery of the materials and despatch it as per our requirements. Therefore, we have to arrange it ourselves. This can be done only if you leave a fixed amount of Rs. 40,000 or Rs. 50,000 at our disposal at Calcutta. We have noted your suggestion regarding sending samples and we are acting on it accordingly.

Sd. M.K. Somani."

5. Here they ask for a sum of Rs. 40,000 or, Rs. 50,000 at their disposal at Calcutta for certain business purposes. The very fact that the branch office of the appellant-firm at Calcutta was corresponding with N. K. Somani, personally who had nothing to do with the appellant-firm or its constituents but who is a director of the respondent-company, throws abundant light upon the fact that the partnership-firm and the incorporate company are reflections of one or the other. Therefore, there is nothing strange in accepting the version of the director of the company sought to be liquidated that he paid a sum of Rs. 46,000 in answer to the call made by the branch office of the appellant-firm from Calcutta.

6. The third item relates to the adjustment made and it was to the extent of Rs. 2,51,511.28. This amount was due to Hemalatha Somani, the wife of R.W. 1 examined in this case and this was admittedly shown as a credit in her favour in the accounts of the appellant-firm. There were certain internal bickerings between the parties in or about November or December, 1971. R. W. 1 who was examined on behalf of the company says as follows :

" Q. You say that your wife wanted money from Shadiram & Sons ? A. Credit balance was to be transferred to Southern Aviation. Q. Did you make any debit entry on behalf of your wife in the account books of Shadiram & Sons ?

A. The transfer of this entry would refer to Rs. 2,50,000 in journal. It has been done in the journal and not in the cash book.

Q. You did not take care of making any entry in the ledger folio of your wife, Hemalatha Somani, in the books of Shadiram & Sons. What do you say ?

A. The journal entries are done not on the same date; but after few days the journal entries are done.

Q. So you did not insist upon an entry. What do you say ?

A. It was done in November. In December the books were removed from the office."

7. These answers were brought about in cross-examination. The debt due by the appellant-firm to Hemalatha Somani is not in dispute. The company pleads adjustment by transfer. This would mean that the claim made by the petitioning-creditor in the statutory notice would automatically be reduced by a sum of Rs. 2,50,000 and odd and it was adjusted by the company towards the debts due by the partnership-firm to Hemalatha Somani. It was this which was considered by the learned judge and he was right in having accepted the prima facie case of adjustment of the credit in favour of Hemalatha Somani by the company as it was done at the instance of Hemalatha Somani herself. That Hemalatha Somani did ask her husband to make such an adjustment is also clear from exhibit R-10 dated November 26, 1971, which runs as follows :

" A sum of Rs. 2,95,000 approximately is standing to my credit with you. I also understand that you have a credit balance with Messrs. Southern Aviation (P.)

Ltd., 68, Sembudoss Street, Madras-1. As I am a promoter-director of the said company, I am agreeable to your transferring to my account with you the debit balance of the company with you in consideration of the company crediting my account with them with such amounts.

Yours faithfully, Sd. Mrs. Hemalatha Somani."

8. She expressed her willingness for transfer of the credit standing in the partnership account to the account of the company as she was a promoter of the company herself. This document is not disputed by the parties before us. In fact, the husband of Hemalatha Somani proved it. The document was marked by consent. All these factors taken together lead to the conclusion that the debt as claimed by the appellant-firm has been rightly disputed bona fide by the company.

9. We have already referred to the important ingredients which ought to be pleaded and proved in a company petition for winding up of an incorporated company on the ground that it is unable to pay its debts. The existence of the debt alone may not be sufficient as in the instant case the defence was one of discharge. If a plea of discharge is set up, as already stated by us, and if it is prima facie established, it implies that the debt as claimed is disputed. The jurisdiction to wind up a company incorporated under the Companies Act is discretionary and all the circumstances have to be considered by the company court before it exercises its judicial discretion to efface the existence of a corporate body. We are not satisfied that the debt as claimed by the petitioning creditor and on the foot of which this petition for winding up was filed u/s 433(e) of the Companies Act is sustainable. This is because there is a bona fide dispute about the existence of the debt and its quantum. The learned judge rightly dismissed the application for winding up. The appeal fails and is dismissed. No costs.