

(1996) 06 CAL CK 0025
In the Calcutta High Court
Case No : Company Petition No. 257 of 1994

S.M. Enterprises Pvt. Ltd.	Vs	APPELLANT
Sanpaolo Hambro Nicco Finance Ltd.		RESPONDENT

Date of Decision : 06-06-1996

Acts Referred:

Arbitration Act, 1940 — Section 34
Companies Act, 1956 — Section 433, 434, 439

Citation : (1997) 2 CALLT 60 : (1999) 96 CompCas 691

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shyamal Kumar Sen, J.—There are two applications, one is an application for winding up for non-payment and the other is an application for stay u/s 34 of the Arbitration Act, 1940.

2. The main question that arises for determination in the application is whether Section 34 of the Arbitration Act is applicable in winding up proceedings and whether stay should be granted in the facts and circumstances of the instant case.

3. The facts on record, inter alia, are that on the terms and conditions more fully and particularly stated in an agreement of lease dated October 28, 1992, the petitioner granted a lease to the company of 864 C. T. C. Segment Rings (hereinafter referred to as the "said equipment").

4. The company acknowledged its liability to the petitioner and from time to time made payment of a sum of Rs. 5,46,545.42 to the petitioner.

5. In spite of requests the company failed and neglected to make payment of the balance lease rentals. As on the date of institution of the winding up petition a sum of Rs. 5,46,545.42 was due and payable by the company to the petitioner.

6. In acknowledgment and part payment of its liability to the petitioner, the said company issued diverse cheques to the petitioner which upon presentation were however, dishonoured for non-payment.

7. The winding up petition was filed in July, 1994. On July 28, 1994, Baboo lall Jain J. gave directions for exchange of affidavits. The company from time to time obtained extension of time to file its affidavit-in-opposition and ultimately filed such affidavit-in-opposition on November 25, 1994.

8. The fact that the amount claimed is due and payable has not been disputed in the affidavit-in-opposition filed on behalf of the company in the winding up petition except that it was contended by the company that the Union Bank of India had filed a suit against it and a receiver was appointed in respect of a tea estate purchased by the company. Due to the appointment of the said receiver the lease rentals could not be paid by the company.

9. On or about March 29, 1995, that is almost four months after filing its affidavit-in-opposition to the winding up petition, the company made an application u/s 34 of the Arbitration Act, 1940, seeking to permanently stay the said winding up petition.

10. In the said application u/s 34 of the Arbitration Act, 1940, the petitioner therein, that is the company, failed and neglected to enumerate the disputes which are purportedly referable to arbitration in terms of the arbitration clause, contained in the agreement of lease.

11. No particulars relating to the alleged disputes have, however, been specified in the application u/s 34.

12. It has been submitted on behalf of the petitioning creditor that a winding up petition cannot be stayed merely because the debts mentioned in the petition arose out of a transaction contract which provided for arbitration. The right to apply for winding up is the creature of statute and not of contract.

13. In support of his contention the learned advocate for the petitioning creditor has relied upon the judgment and decision in the case of Hind Mercantile Corporation Pvt. Ltd. v. J. H. Rayner and Co. Ltd. [1971] 41 Comp Cas 548 (Mad) and Trilok Chand Jain v. Swastika Strips (P.) Ltd. [1991] 70 Comp Cas 197 (P & H).

14. It has further been submitted on behalf of the petitioning creditor that the discretion of the court to stay the proceeding must be used in the totality of the facts and circumstances of each case. A pre-determined formula cannot be laid down in matters of use of judicial discretion. The conduct of the parties, the surrounding circumstances of the case, the motive apparently behind the stay application will all have to be looked into along with other relevant factors. Technically, there may be an arbitral dispute arising on mere non-payment. The court's discretion should not be used in favour of a debtor who does not pay.

