

**(2001) 03 KAR CK 0061**

## In the Karnataka High Court

**Case No :** Original Side Appeal No. 25 of 1999

The Sandu Manganese and Iron ores Limited, Yeshwantnagar,  
Karnataka

APPELLANT

 $V_S$ 

Manganese Ore (India) Limited, Nagpur

RESPONDENT

**Date of Decision : 29-03-2001**

**Acts Referred:**

Companies Act, 1956 — Section 433, 434 (1)

**Citation :** (2001) ILR (Kar) 4420 : (2001) 4 KarLJ 590

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

**Bench :** Division Bench

**Advocate :** Sri Vivek Chandy and Associates, for the Appellant; Sundarswamy Ramdas and M/s. Anand. Advs., for the Respondent

**Final Decision :** Allowed

## Judgement

1. The appellant (hereinafter also referred to as the "Company") has filed this appeal challenging the order dated 26-3-1999/1-4-1999 passed by the learned Company Judge, in Co.P. No. 168 of 1998 overruling its preliminary objection regarding maintainability, and ordering the petition for winding up to be listed for admission. The appellant and respondent herein will also be referred to as "Company" and "Creditor" respectively in this order.

2. The respondent herein filed the said petition (Co.P. No. 168 of 1998) u/s 439 read with Section 433(e) of the Companies Act, 1956 ("Act" for short) alleged that Rs. 34,45,136.32 was due as on 31-5-1997 from the Company in regard to goods supplied by it from time to time; that in spite of service of a notice dated 3-3-1998 issued by it through its Counsel u/s 434(1)(a) of the Act demanding payment, the Company did not make the payment; that the Company should therefore be deemed to be unable to pay its debt u/s 434(1)(a) and Section 433(e) of the Act. The petition also contains an averment (in para 15) that the Company is also liable to be wound up u/s 434(1)(c) of the Act as the Company had failed to pay the amount due to the petitioner and as the Company had

incurred losses and had defaulted in paying a large number of creditors and had thus become commercially insolvent.

3. The demand notice dated 3-3-1998 was addressed to the administrative office of the Company and not to its registered office. The creditor was obviously aware of the address of the registered office, as that address is mentioned in the cause title of the petition for winding up. The case of the creditor is not that the registered office was closed or that there was any impediment for serving the notice at the registered office. No explanation is forthcoming for serving the notice on the administrative office instead of registered office.

4. A preliminary objection statement dated 16-2-1999 was filed by the Company contending that the notice dated 3-3-1998 issued under Section 434(1)(a) was addressed to and served on its administrative office at Bangalore and not its registered office; and that the mandatory requirement of Section 434(1)(a) of the Act that such notice should be served on the registered office of the Company was not complied with and therefore the petition was liable to be rejected in limine.

5. The learned Company Judge who heard the matter, found that the notice u/s 434(1)(a) was issued to the administrative office of the Company and not to the registered office of the Company. He however held by the order under appeal dated 26-3-1999/l-4-1999 in the case of Manganese Ore (India) Limited, Nagpur Vs. The Sandur Manganese and Iron Ores Limited, Yeshwantnagar, Bellary District, , that on the facts and circumstances of the case, service of notice on the administrative office of the Company was sufficient compliance with Section 434(1)(a) of the Act. Feeling aggrieved, the appellant has filed this appeal.

6. Section 434(1)(a) of the Act provides that a Company shall be deemed to be unable to pay its debts, on fulfilment of the following three conditions:

- (i) the Company should be indebted to the creditor in a sum exceeding Rs. 500/-;
- (ii) the creditor should serve on the Company, a demand under his hand requiring the Company to pay the amount due, by causing it to be delivered at the registered office of the Company, by registered post or otherwise; and
- (iii) the Company should neglect to pay the amount, or fail to secure or compound for the amount, to the satisfaction of the creditor, for a period of three weeks.

