

(2002) 11 DEL CK 0005
In the Delhi High Court
Case No : C.P. No. 226 of 1994

Shadow Communications

APPELLANT

Vs

Prince Gutka Ltd.

RESPONDENT

Date of Decision : 20-11-2002

Acts Referred:

Companies Act, 1956 — Section 434, 439
Partnership Act, 1932 — Section 69
Registration Act, 1908 — Section 69(3)

Citation : (2003) 116 CompCas 536 : (2003) 2 CompLJ 262 : (2003) 41 SCL 277

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : L.K. Singh, for the Appellant; Rajeev Sakhdar and Sanjeev Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—The first question to be answered in this Petition is whether the relief of winding up is available to an un-registered partnership. Counsel for the Petitioner relies on Kalra Iron Store v. Faridabad Fabricators(P) Ltd. (1991) 1 Comp LJ 177 in which Justice Y.K. Sabharwal, as his Lordship then was, held as follows:--

"9. Reverting to the second objection, it has to be borne in mind that Section 69 of Indian Partnership Act only contains a prohibition or an unregistered firm filing a suit to enforce a right arising from a contract or conferred by the said Act. The firm has to be registered and the person suing has to be a registered partner. The suit to attract Section 69 has to be the one to enforce a right arising from a contract or conferred by the Act. Mr. Khanna has not been able to cite any judgment holding that Section 69 would be applicable to winding up proceedings under the Companies Act. In the winding-up petition, primarily, the Court is required to adjudicate whether the respondent is commercially solvent or insolvent and is not to enforce any right arising from a contract. The proceedings

are not a "suit". No decree like a suit is passed. The petitioner in this case, is only exercising statutory right under the Companies Act. The right is not arising from a contract between the petitioner and the company. In my view, the provisions of Section 69 have no applicability to the proceedings under the Companies Act. I am fortified in my view by a Division Bench decision of the Madras High Court in Kottamasu Sreeman Narayanamurthy and Anr. v. Chakka Arjanadu, AIR 1939 Mad 145, holding--

A petition for the adjudication of a debtor as insolvent is not a proceeding to enforce a right arising from a contract. The right which the credit who files the insolvency petition against his debtor is seeking to exercise is the right a creditor who finds his debtor in insolvent circumstances to have the assets of the debtor administered in insolvency and distributed for benefit of the creditors as a body. this is a right which is conferred upon the creditors by statute and is not a right arising out a particular contract of loan between a petitioner creditor and a debtor. The mere fact that the petitioning creditors constitute a firm and the debt is due to the firm in which the petitioner are partners and they cannot file a suit to recover the amount due to them unless the firm is registered, does not deprive the petitioners of their right to file a petition in insolvency."

2. Counsel for the Respondent draws attention to the decision of a Single Judge of the Hon"ble High Court of Bombay in Padma Alloy Castings(P) Ltd. and Dabholkar Enterprises v. Padma Alloy Castings(P) Ltd. (1195) 2 Comp 131 in which the following contrary view has been taken:

"Remedy to recover the dues from third party by way of a suit is barred in view of Section 69 of the Partnership Act and Therefore, when the remedy of the petitioners is barred for recovery of the said amount due from the respondent company, there does not exist the debt which is recoverable by the petitioners, and Therefore, the presumption which would arise as a result of the notice u/s 434 of the Companies Act would stand rebutted."

3. Justice I.J. Shah had discussed and distinguished Kottamasu Sreeman Narayanamurthy's case (Supra), a paragraph of which had been extracted by Justice Y.K. Sabharwal. It would be of significance to note that while adopting his view, Justice Sabharwal had noted that there was no precedent on this legal nodus.

4. Mr. Sakhdar, learned counsel for the respondent has also relied on Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., . The Hon"ble Supreme Court was called upon to interpret Section 69 of the Partnership Act and, in particular, to the words "a claim of set off or other proceedings to enforce a right arising from the contract" occurring in Sub-section 3 of that Section. The view favored by the Apex Court was that the phrase "other proceedings" should be given an untrammelled interpretation, even after applying the principle of statutory interpretation of ejusdem generis.