15. The learned advocate in this connection has relied upon the judgment and decision in *Gobind Industrial Gases Ltd. v. Bindyswari Gas Agency* [1995] 1 CHN 356. It has further been submitted that since there is no dispute involved with regard to the claim of the petitioning creditor, there is no question of appointment of arbitrator and referring the matter to arbitration and to stay the proceeding.

16. The learned advocate has relied upon the judgment and decision in *Shree Gouri Shankar jute Mills Ltd., In re* [1982] 2 Comp L] 607 (Cal). Apart from the fact that there is no dispute that the learned advocate has argued that it must be shown that the party who has invoked the arbitration clause must be ready and willing to proceed with the arbitration and must make the application for stay of proceeding at the earliest stage. The learned advocate has relied upon the judgment and decision in *State of Punjab Vs. Geeta Iron and Brass Works Ltd.*,

17. It has further been submitted that the company has not shown its readiness and willingness to proceed with the arbitration. In fact, the application u/s 34 was made almost nine months after the institution of the winding up proceeding.

18. To appreciate the contentions of the parties it is necessary to consider the scope of Section 34 of the Arbitration Act, 1940. Section 34 provides as follows :

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps, in the proceedings apply to the judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

19. Considering the provisions contained in Section 34, it appears to me that it is necessary to find out if the claim in the winding up petition is covered by the arbitration clause between the parties. In other words, it is to be ascertained if the claim or subject-matter in the winding up petition is a matter agreed to be referred to arbitration. The arbitration clause is also set out hereinbelow :

"All disputes, differences, claims and questions, whatsoever, which shall arise either during the subsistence of this agreement or afterwards between the parties and/or their respective representatives touching these presents or any clause or thing herein contained or otherwise in any way relating to or arising from these presents shall be referred to the arbitration of two arbitrators, one to be appointed by each party to the dispute and such arbitration shall be in accordance with and subject to the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof for the time being in force. All

disputes are subject to Calcutta High Court jurisdiction."

20. In the case of *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*, the Supreme Court made it clear that the legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. It has, however, been observed that when a suit is commenced as to a matter which lies outside the submission, the court has to refuse to stay the suit. In that decision the Supreme Court clarified the meaning of the expression "matter agreed to be referred". The arbitration clause relating to an agreement to take over the electric company was in the following terms, namely, "any dispute or difference . . . over valuation as arrived at by the Government and that arrived at by the company . . . shall be referred to arbitration". The Supreme Court held that the arbitration clause conferred jurisdiction on the arbitrator to decide disputes arising on the valuation of the undertaking and not all disputes arising out of the agreement or in respect of it. Therefore, the question relating to the breach of the contract or its rescission is beyond the scope of the arbitration clause. The Supreme Court have observed that the arbitration clause is a written submission agreed to by the parties in a contract and like every written submission to arbitration must be considered according to its language and in the light of the circumstances in which it is made, when deciding whether the dispute in question is covered thereby. Where the arbitration agreement is broad and comprehensive and embraces any dispute between the parties in respect of the agreement or in respect of any provision in the agreement or in respect of anything arising out of it and any of the parties seeks to avoid the contract, the dispute is referable to arbitration . if the avoidance of the contract arises out of the terms of the contract itself. But, where the party seeks to avoid the contract for reasons de hors it, the arbitration clause cannot be resorted to as it perishes along with other terms of the contract. Where, however, the arbitration clause is not so comprehensive and is not drafted in such broad language, that proposition does not hold good.

21. For the purpose of consideration of the questions involved, in my view, it is also necessary to consider the true scope and nature of the winding up petition. The winding up petition is a statutory right given to a creditor of a company. The Supreme Court in *Anderson Wright Ltd. Vs. Moran and Company*, considered the nature of a winding up proceeding.

22. In the instant case it appears that there is practically no dispute that the company is liable to make payment and the only contention of the company in its affidavit-in-opposition as already noted is that it could not make payment since Union Bank of India had filed a suit against it and a receiver was appointed in respect of a tea estate purchased by the company and due to the appointment of the said receiver, lease rent could not be paid by the company.

