
(1993) 06 BOM CK 0023

In the Bombay High Court

Case No : Company Application No. 26-R of 1992 in Company Petition No. 4-R of 1992

Suvarn Rajaram Bandekar

APPELLANT

Vs

Rajaram Bandekar (Sirigao) Mines Pvt. Ltd.
 Rajaram
Bandekar (Sirigao) Mines Pvt. Ltd. Vs Suvarn Rajaram
Bandekar

RESPONDENT

Date of Decision : 03-06-1993

Acts Referred:

Companies (Court) Rules, 1959 — Rule 17, 21
Companies Act, 1956 — Section 433, 434, 443, 443(2)

Citation : (1997) 88 CompCas 673

Hon'ble Judges : G.D. Kamat, J

Bench : Single Bench

Advocate : I.M. Chagla and S.K. Kakodkar, R.V. Kamat, J. Dwarkadas and J.E. Coelho Pereira, for the Appellant;

Judgement

G.D. Kamat J.

1. Company Petition No. 4-R of 1992, is by a creditor for winding up of the company, Rajaram Bandekar (Sirigao) Mines Pvt. Ltd., under sections 433 and 434 of the Companies Act, 1956. It is averred in the petition that the company is indebted in the sum of Rs. 38,96,460 as on February 23, 1992, being the amount due under a decree of the Civil Court, Vasco da Gama, dated April 12, 1991, made in Special Civil Suit No. 36 of 1990. According to the petitioner, the company was directed to pay to the petitioner a total amount of Rs. 66,48,252.04 by way of instalments on dates set out in Schedules I and II annexed to the petition and that the company defaulted in payment of the second instalments of payment of Rs. 5,40,000. The company was called upon to pay the defaulted instalment by a notice dated August 9, 1991, but under the reply of the company dated August 19, 1991, the company whilst not denying that the instalment had not been paid, denied that there was any default and otherwise denied that the provisions of section 434 can be invoked by the

petitioner. In the meantime, some more instalments were paid by the company, but the eight instalment due on December 31, 1991, was not paid and the company invoked the jurisdiction of the civil court to extend time for payment of the instalments due upon the decree. It is also the case of the petitioner that in terms of clause 13 of the consent decree default in payment two instalments make the entire balance amount payable forthwith and as the company failed to effect payment of two instalments, the entire amount under the decree is payable, together with interest at the rate of 18 per cent. per annum payable thereon. Statutory notice u/s 434 of the Companies Act, 1956, dated January 1, 1992, was served and despite calling upon the company to pay the amount due within three weeks from the receipt of the said notice, the company did not comply with the same. In the meantime, it appears that the company took out another application before the civil court dated January 11, 1992, which had decreed the suit for a declaration that the company had not committed default under the decree. The application for extension of time and the application for a declaration that the company has not committed default under the decree are said to be attempts by the company to create a sort of an apparent shield to somehow get over the default committed and, therefore, those applications are dubbed to be frivolous. According to the petitioner, from the facts stated in the petition, it is clear and transparent that the company is unable to pay its debt and/or is insolvent and hence sought an order for winding up the company.

2. Upon giving notice to the company, the company after obtaining time for filing an affidavit-in-reply replied to the application for winding up on April 23, 1992. Upon filing an affidavit-in-rejoinder by the petitioner, the company filed its affidavit in surrejoinder some time on July 31, 1992. For want of time, the petition could not be taken up for admission, though it came on board. Company Application No. 26-R of 1992 was instituted by the company on October 6, 1992, for chamber summons with a prayer that the company petition be rejected in limine and pending the hearing and final disposal of the application all further proceedings in the petition be stayed. Notice of this application was given to the petitioner who has vehemently opposed the company application on the ground that the same is nothing but a gross abuse of the process of the court having been filed with the mala fide and ulterior motive of delaying the hearing of the company petition which is pending. Even otherwise, according to the petitioner, the application does not disclose any grounds to justify the filing of such an application, as the grounds set out in the affidavit in support are nothing but in the nature of defences which are in fact taken in the affidavit-in-reply filed by the company to the winding up petition.

3. Mr. Kakodkar, learned counsel appearing for the company, urged that the company petition cannot be taken up by this court unless and until the company application is disposed of. According to him, the company application is required to be decided at the threshold, for if the company application is allowed and the summons is made absolute, there can be no hearing of the company petition on the merits. He, therefore, took umbrage to both the petitions being placed on the

board together.