5. It is no longer rest integra that the relief of winding-up is not intended to be

an alternate mode of recovery of dues. The Restatement of the law is contained in *Pradeshia Industrial and Investment Corporation of Uttar Pradesh v. North India Petro-Chemical Ltd. and Anr.* (1994) 2 Comp LJ 50 in which this has become abundantly and undeniably clear. The question, however, is whether the winding-up orders can nonetheless be passed in cases where legal objections, deracinating the Courts jurisdiction to adjudicate upon dispute, have been shown to exist. If the words "other proceedings" in Section 69(3) of the Registration Act are not circumscribed or tempered by the preceding words "a claim of set off", the view of this Court in *Kalra Iron Stores's* case (*Supra*) falls in the penumbra, because of the subsequent decision of the High Court of Bombay.

6. Apart from the undebatable principle that winding-up proceedings are not surrogate for the ordinary civil proceedings, it is also a well entrenched tenant of Company law jurisprudence that if a bonafide defense has been disclosed, the Court ought not to proceed under Sections 434 & 439 of the Companies Act. In this regard, the first question which must be answered is the importance to be attributed to the neglect or failure to respond to the statutory notice. This question has already received the attention of this Court in *Vimco Ltd. v. Sidvink Properties (P) Ltd.* 1996 86 Comp Case 610 , *G.K.W. Ltd. Vs. Shriram Bearings Ltd.,* and *Mayar Traders Ltd. v. Akhil Services Ltd.* 52 (1993) DLT 577 and *Indo American Electricals Ltd. Vs. Capital Meters Pvt. Ltd.,* . In the last judgment, my learned brother had been satisfied with a defense which had been disclosed, not in reply to the statutory notice, but by way of reply to the Petition itself. I have favored the view that the neglect to respond to the statutory notice is per se not fatal. Quite often the defense can be gathered from other correspondence exchanged between the parties. The implication and consequences of such inaction have been considered in some detail by me in CW 147/99 entitled *Resham Singh & Co. P. Ltd. v. Daewoo Motors India Ltd.* in these words:

2. On behalf of the Petitioner the following cases have been relied upon.

1. *G.K.W. Ltd. Vs. Shriram Bearings Ltd.,*
2. 52 (1993) DLT 577. *Mayar Traders Ltd. v. Akhil Services Ltd.*
3. *Rishi Pal Gupta Vs. S.J. Knitting and Finishing Mills Pvt. Ltd.,*
4. 1982 (52) Comp Case 479. *Westinghouse Saxby Farmer Ltd.*
5. 1978 (48) Comp Case 378. (Bombay) *United Western Bank Ltd.,*
6. *M/s. Goodwill India Ltd. Vs. M/s. P.S.B. Paper Mills Pvt. Ltd.,*

3. I shall first deal with the consequences of the Respondent's failure to send a Rely to the Statutory Notice. The reliance of Mr. Valmiki Mehta, learned Senior Advocate appearing for the Petitioner on the above-mentioned decisions of my Learned Sister Usha Mehra, J. is somewhat exaggerated. The decisions do not inexorably lead to the conclusion that Winding-up orders must invariably be passed where no response to a Statutory Notice has been made. From my