23. The conditions that must exist before an order for stay of proceedings can be made u/s 34 of the Arbitration Act are that there must be a subsisting and

binding arbitration agreement capable of being enforced between the parties, in order that an arbitration clause can be enforced, there must also exist a dispute. In the absence of a dispute between the parties to the arbitration agreement there can be no reference. In this connection the judgment and decision in Union of India (UOI) Vs. Birla Cotton Spinning and Weaving Mills Ltd., may be taken note of. In the aforesaid decision it was, inter alia, held by the Supreme Court in paragraphs 3 and 4 as follows :

"The arbitration clause is wide and includes not only disputes arising under the covenants of the contract but also to disputes under conditions general or special or in connection with the contract. But before an order for stay of a proceeding may be made u/s 34 of the Arbitration Act, the following conditions must co-exist :

(i) there must be a subsisting and binding arbitration agreement capable of being enforced between the parties ;

(ii) the subject-matter in dispute in the proceeding sought to be stayed must be within the scope of the arbitration agreement ; and

(iii) the petition must be made to the judicial authority by a party to the arbitration agreement or some person claiming under him at the earliest stage of the proceeding, i.e., before the filing of the written statement or taking any other step in the proceeding. The judicial authority may, if these conditions exist, grant stay, if it is satisfied that the party applying is and has also been at all material times before the proceedings were commenced ready and willing to do all things necessary for the proper conduct of the arbitration and there is no sufficient reason for not referring the matter in accordance with the arbitration agreement.

The evidence recorded by the trial court discloses that there was no dispute between the company and the Union arising under the contract on which the suit was filed, the Union accepted liability to pay the amount claimed by the company in the suit. The Union still declined to pay the amount asserting that an amount was due from the company to the Union under a distinct contract. This amount was not sought to be set off under any term of the contract under which the company made the claim. The dispute raised by the Union was, therefore, not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the company under another contract which it may be noted had already been referred to arbitration. The Union had no defence to the action filed by the company ; it was not contended that the amount of Rs. 10,625 was not due to the company under the contract relied upon by the company. For enforcement of the arbitration clause there must exist a dispute : in the absence of a dispute between the parties to the arbitration agreement, there can be no reference."

24. In the instant case, the application u/s 34 of the Arbitration Act does not specify any dispute and in the affidavit-in-opposition to the winding up petition the company has not raised any specific dispute with regard to the dues of the

petitioner.

25. It is well settled that reference to arbitration can be made only if there is a dispute relating to the claims of the parties.

26. In the instant case also there appears to be no defence in the winding up petition. It is well settled that unless there is a dispute, there is no question of arbitration. Apart from that, the arbitration clause can never stand in the way of the filing of a winding up petition provided the claim is undisputed or there is no dispute as to the date or there is no substance either in law or in fact in the defence sought to be raised. In this connection the judgment and decision in *Shree Gouri Shankar Jute Mills Ltd., In re* [1982] 2 Comp LJ 607 (Cal) relied upon by the learned advocate for the petitioning creditor may be taken note of.

27. It has also been held in the case of *Gobind Industrial Gases Ltd. v. Bindyswari Gas Agency* [1995] 1 CHN 356 relied upon by the learned advocate for the petitioning creditor that the discretion of a court to stay the proceeding must be used in the totality of the facts and circumstances of each case. A pre-determined formula cannot be laid down in matters of use of judicial discretion. The conduct of the parties, the surrounding circumstances of the case, the motive apparently behind the stay application will all have to be looked into along with other relevant factors. Technically, there may be an arbitral dispute arising on a mere non-payment. The court's discretion should not be used in favour of a debtor who does not pay.

28. In the instant case, the company has acknowledged its liability, made part payment and there is practically no scope for raising any dispute.