In this case, we are concerned with the second requirement, that is delivery of a notice of demand at the registered office of the Company. The question that arises for consideration in this appeal is whether service of a notice demanding payment, on the administrative office of a Company, is sufficient compliance with the requirement u/s 434(1)(a) of the Act.

7. The language employed in Section 434(1)(a) of the Act is significant. While the section provides that the mode of service can be either by "registered post or

otherwise", it does not provide the place of service as "at the registered office or other office", but specifically states as "at its registered office". Further, while the requirement "a demand under his (creditor's) hand" is explained in sub-section (2) as including a demand signed by any agent or legal adviser duly authorised, there is no such explanation in regard to the requirement relating to service at "registered office" by clarifying that service at an administrative office or branch office will also be service at registered office. In the absence of any explanation or further deeming provision enabling the interpretation of the words "delivered at its registered office" as meaning "delivery at the administrative office", it is not possible to hold that service of notice at an office other than registered office as sufficient compliance with Section 434(1)(a) requiring service at registered office.

8. It is well-settled that a legal fiction can be raised as provided under a statute, only when the conditions stipulated for raising such legal fiction are strictly and fully complied with. Where the specific requirements are not complied with, no legal fiction will arise. A legal fiction cannot be raised, when the conditions specified do not exist, on the ground that there is substantial compliance or implied or inferred compliance of the requirements to be fulfilled for raising the legal fiction, unless such lesser or alternative compliance is permitted by an explanation or another deeming provision. As observed by the Supreme Court in *Commissioner of Income Tax, Bombay City II Vs. Shakuntala and two Ors. etc.*, , a legal fiction cannot be created by travelling beyond the language of the section by which it is created. Therefore if a creditor wants the benefit of the legal fiction u/s 434(1)(a) that a Company is unable to pay its debts, he has to strictly fulfil all the conditions stipulated therein for raising such legal fiction.

9. The Courts have consistently held that requirements of Section 434 should be strictly complied with and the service of the notice should be at the registered office of the Company (and not any other office), to raise the presumption u/s 434(1)(a).

9.1 In *N.L. Mehta Cinema Enterprises (Private) Limited v Pravin Chandra P. Mehta*, a Division Bench of the Bombay High Court considered this question. In that case, the petition for winding up was solely based on the Company's "neglect to pay" in response to a notice issued by the creditor u/s 434(1)(a). A Single Judge admitted the petition on the ground that although the notice u/s 434 had been sent to the administrative office of the Company, instead of to the registered office, no substantial injustice was caused to the Company by such defect or irregularity. He relied on Rule 33 of the Companies (Court) Rules, 1959 which inter alia provided that service under the Rules shall not be deemed to be invalid by reason of any defect provided the Court is satisfied that such service is in other respects sufficient. On appeal, a Division Bench reversed the decision of the Single Judge holding that Rule 33 applied only to service under the Rules and not to service under statutory provisions like 434(1)(a). The Division Bench pointed out that Section 434(1)(a) contains a legal fiction which is available even

against a Company otherwise solvent when it does not respond to a notice of demand made by a creditor. It was held that in order to raise the legal fiction u/s 434(1)(a), that the Company is unable to pay its debts, the requirements of Section 434(1)(a) has to be strictly complied with; and service of notice of demand at the administrative office of the Company, was not sufficient to raise the presumption u/s 434(1)(a) and consequently, the winding up petition was liable to be rejected,

9.2 The Calcutta High Court, in *Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI) and Another*, and *In re Dytron (India) Limited* and the Delhi High Court in *Kalra Iron Stores v Faridabad Fabricators (Private) Limited*, have also taken the same view and held that demand notice should be served only at the registered office of the Company and service on the administrative office will not give rise to the presumption u/s 434(1)(a).