4. It must be pointed that before the arguments were heard in both these matters, it was made clear that the court will take the company petition as well as the company application simultaneously for hearing on the merits, for the reasons that the company application was instituted much after the company petition became ripe for hearing on admission and the entire set of pleadings had been completed. It was obviously, therefore, an attempt by the company to somehow delay the hearing of the company petition on the merits. In fact, the grounds taken in the application are the very grounds taken in the affidavit opposing the winding up petition. Perhaps there is one more reason as to why the company resorted to obtaining a chamber summons. It was set out as a defence by the company in their affidavit that the company has moved the civil court of Vasco da Gama for extension of time to pay the instalments falling due in terms of the consent decree dated April 12, 1991, and that the same application had been rejected by the trial court and which rejection was challenged in Civil Revision Application No. 90 of 1992 in the High Court, which was then pending disposal. The High Court in fact rejected that Civil Revision Application No. 90 of 1992 on September 25, 1992. It, therefore, stands to reason that once the revision application was disposed of by the High Court in late September, 1992, the company thought of delaying the hearing of the company petition on the merits.

5. It is true that company application ordinarily is taken up first and upon the fate of the same, take up the main company petition. I have already made things clear as to why I am embarking upon the course of hearing both the matters together. I do not, therefore, think that having regard to the facts and circumstances of this case the company application is required to be decided first and depending upon the result thereof to decide the company petition.

6. Mr. Kakodkar now submitted that the law relating to procedure must be followed strictly and it cannot be bypassed and that is the correct perspective in winding up proceedings. Referring to section 433 of the Companies Act, Mr. Kakodkar sets that a company may be wound up by a court under clauses (a) to (f) and mentioned therein. He lays emphasis on the words "may be wound up", to show that it is the discretion of the court and not that the court shall make an order for winding up. He now says that each of the clauses of section 433 is a separate ground for the court to make an order or not for winding up. According to him, what is relevant for the purposes of his argument are clauses (e) and (f). Clause (e) of speaks of inability to pay the debts of the company generally and cannot include a decree against the company. In so far as clause (f) is concerned, he says that it is for the court to come to an opinion that it is just and equitable that the company should be wound up. The submission, therefore, is that when a petition for winding up is based upon non-satisfaction of a decree, no relief can be found of the petitioning party to obtain an order for winding up. According to him he gets support for this proposition when one reads section

443(2) of the Companies Act. Section 443 on powers of the court on hearing petition in sub-section (2) lays down that where a petition is presented on the ground that it is just and equitable that a company should be wound up the court may refuse to make an order of winding up if it is of the opinion that some other remedy is available to the petitioner and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. In other words, the contention of Mr. Kakodkar is that clause (f) of section 433 cannot be invoked by this court inasmuch as the petitioner can take up execution proceedings to execute a consent decree when there has been default in payment of the installments under a decree. Mr Kakodkar contends that in so far as clause (e) of section 433 is concerned no ground is made out for this court to make a winding up order. Upon reading the company petition he refers to paragraphs 6 and 19 say that after making some statement of fact, the petitioner's ground with regard to the company's inability to pay is based upon an inference. He now urged that inference has no place in winding up proceedings and a petitioning party must clearly aver the inability of the company to pay and if there is no averment of this kind, no ground is available and, therefore, the petition ought to be dismissed.

7. This submission in fact so required to be decided in the application as well as in the main company petition. I will come back to this after certain aspects as urged by Mr. Kakodkar in the company application are looked into. Rule 6 of the Companies (Court) Rules, 1959, stipulates, that save as provided by the Act or by the rules the practice and procedure of the court and the provisions of the Code so far as applicable, shall apply to all proceedings so far as they are applicable. Rule 11(a) lays down that applications are to be made by a petition. Rule 17, which speaks of forms, sets out that the forms in Appendix I shall be used with such variations as the circumstances may require. Mr. Kakodkar's emphasis is on the word "shall" in rule 17. Referring to rule 21, he says it is clearly incumbent upon a petitioning party that every petition shall be verified by an affidavit made and such an affidavit is to be filed along with the petition which shall be in Form III. He pointed out that in so far as the present petition is concerned, the mandate of rule 17 as also rule 21 has been violated, with the result the petition is not in the form which is provided by the rules which are statutory, nor in the form which is mandatory.

8. A petition for winding up of a company shall be in Form 46 as in the present case and this has been clearly stipulated in rule 95, says Mr. Kakodkar. According to him, there is again violation of rule 95 and Form 46, inasmuch as clause 8 of the Form has not been adhered to where a petitioning party is required to clearly say that the company is insolvent if applicable and unable to pay its debt if that be the case. Upon all this, Mr. Kakodkar urged that the rules and the form being statutory and mandatory, respectively, must be strictly construed and followed and, according to him, the remedy of winding up under the Companies Act being an extraordinary remedy and not within the purview of ordinary civil courts, cannot be given a go-by and viewed in a correct perspective, the company

petition ought to be rejected in limine, without going into the merits any more.