29. The principles laid down by A. N. Ray J. on February 2, 1994, in an unreported decision in *Subrata Sasmal and Co. Pvt. Ltd. v. Ram Kumar Radhey Shyam Dedia-- Company Petition No. 191 of 1993*, do not apply to the facts and circumstances in the instant case.

30. An application u/s 34 of the Arbitration Act for stay of proceedings in a suit must disclose the existence of a dispute between the parties which would oblige the parties under the arbitration clause in an agreement, to refer the matter to arbitration. In the absence of such an allegation, an application for stay of the proceedings is not maintainable.

31. This is the settled view of law. Reference may be made in this connection also to the decisions in *Daman Anand and Another Vs. Hira Lal and Others*, and *Pearl Hosiery Mills, Ludhiana Vs. Union of India and Another*, .

32. The judgment and decision in *William Jacks and Co. (India) Ltd. v. Saraswati Industrial Syndicate Ltd.* [1986] 59 Comp Cas 876 (P & H) has been relied upon by the learned advocate on behalf of the petitioner and the same may be taken note of.

33. In my view, the proceeding for winding up of a company comes within the

special jurisdiction which has been conferred only on the High Courts. In fact, the proceedings under the provisions of Sections 433 and 434 read with Section 439 of the Companies Act, 1956, are completely of a different jurisdiction than the one regarding which remedy can be sought by way of arbitration under the clause in question. It is fallacious to conceive that the proceedings for winding up under the provisions of Sections 433, 434 and 439 of the Companies Act, are by way of recovery of amount touching the various provisions of the scheme. Under the provisions of Section 433 of the Companies Act, the Legislature codified the circumstances/grounds on which a company may be ordered to be wound up by the court. Section 434 provides as to under what circumstances a company may be deemed to be unable to pay its debts, whereas Section 439 makes provision for an application for winding up.

34. The said proceeding, in my view, is more or less like insolvency proceeding wherein the claim is mainly for rateable distribution of assets amongst the creditors of the company whereas an arbitration proceeding is in the nature of a dispute between the parties to the contract only. The same view has also been taken up by the Punjab and Haryana High Court, in the aforesaid decision of William Jacks and Co. (India) Ltd. v. Saraswati Industrial Syndicate Ltd. [1986] 59 Comp Cas 876. Moreover, it is well settled that in the event the company can raise a bona fide dispute, the winding up petition is not admitted. Whereas arbitration will only lie in case of a dispute covered under the arbitration clause under the contract. Therefore, the scope of two proceedings are entirely different.

35. Similar question, namely, if the winding up petition can be stayed u/s 34 of the Arbitration Act in view of the existence of an arbitration clause was also considered by the Punjab and Haryana High Court in Trilok Chand Jain v. Swastika Strips (P.) Ltd. [1991] 70 Comp Cas 197. In the aforesaid case the respondent-company was a partner in a firm. By an agreement, it was decided to dissolve the firm and the company was to take over the assets and liabilities of the firm as a going concern, after paying to their respective accounts. Clause 15 of the partnership deed provided that the disputes among the partners relating to accounts, profits and losses of the business, or the rights and liabilities of the partners under the deed of dissolution or winding up of the business or any other matter relating to the firm shall be referred to arbitration. The company having failed to honour its commitments upon dissolution of the firm and take over of its business the partners filed a petition for winding up and the company filed an application for stay of proceedings on the petition and for reference of the matter to arbitration in terms of Clause 15 of the partnership deed :

It was held, dismissing the application, that proceedings under Sections 433/434 read with Section 439 of the Companies Act, are in a completely different jurisdiction from that under which relief can be sought by way of arbitration, Proceedings for winding up under Sections 433/434 of the Companies Act are in no way proceedings for the recovery of any amount. None of the disputes referred to in Clause 15 of the partnership could be co-related to the relief in the

company petition. The proceedings on the petition, therefore, could not be stayed.

