

(2001) 01 KAR CK 0017
In the Karnataka High Court
Case No : Original Side Appeal No. 28 of 1999

Synopsys (Singapore) Private Limited, Singapore	APPELLANT
Vs	
GPS Usha Private Limited, Bangalore	RESPONDENT

Date of Decision : 09-01-2001

Acts Referred:

Companies Act, 1956 — Section 433 (e), 434

Citation : (2001) 6 KarLJ 348

Hon'ble Judges : R.V. Raveendran, J;B.K. Sangalad, J

Bench : Division Bench

Advocate : A. Murali, for the Appellant; K. Narayana, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Raveendran, J.—The appellant has filed this appeal against the order dated 25-6-1999 passed by the Company Judge in Company Petition No. 173 of 1999 disposing of the said company petition filed by the appellant u/s 434 read with Section 433(e) and (f) of the Companies Act, 1956 with the following observations:

"In my opinion, since the respondent-company has not acknowledged the debts due to the petitioner-company, it is clear that there is a serious dispute with regard to the payment and nonpayment of the amounts due. In my opinion, a winding up petition is not a proper mode of enforcing a bona fide disputed debt. Petitioner-company is well-advised to approach the appropriate Civil Court for redressal of all its grievances"

2. The appellant contends that it is a company incorporated under the laws of Singapore and the respondent is a company incorporated under the Companies Act, 1956. The appellant claims to have sold and supplied equipment of the value of US Dollars 67,636 to the respondent under Invoice No. 70025485, dated 3-4-1988, in pursuance of respondent's purchase order dated 24-12-1997. The appellant alleges that the respondent has taken delivery of the goods supplied

under the said invoice, but has failed to pay the amount due in spite of the repeated demands.

3. In response to the letter dated 20-3-1999 sent by the appellant demanding payment, the respondent sent the following reply dated 24-3-1999:

"We acknowledge the receipt of your letter March 3, 1999 asking us to release payment of USD 67,636.00 by 20th of March, 1999.

In this connection, please note that as per our books there is no amount outstanding for payment to Synopsys. We have also informed your local associates M/s. D"giopro accordingly".

4. According to the appellant, the liability has been untenably denied. It is alleged that the respondent had taken delivery of equipment supplied under two earlier invoices dated 3-2-1998 and 18-2-1998 and paid for them, On the other hand, in regard to the last supply under invoice dated 3-4-1998, the amount has been withheld without any reason. The appellant therefore, claims to have issued a statutory notice dated 5-5-1999 under Sections 433(e) and 434 of the Companies Act through the Counsel. As there was no response, the appellant filed a petition for winding up, in June 1999. When the matter came up for orders before the learned Company Judge on 25-6-1999, the learned Company Judge disposed of the petition as stated above, without even directing notice to the respondent.

5. Feeling aggrieved, the appellant has filed this appeal. The appellant contends that the learned Company Judge had committed an error in coming to the conclusion that there is a bona fide dispute merely on the basis of the reply dated 24-3-1999 from the respondent, without examining the facts in detail and ignoring the fact that Statutory Notice dated 6-6-1999 has not been replied. The appellant has also contended that the learned Company Judge has also failed to satisfy himself whether respondent had prima facie proof of the facts on which its defence depended and liability was denied, before deciding whether there is a bona fide dispute regarding the debt or not. It is contended that where the creditor has placed material relating to supply (purchase order and invoice), mere denial of the claim, does not amount to bona fide dispute; and that unless the respondent demonstrates how the claim for supplies made was not tenable or that the amount claimed has been paid, the Company Court should ignore the denial and proceed on the basis that the respondent-company was unable to pay its debts. According to the appellant, the Company Judge had relegated the appellant-creditor to the Civil Court, without application of mind as to whether there really existed a dispute.