9.3 In *P.S.V.P. Vittal Rao v Progressive Constructions (Private) Limited*, the Andhra Pradesh High Court, negatived the contention that the requirement relating to service at registered office is only a technical formality and held that the winding up petition should be dismissed in limine where the notice is not served on the registered office. In *Vysya Bank Ltd. Vs. Randhir Steel and Alloys (P.) Ltd.*, the Bombay High Court held that the requirement of giving notice and its service at the registered office is so mandatory that even the Company cannot waive it and even if the registered office of the Company was not functioning and Company had given some other address for correspondence, the notice should still be addressed to the registered office and not to the correspondence address.

10. The learned Company having considered the matter, started on the correct note, if we may say so with respect, by observing that "where the law postulates a specific procedure, non-observance of that procedure would ipso facto vitiate the proceeding and if that is the position, the litigation would be still-born and non est and incapable of being cured, rectified or revived". But then he proceeded to hold that where the notice is served in good faith on an office that is sufficiently large and sufficiently important and where administrative functions are carried out and from where the notice is bound to be transmitted to the registered office, it could be held that there is substantial compliance of the requirements of Section 434(1)(a) of the Act. The observation by the learned Company Judge that service of notice on an administrative office is really a case of service on the registered office through another office as the administrative office would normally forward the notice to the registered office, cannot be supported either in law or in logic.

11. In most cases of lending, or supply of materials, the creditor will correspond invariably with the administrative office or branch office or the factory of the Company, dealing with the matter; and therefore issue of a notice of demand to such branch/administrative office/factory will normally be a bona fide action. Seldom will a notice be sent to an administrative office or branch office with any mala fides or ulterior motive. Therefore, if the two tests laid down by the learned

Company Judge to hold that service of notice on administrative office is sufficient compliance with Section 434(1)(a) are correct, then virtually all demand letters by creditors to administrative offices/branch offices/factory of a Company should be treated as sufficient compliance with Section 434(1)(a). Surely that is not the intention of Section 434(1)(a). The reasoning and conclusion of the learned Single Judge, if accepted would virtually render nugatory, the requirement of Section 434(1)(a) that the notice of demand should be served on the registered office of the Company. The order under appeal cannot therefore be sustained.

12. But we do not agree with the appellant that the winding up petition should be dismissed in limine. The averments in the petition disclose that the petition for winding up is based not only on Section 434(1)(a) but also on Section 434(1)(c). Therefore, even if the legal fiction u/s 434(1)(a) is not available, the petition requires consideration u/s 434(1)(c). It is now well-settled that where the notice of demand issued u/s 434(1)(a) is defective, the creditor can still prove that the Company is unable to pay its debts u/s 434(1)(c). Reference may be made to the decisions of the Andhra Pradesh High Court in *Ramdas and Company v Kitti Steels Limited*, the decision of the Allahabad High Court in *Alliance Credit and Investments Limited v Khaitan Hostombe Spinels Limited*, the decision of the Gujarat High Court in *Garodia Hardware Store and etc. Vs. Nimodia Plantations and Industries Pvt. Ltd.*, , and the decision of the Madras High Court in *B. Viskwanathan v Seshasayee Paper and Boards Limited*.

13. In this case no documents have been produced by the creditor in support of the case u/s 434(1)(c). Neither the audited Balance Sheets of the Company nor other documents to show that the Company has incurred heavy losses or had defaulted in payment, are produced by the creditor. On the other hand, the Company has also not filed objections denying the averments in the petition that it has defaulted in paying several creditors and is unable to pay its debts. As the petition is filed invoking Section 434(1)(c), the creditor should produce the documents in support of its claim and the Company should be given an opportunity to file its objections and documents to rebut the case of the creditor u/s 434(1)(c).

14. In view of the above, the appeal is allowed in part. The order of the learned Single Judge dated 26-3-1999/1-4-1999 in Co.P. No. 168 of 1998 overruling the preliminary objection regarding non-compliance with Section 434(1)(a), is set aside. As a consequence, we request the Company Court to now hear the parties in regard to admission of the petition on the ground based on Section 434(1)(c) of the Act, after giving an opportunity to the creditor to file documents in support of its case u/s 434(1)(c) and an opportunity to the Company to file its objections to the case u/s 434(1)(c).