36. The judgment and decision in the case of Hind Mercantile Corporation Pvt. Ltd. v. J. H. Rayner and Co. Ltd. [1971] 41 Comp Cas 548 (Mad) may also be taken note of. The aforesaid decision pertains to a contract between the applicant and the respondent-company which contained a clause to the effect that in respect of any dispute thereunder, neither party shall bring any action or legal proceeding until after an award is obtained from an arbitrator. In respect of certain monies due under the contract, the respondent filed a petition for winding up of the applicant-company u/s 433(e) of the Companies Act, 1956. In the application filed by the applicant-company u/s 34 of the Arbitration Act for stay of the winding up petition, the High Court held that the relief claimed in the winding up petition cannot be said to arise out of or under the contract so as to be referred to arbitration and, as, u/s 34 of the Arbitration Act, only proceedings in respect of any matter agreed to be referred can be stayed, the winding up petition could not be stayed.

37. While dealing with the question if the winding up proceeding should be stayed in an application u/s 34 of the Arbitration Act, the learned judge of the Madras High Court held, inter alia, as follows (at page 549) :

"The question is whether the institution of the petition u/s 433(e) of the Companies Act is a proceeding that would come under the said arbitration clause. No doubt, the language employed in Clause 26 of the contract is wide enough to cover any dispute that may arise out of or under the contract. The question for decision in the company petition is not a matter that arises out of or under the contract. The respondent-company has filed the company petition on the allegation that the applicant has admitted its liability for a particular amount. No relief is sought as regards any matter that arises out of or under the contract. The point for decision in the company petition is whether the applicant-company is unable to pay the debt. If the debt itself is disputed, it would be a matter for consideration in the company petition whether an enquiry into that controversy is permissible under the provisions of the Companies Act, I do not wish to express any opinion on that question at this stage. Suffice it to note that so far as the relief claimed in the company petition is concerned, I do not think that it can be said to arise out of or under the contract. u/s 34 of the Arbitration Act, if any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may apply therein for stay of the proceedings. It would be seen from the above provision that the legal proceeding which can be stayed should be a proceeding in respect of any matter agreed to be referred. The expression "any matter agreed to be referred" makes it clear that, unless the matter has been agreed to be referred, the proceeding cannot be stayed, even though it may incidentally have a bearing upon the contract providing for

arbitration. In the instant case, it cannot, by any stretch of reason, be said that the parties contemplated that any reference to arbitration for winding up of the applicant-company was possible or could be done by an arbitrator. In that view, I think, the company petition is not liable to be stayed. The application is accordingly dismissed."

38. I respectfully agree with the view taken by the learned judge of the Madras High Court. In my view, the proceedings for winding up u/s 434 of the Companies Act are of completely different nature than the one under which remedy or relief can be sought by arbitration. It is well settled that the company court is not a debt collecting court and the claim for winding up is not meant only for payment in respect of the claim of the applicant or for adjudication of the dispute. The nature of proceedings for winding up ultimately results in liquidation of the company involving taking into account, claims of different creditors as provided under the Companies Act. In any event, the proceedings for winding up under the Companies Act cannot be said to be proceedings for recovery of the amount by way of adjudication of the dispute relating to the claim of the company. So none of the disputes covered under the arbitration clause can fall within the purview or scope of the winding up proceedings.

39. The judgment and decision in the matter of *In Re: Thakur Paper Mills Ltd.; In Re: Kailash Chand Jain*, may also be taken note of. N. L. Untwalia J. of the Patna High Court as he then was also considered a similar question as to maintainability of a winding up petition in the event there is an arbitration clause. The learned judge thereafter further held that "if the dispute raised by the company being not bona fide, would not have stood in the way of the success of the application for winding up, the arbitration clause contained in the distributorship agreement would have met the same fate. If the dispute is not bona fide, there was nothing for the arbitrator to arbitrate, and the clause by itself, as I have expressed the view in my earlier order, would not have attracted any bar to the maintainability of the application because then there would have been nothing left for the arbitrator to arbitrate and the winding up proceeding could not be referred to arbitration.