6. The appellant did not produce the balance-sheet or any other documents to show that the respondent was in financial difficulties or that it had shown the appellant as creditor in regard to the amount due. The appellant did not also produce any documents or letter where the respondent had admitted the liability. It did not produce any receipt or acknowledgment issued by the respondent, for

receiving the equipment. On the other hand, the only documents produced by the appellant are the copies of the purchase order said to have been placed by respondent and the invoice under which the appellant had supplied the equipment, and the reply wherein the respondent had repudiated the liability stating that its books of accounts did not show any amounts outstanding to the appellant. Let us consider whether the documents produced by appellant and the averments in the petition establish any liability on the respondent, at least prima facie.

7. The first document relied on by the appellant is the purchase order dated 24-11-1997 said to have been issued by the respondent. The said purchase order dated 24-12-1997 was placed on M/s. "Synopsys Inc., at California, USA" and not the appellant ("Synopsys (Singapore) Private Limited, Singapore"). The purchase order clearly states that the amount had to be billed to "GEC Plessey Semiconductors, United Kingdom" and supplies should be effected to "GPS Usha Private Limited, Bangalore" (respondent). Thus the purchase order makes it clear that payment is to be made by a UK concern and not the respondent.

8. The next document relied on is copy of the invoice dated 3-4-1998. The invoice is not of the appellant, but of "Synopsys Inc., Mountain View, California" on whom the order was placed. The said invoice also makes it clear that the person billed is "GEC Plessey Semiconductor, Cheney Manor Swindon, United Kingdom" and the equipment has to be shipped to respondent. The invoice is fully in consonance with the purchase order and together they establish the following:

- (i) The order was placed by respondent but on "Synopsys, USA".
- (ii) The invoice is not raised by the appellant on the respondent, but is raised by M/s. Synopsys Inc., California on GEC Plessey Semiconductors, United Kingdom.
- (iii) The person who is liable to pay the bill amount is not the respondent but "GEC Plessey Semiconductor, United Kingdom".

9. The said documents do not show any privity of contract between the appellant and the respondent at all, much less liability on respondent for payment. No other document is produced. The respondent has therefore rightly repudiated the liability by stating that its books do not show any amount outstanding for payment to Synopsys.

10. The Company Court was therefore justified in holding that the respondent had not acknowledged or admitted the liability and that there was a serious dispute in regard to the claim and therefore winding up proceedings is not a proper remedy for enforcing a bona fide disputed claim and that the appellant may approach the Civil Court for redressal of the grievances.

11. It was next contended by appellant that having regard to the procedure laid down in Rule 96 of the Companies (Court) Rules, 1959, when a petition for winding up is filed, the Company Court should adopt only one of the following

three courses: (i) issue notice to the company to show cause why the petition should not be admitted; or (ii) admit the petition and fix a date for hearing and issue notice to the company before giving directions about advertisement of the petition; or (iii) admit the petition, fix the date of hearing and order advertisement and service of the petition on the persons specified in the order. On that premises, it is contended that when a petition for winding up is filed, the Court cannot reject the petition at the threshold, but should only deal with it by following any one of the three courses stated above. Reliance is placed on the decision of the Supreme Court in *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others*, , in this behalf.

12. The contention that a company petition cannot be dismissed or rejected at the stage of admission, without ordering notice of the petition to the respondent-company, is to say the least, is startling. The Company Court choosing one of three courses stated in Rule 96 would arise only when the Court is satisfied that the petition has to be entertained on account of existence of a prima facie case. In a creditor's petition for winding up u/s 433(e), this would mean that the petition and annexures thereto should disclose prima facie, the existence of a relationship of creditor and debtor between the petitioner and respondent-company, existence of a debt in excess of Rs. 500/-, and non-payment thereof after service of a notice in the manner prescribed in Section 434 of the Act. Where the documents produced, and petition averments, do not disclose any liability on the part of the respondent towards the petitioner, even prima facie, and there is neither any averment nor any document to show that respondent-company is in financial difficulties and the documents produced show a clear denial of liability by the respondent, the Court has the discretion, and in fact a duty, to reject the petition for winding up at the threshold. In such a situation it is unnecessary to issue a notice to the company to show cause. In fact there is no ground for winding up, against which the respondent-company should show cause. The ipse dixit of an alleged creditor, without anything more, is not sufficient to entertain a petition for winding up and issue notice to the company to show cause. Not only an order admitting a petition for winding up, but even a notice in a petition for winding up, would cause unnecessary tension and anxiety to the persons in management of company.