understanding of the judgment my Learned Sister had taken the failure to reply to the notice as an important factor in determining whether a bona fide defense had been put forward. In the circumstances of both the cases, she preferred to view the defense as an afterthought and as being bereft bona fide. In CP 220/2001 entitled H.B. Stock Holdings Ltd. v. Associated Infotech Ltd., I have favored the opinion that where no response had been made to the statutory notice the Respondent Company runs the risk of a winding-up petition being admitted for hearing at the threshold stage itself. Normally, the Company Judge would consider it prudent in the first instance to issue notice to the Respondent so that its defense to the possible far-reaching and fatal winding-up orders can be considered. The admission of the Petition at its first hearing is possible because, by virtue of Section 434 of the Companies Act, a presumption of the indebtedness can be legitimately drawn by the Court where no Reply to the statutory notice is forthcoming. The risk of the admission of the Petition, as well as the appointment of a provisional Liquidator is thus broodingly and ominously present in all those cases where the Respondent Company neglects to send any Reply to the winding-up notice. But this is as far as the danger extends. My attention has been justifiably drawn to the decision of the Single Judge of this Court in Vimco Ltd. v. Sidvink Properties (P) Ltd. 1996 86 Comp Case 610, where it has been held by P.K. Bahri, J. that where a bona fide dispute had been shown to the Court, the question of applying the deeming provision should not automatically arise. I continue to be in respectful agreement with this view. Applying this ratio to the facts of the present case, without in any manner diluting or undermining the significance of the failure of the Respondent Company to respond to the statutory notice, this factor will be duly kept in perspective when the conspectus of facts is considered.

7. The facts, succinctly stated, are that the Petitioner is engaged in the business of releasing advertisements, inter alia, animated and commercial, in various motion pictures, on behalf of principals such as the Respondent Company. The mechanics of the arrangement is that the Petitioner receives commission of 15% against the Invoice value of the insertions. In this transaction, the Petitioner may have already paid 85% of the Invoice value to the owners of the motion picture, towards the costs of the insertion. It has been averred in the Petition before me that this is the position that exists. Learned counsel for the Petitioner has vehemently stressed the fact that the Petitioner has already paid out 85% of the Invoice and is out of pocket to this extent. It is his submission that it would be commercially imprudent for the Petitioner to have released these insertions unless it was specifically authorised or instructed to do so. In civil proceedings, the Judge must decide in accordance with preponderance of possibility or probabilities. Consequences of a winding-up order, however, are almost draconian inasmuch as all it sounds the death-knell of the Company and brings about its civil death. For this reason alone, it has been repeatedly held that if controverted and controversial facts have been pleaded on the either side and have prima facie manifested themselves, the Company Judge should relegate the

parties to take recourse to the ordinary civil proceedings for recovery of amounts claimed to be outstanding. In the summary proceedings, which winding-up petitions essentially partake of, such questions cannot or ought not be decided.

8. The defense that is put forward is that no authorisation or instructions had been given by the Respondent to the Petitioner for carrying out insertions other than the animated ones. This controversy has not been raised for the first time in reply to the Company Petition. Perusal of the letter dated 15th July, 1992 will disclose that this objection had been taken on that date itself. Learned counsel for the Petitioner has emphasised the fact that payments have also been made towards the commercial insertions. I find the Explanation given thereto to be satisfactory viz. that these payments were released but there was a clear caution that in future, unless there was a specific authorisation, payments would not be made. Particularly telling is an admission available in the letter dated 26th July, 1994 wherein it has been stated that "thereafter as your verbal instructions my client carried out the advertisement of your product from time to time in the films released on video". It would be extremely dangerous for a Company Judge to issue winding-up orders in circumstances where a verbal contract is pleaded even though a written contract may be in existence. These instructions would be even contrary to the prescription contained in the Indian Evidence Act. My attention has also been drawn to the Petitioner's statement that it proceeded to carry out insertions even though the Respondent had refused to endorse the subject invoices. This position is palpably clear from paragraph 5 of the Rejoinder to the Winding-up Petition, where the Petitioner has stated that "there is no endorsement of acceptance on the invoices annexed at pages 59 to 75 of the company petition marked an Annexure-A6 because the respondent refused to endorse the acceptance on the invoice/bill but at the same time instructed the petitioner to continue with the release of the advertisements in the films". The Petitioner would have been wise, at least in hind-sight, not to have brought upon itself dues and liability of 85% of the Invoice value in the absence of clear-cut instructions.

9. In this factual matrix, I do not consider it expedient to proceed any further with this Petition.

10. Since the Petition is disposed of on merits, I do not find it necessary to refer to a larger Bench the question of whether a winding-up Petition can be filed by an unregistered partnership.

11. The Petition stands dismissed.