9. In support of his proposition Mr. Kakodkar relied upon the decision of Registrar of Companies Vs. New Suraj Financiers and Chit Fund Co. Pvt. Ltd., . A learned single judge to the Punjab and Haryana High court held that an affidavit in support of a company petition is treated as substantive evidence and where there is no affidavit in accordance with law accompanying the petition, it is no petition in the eye of law. It was further observed that amendment of a petition for winding up, if allowed, relates back to the date of presentation of the petition and, therefore, it would lead to great deal of confusion if the petitioning party is allowed to swear and supply a fresh affidavit at a later stage because rights of third parties may crop up.

10. This was undoubtedly a case where there was defect in the verification in the sense that the affidavit contains blanks, with the result the court could not know which blank paragraphs were true and correct to the best of the knowledge and what blank paragraphs are true to the belief. This case no doubt, in turn, referred to a judgement of the Division Bench of the same High Court rendered in Mool Chand Wahi Vs. National Paints P. Ltd. and Another, . Mr. Kakodkar thereafter place reliance on a decision of this court in Gangadhar Narsinghdas Agrawal v. Timble Pvt. Ltd. [1992] 74 Comp Cas 846. This decision was rendered by this court on the peculiar facts of the case. It was found that there were several deficiencies in the petition, starting from the statutory notice itself and there was no averment whatsoever that the company is insolvent or is otherwise to pay the debts. Yet, a direction was made to the company to pay a certain amount by a particular date, based upon the admission of the company.

11. The present company petition is accompanied by an affidavit filed by the petitioner, who is armed with a decree against the company. The petition is accompanied by an affidavit sworn on February 26, 1992, before the Senior Superintendent (Judicial) of this High Court. The affidavit says that each and every averment enumerated in the petition is as if the same is specifically set out in the affidavit and further that the facts mentioned in the petition are true to his knowledge and legal submission are based on legal advice which he believed to be true.

12. In so far as the verification is concerned, the same states :

"I, the deponent abovenamed, do hereby on solemn affirmation beg to state that whatever is stated in the foregoing paragraphs is true to my own knowledge."

13. Mr. Chagla, learned counsel for the petitioner, says that objections and submissions mentioned in the application and also in the petition are hypertechnical and are in fact devoid of substance. According to him, the question is whether the petition contains the necessary facts to clothe the petitioner with a cause of action to seek a winding up proceeding before a company court, and once the necessary facts are there, the question for decision is whether this court should make a winding up order or not; that the form set out and appended to

the Rules of 1959 made under the Companies Act are only an aid and they are no more than guides.

14. It is true that regard being had to the rules they are undoubtedly statutory and the forms are to be adopted wherever they are applicable. The rules relating to the affidavit and the verification cannot be ordinarily brushed aside, but then what is required to be seen is whether the petition substantially complies with the requirements and, secondly, even when there is some breach or omission, whether it can be fatal to the petition.

15. In this connection, what is required to be seen is the purpose of the pleadings and affidavit and their verification. In my view, the prime purpose is that a party pleading must be confined to the pleadings. In so far as an affidavit is concerned in company petitions, there is no trial nor evidence is ordinarily taken, with the result, the affidavit evidence becomes the sole evidence for the court to decide the petition one way or the other. The Constitutional Bench of the Supreme Court in the decision of A.K.K. Nambiar Vs. Union of India (UOI) and Another, , has laid down that verification of an affidavit is necessary and the observation "affidavits not properly verified" cannot be admitted in evidence. The reason for verification is to enable the court to find out which facts can be said to be proved on the affidavit evidence of rival parties. The importance of verification is to test the genuineness and authenticity of the allegations and also to make the deponent responsible for the allegations. In essence, the verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In my view not much effort is necessary in the present case, because finally, as mentioned earlier, the petition for winding up has been contested and what transpires is that the most material and pertinent facts are not denied by the company. I would presently enumerate that the respondent company admits :

- (1) that a consent decree is in existence between the parties made by a competent civil court;
- (2) that a default has been made by the company;
- (3) that a statutory notice u/s 434 has been given; and
- (4) that the demand under the notice has not been met.