13. Rule 96 deals with "Admission" of petitions and directions as to advertisement. The use of the word "admission" in Rule 96 clearly indicates that when the matter is listed for admission, the Court should apply its mind whether the petition is fit to be entertained. It follows therefore that if the petition does not make out any of the grounds u/s 433, the petition can be refused to be admitted and rejected at the threshold. A company petition is not similar to a suit where summons is directed to defendants in all matters irrespective of its merits (even in suits, the power of rejection before directing summons to defendant is provided for under Order 7, Rule 11 of the CPC). If a petition for winding up can be dismissed without admission, after issuing notice to the company and hearing the company, there is no reason why it cannot be

dismissed at the threshold without issuing notice, when the petition does not disclose the conditions necessary to entertain such a petition. All that is required is that the rejection at the threshold should be supported by reasons. In fact even admission and direction for advertisement should be only by a reasoned order as held by this Court in *Airwings Private Limited Vs. Viktoria Air Cargo GmbH Langer Kornweg*, .

14. Thus when a petition for winding up is filed, the Court upon consideration, may either decide to entertain or not to entertain the petition. If it decides not to entertain the petition, it will reject the petition without ordering notice. If it decides to entertain the petition, then it may either (i) issue pre-admission notice to the company; or (ii) admit the petition and fix a date for hearing and issue notice to the company (and such other person whom the Court thinks should be served with notice) before giving directions about advertisement; or (iii) admit the petition, fix the date of hearing and direct advertisement and service of petition on the company and other persons, if any, as decided by the Court. It is needless to say that even where a *prima facie* case is made out, the Court should normally adopt the first course. Only in very clear and strong cases second course is adopted. The third course should be adopted in very exceptional circumstances as advertisement of a winding up petition may many a time sound the death knell of the company.

15. The decision in *Cotton Corporation of India Limited*, *supra*, relied on by appellant does not support the proposition that having regard to the provision of Rule 96, the Company Court has no discretion but to order notice of the petition for winding up to the respondent-company. The question whether a petition could be rejected at the threshold if it does not have any merit, was not considered by the Supreme Court. The Court only pointed out that neither admission nor advertisement automatically followed presentation of a petition for winding up; and Rule 96 conferred power on the Company Court to issue pre-admission notice to the company instead of straightaway admitting the petition, so that the company is not taken unaware and may appear and point out to the Court that the petitioner is actuated by an ulterior motive and that presentation of the petition is only a device to pressurise the company to submit to an unjust claim. Thus the provision for pre-admission notice in Rule 96, is only an enabling provision, that is to enable the Court to hear the company before admission, and is not a mandate to issue notice to the company in all cases, even when there is no case to be answered by the respondent-company. There is no reason why a company should be made to face a proceedings for winding up by issue of a notice, when the petition does not disclose any cause of action and has no merit.

16. There is need to issue a notice to a respondent only if it is intended to pass an order adverse to the interest of the respondent. Where the petition is to be dismissed for want of a case, there is no need to issue any notice to the respondent. For example, if a notice u/s 434 is not issued to respondent, or where the claim is one for damages for non-performance or is one which is

barred by limitation, and the Court is satisfied that there is no case for winding up u/s 433(e), the petition can be rejected straightaway.

17. We are supported in this view by a decision of the Madras High Court in K.S. Trivedi and Company v. Ashok Leyland Limited. In that case, the Company Court found that the amount claimed as debt was not a definite or determined amount and there was no averment as to when the amount fell due and the claim was disputed bona fide. The Court held that in such situation, it is not necessary to issue even a pre-admission notice to the respondent-company, and dismissed the petition in limine, directing the petitioner to prove its claim by either filing a suit or in any other manner.

18. Therefore, we find no grounds to interfere and accordingly this appeal is therefore dismissed with costs payable to respondent,

19. We make it clear that the observations in this judgment are with reference to the question whether a petition for winding up ought to have been entertained, and will not come in the way of appellant establishing its claim if any against respondent, in a Civil Court in accordance with law.