40. The learned advocate for the petitioning creditor has also referred to the judgment and decision in *Food Corporation of India v. Yadav Engineer and Contractor* AIR 1982 SC 1302, and has submitted that the filing of an affidavit-in-opposition by the company to the main winding up petition must, in the present case, be deemed to be a step in the proceeding inasmuch as the company by obtaining directions to file the said affidavit-in-opposition and by actually filing such affidavit-in-opposition has displayed an unequivocal intention to proceed with the winding up petition.

41. He has further submitted that in the present case in the winding up proceeding affidavit-in-opposition was filed on November 25, 1994, while the application u/s 34 was made on or about March 29, 1995. It is the contention of the learned advocate for the petitioning creditor that since an application is

required to be filed before filing of the written statement, the affidavit-in-opposition to the winding up petition also should not have been filed actually before filing of the petition for stay u/s 34. In my view, the submission of the learned advocate for the petitioning credi-tor cannot be said to be without any substance.

42. It is quite true that unless a clear case to the contrary is made out, the approach of the court should be to hold the parties to their bargain provided necessary conditions for invoking Section 34 are satisfied.

43. One of the conditions, however, to be satisfied before an order u/s 34 can be obtained is that the party to the legal proceeding has at any time before filing a written statement or taking any other step in the proceeding applied to the judicial authorities for stay of proceedings.

44. The judgment and decision in the case of Food Corporation of India v. Yadav Engineer and Contractor AIR 1982 SC 1302, relied upon by the learned advocate for the petitioner, may be taken note of. The Supreme Court, in paragraph 3 of the said judgment, after quoting Section 34 of the Arbitration Act, has observed as follows :

"The contours of the controversy are confined to one of the negative requirements of Section 34 to be fulfilled by a party seeking the discretionary relief of stay of proceedings to qualify for the same. It is not necessary to reproduce all the relevant conditions for attracting the application of Section 34. One of the conditions to be satisfied before an order u/s 34 can be obtained is that the party to the legal proceeding has at any time before filing a written statement or taking any other steps in the proceedings applied to the judicial authority for stay of proceedings. In other words, a party seeking stay of proceedings must move the court with an application u/s 34 before filing the written statement to the suit or before taking any other steps in the proceedings. Admittedly, application in the present proceedings was filed before filing the written statement. The question is whether the second pre-condition is satisfied in that the application u/s 34 was filed before taking any other steps in the proceedings. What does the expression "before taking any other steps in the proceedings" signify ? Before ascertaining the scope and ambit of the expression it would be worthwhile to briefly narrate the *raison d'etre* for prescribing this condition."

45. As already noted the instant application u/s 34 has been filed a long time after the filing of affidavit-in-opposition, whereas a stay application has been filed on or about March 29, 1995. It, therefore, appears that the essential conditions for requirements of stay u/s 34 of the Arbitration Act have not been complied with in the instant case.

46. The matter was fixed for judgment on May 31, 1996, when Mr. Ghosh, the learned advocate submitted that he likes to make further submissions on the basis of the Arbitration and Conciliation Ordinance, 1996, and, accordingly, the

matter was heard again. His submission is that the Arbitration and Conciliation Ordinance, 1996, is applicable since there is no commencement of arbitration proceeding upto now. He has referred to the relevant provisions of the Ordinance in this connection. The application filed by Mr. Ghosh's client before me is an application u/s 34 of the Arbitration Act, 1940. The said application was filed on March 28, 1995. The question, therefore, of applying and converting the same into an application under the Ordinance does not arise. Accordingly, the said submission of Mr. Ghosh, cannot be accepted.

47. Considering the facts and circumstances in my view, this is not a fit case where the relief should be granted u/s 34 of the Arbitration Act.

48. The application u/s 34, therefore, fails and is dismissed.

49. There will be no order as to costs.

50. Stay prayed for is refused.