Though so many things have been mentioned in the affidavit in the reply filed by Narayan Rajaram Bandekar, who is the managing director of the company, in paragraph 6, a clear statement has been made that the instalment due on April 30, 1991, could not be paid and in paragraph 21, a statement has been made that the company has the ability to pay all bona fide claims. While reiterating that several employees are working for the company whose total salary bill amounts to Rs. 7,30,000 and the company has taken on hire a large number of trucks at huge hire and in fact extracted over three lakh metric tonnes of ore, it is year averred in the affidavit that there is a recession in the international

market. In view of all this, and more particularly the admitted facts which I have already highlighted, I do not think that the company can be permitted to raise any technical or hypertechnical grounds to reject the present petition.

15. I have already made reference to the affidavit of the petitioner where in paragraph 4 an averment has been made that the statement of facts made in the petition are true to his knowledge and legal submissions are based on advice. Though the verification at the foot of the affidavit is defective, in my view this defect cannot go to the root of the matter. If the respondent company had not admitted the existence of a consent decree or default or the receipt of statutory notice and non-compliance thereof, the story would have been different and in that event a different view could have been taken in the matter. This being the position, I do not think that the application of the company can be granted on the technical grounds of strict non-compliance with the rules of form. The Calcutta High Court in *Darjeeling Commercial Co. Ltd. v. Pandam Tea Co. Ltd.* [1983] 54 Comp Cas 814, has correctly taken the view with due respect to the learned court that pedantic and strict adherence to the mere forms cannot be a principle on which company law has to be administered. When substantial compliance is there, more particularly when facts are clearly and substantially admitted, it can never be the basis for rejection of a petition.

16. The next question to consider is whether a decree-holder is entitled to maintain a petition u/s 433 of the Companies Act under its clause (e). I have already referred to the submissions of Mr. Kakodkar, learned counsel for the company, and I do not think it is necessary to refer to them once again. There is enough justification for Mr. Chagla to contend that even in addition to the execution of a decree winding up proceedings at the instance of decree-holder are permissible and a petition by a decree-holder would fall within the ambit and scope of section 433(e). He placed reliance on the decisions in *Madhuban Pvt. Ltd. v. Narain Dass Gokal Chand* [1971] 41 Comp Cas 685 (Del), *Seethai Mills Ltd. v. N. Perumalsamy* [1980] 50 Comp Cas 422 (Mad), *Sarabhai Machinery Vs. Haryana Detergents Ltd.*, and in a slightly different context, in the decision of *In the Matter of Advent Corporation Pvt. Ltd.*, . Having regard to these authorities there can be no dispute that clause (a) of section 434 is a general clause and applies to all sorts of debts including a judgement debt under the decree. It is, therefore, difficult to accept the proposition of Mr. Kakodkar that a debt under a decree cannot be made a foundation for a petition for winding up and it cannot be read in any of the clauses u/s 433 of the Companies Act.

17. I have considered the matter from all its angles and gone through the material. As mentioned earlier, apart from the admitted facts, the consent decree has mentioned each and every instalments payable and the date against which the same payable. In fact, I have not been able to find any defence for the company to get over the situation. Whatever defences are raised to the winding up petition, do not seem to be bona fide taken and once there has been a consent decree and a breach committed, in my view, having regard to the settled position

of law, the order in the company petition must be made *ex debito justitiae* as has been held in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, . I have already made reference that with a view to gain time or rather, to while away the time, the company left no stone unturned. It attempted to seek extension from the court which had made the decree and upon rejection, the matter came before the High Court in revision. That revision also was dismissed. Merely because the company has instituted another application praying for declaration that the company is not bound to pay the decretal amount is another pointer in the direction that the attempt of the company is somehow or the other to say that the company has money but the company does not want to pay. I have also considered the statement contained in paragraph 19 of the petition where the petitioner averred that the company is unable to pay its debt and/or is insolvent; that the same is based upon an inference and not a positive statement as urged by Mr. Kakodkar. From the affidavit in reply filed by the company, the company is undoubtedly trying to make out a case that the creditor-petitioner should bear with the company until the difficulties of the company get over. I do not think this can be accepted as a defence to the winding up proceedings in the present petition. I do not propose to go into the question of insolvency of a company once I have come to the conclusion that the company is unable to pay its debts.

18. On behalf of the petitioner, reliance has been placed on orders in some other petitions for winding up and certain observations in some other judgement in which the company was party. I do not think that it is necessary to refer to them, specifically. I am convinced that, on the facts and circumstances of this case, there is no defence to the company and that the company is unable to pay, is *ex facie* clear. The order for winding up must, therefore, go as a matter of course.

19. Petition accordingly admitted. No advertisement for a period of six weeks. If within these six weeks the company deposits the amount due the petition to be placed for appropriate directions. Otherwise advertisement to follow. Company application is rejected.

20. Order pronounced. Give notice of this order to counsel for the parties.