
(2007) 09 KAR CK 0019
In the Karnataka High Court
Case No : Original Side Appeal No. 14 of 2006

Tirupati Adhesives Private Limited

APPELLANT

Vs

Visen Industries Limited

RESPONDENT

Date of Decision : 26-09-2007

Acts Referred:

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

Citation : (2008) 142 CompCas 384 : (2008) ILR (Kar) 788 : (2008) 3 KarLJ 612 : (2008) 1 KCCR 47 SN

Hon'ble Judges : V. Gopala Gowda, J;Arali Nagaraj, J

Bench : Division Bench

Advocate : R. Ganesh Kumar, for the Appellant; K.G. Raghavan, for Dua Assts., for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is filed u/s 4 of the Karnataka High Court Act, 1961, by the Appellant who is respondent in Company Petition No. 157/2005 on the file of the learned Company Judge of this Court aggrieved by the order dated 10.3.2006 admitting the said company petition which was filed by the respondent herein u/s 433(e) and (f) of the Companies Act, 1961 (hereinafter referred to as "the Act") and directing the respondent herein (petitioner therein) to take advertisement in "The Hindu" daily newspaper fixing therein the date of hearing.

2. Stated in brief, the facts leading to the present appeal are as under:

a.) Respondent presented the said Company Petition against appellant (hereinafter the parties are referred to as per their ranking in this appeal) u/s 433(e) and (f) of the Act seeking winding up of the appellant company on the ground that certain dues have remained unpaid to the respondent company by the appellant company despite demand by the former to the latter by issuing statutory notice.

b) After the said petition was filed, the appellant appeared in the said case and

contested the same by filing his statement of objections and additional statement of objections annexed therewith the relevant documents in support of his contentions. After perusing the averments in the petition and the statement of objections and also the documents produced by both parties, the learned Company Judge passed the impugned order admitting the said company petition and directing the petitioner to take advertisement in "The Hindu" daily newspaper on or before 29.3.2006 fixing therein the date of hearing as 19.4.2006. Questioning the correctness of this order the present appeal is filed.

3. We have heard the arguments of the learned Counsel appearing for the respective parties and perused the entire material on record. Though the appellant has not stated in the appeal memo, the question of law that would arise in this appeal for our consideration and decision thereon, in the background of the argument advanced by both sides and the facts and circumstances of the case the following question of law would arise:

Whether the learned Company Judge was justified in admitting the said Company Petition (Co.P.157/05) holding that the defence taken by the appellant (respondent therein) contesting the claim of the respondent Company (petitioner therein) was not bona fide?

4. Before proceeding to consider the rival legal contentions (sic) by the learned Counsel for the parties it would be necessary to mention undisputed facts which are relevant for our consideration in this appeal and they are as under:

a) The appellant and respondent both are the companies incorporated under the Act. The respondent company had been supplying adhesive materials to the appellants company for the use by it as raw material in the manufacture of adhesive tapes. Accordingly, during the period from 9.5.2003 to 3.6.2003 the respondent company supplied the said materials to the appellant company under four different bills, totally worth rupees three lakhs twenty seven thousand and odd, which remained unpaid by the appellant despite demands made by the respondent. Therefore the respondent Company sent legal notice dated 28.7.2005 (Annexure-K) to the appellant Company demanding a total sum of Rs. 4,63,491/-, which is inclusive of the total amount under the said bills and interest thereon. The appellant company, despite receipt of the said notice, did not choose to give any reply to it. Therefore, the respondent Company filed the said company petition u/s 433(e) and (f) of the Act seeking winding up of the appellant Company.

b) The appellant company contested the said petition by filing its statement of objections and additional statement of objections, wherein, though it admitted the supply of said materials by the respondent Company under the said bills for the said amount, it set up the defence that some of the materials that were supplied to it by the respondent Company were of sub-standard quality and therefore it returned the same to it and that its customers returned the adhesive tapes manufactured by it by using the said materials supplied by the respondent

and consequently it sustained loss and therefore it withheld the payment of the said amount under the said bills to the respondent Company. As such, there has been a bona fide dispute between the appellant and the respondent companies.

c) Though the respondent Company has admitted that some of the adhesive materials supplied by it to the appellant Company were returned to it by the appellant Company on the ground that the same were not as per the specified quality, it has further contended that the said return was quite earlier to the supply of the materials under the said bill and that the appellant Company had already deducted the value of the returned materials from out of the amount under other relevant bills.

d) The appellant Company, in order to show its bona fides in not making payment of the amount under the said bill, and also to show that it has never been unable to pay its debts, has deposited into this Court in the said petition, a sum of Rs. 3,27,488/- alleged to be due by it to the respondent Company.

5. The learned Counsel for the appellant strongly contended that the learned Company Judge committed serious error in admitting the said company petition on the ground that the dispute raised by the appellant Company by reason of which it withheld the payment of the said amount to the respondent Company was not a bona fide dispute.. He further urged that the view taken by the learned company Judge that this defence of the appellant cannot be accepted as the same is an afterthought is quite erroneous and cannot be sustained in law. As against these legal contentions of the learned Counsel for the appellant the learned Counsel for the respondent sought to justify the impugned order contending that the learned Company Judge rightly admitted the said company petition holding that the dispute raised by the appellant company in its additional statement of objections without raising the same at the earliest opportunity on receipt of the notice issued by the respondent Company was not bona fide.

6. The appellant Company has not disputed the case of the respondent Company that the latter supplied to the former under the said four bills during the period from 9.3.2003 to 3.6.2003 the adhesive materials totally worth Rs. 3,27,485/- for being used by the appellant Company as raw material in the manufacture of adhesive tapes by it and the appellant Company did not pay the same to the respondent Company despite the demand made by the respondent Company by issuing legal notice dated 28.7.2005 nor did it give any reply to the said notice. Similarly, the respondent Company has not disputed the case of the appellant Company that the latter returned to the former some of the adhesive materials on the ground that the same were not of specified quality. Thus, it is clear that there exists a dispute between the appellant and the respondent. Further, it is the case of the appellant Company that the adhesive tape that was manufactured by it by using the said substandard materials supplied to it by the respondent Company was found to be defective and therefore the customers of the appellant Company returned the same to it and consequently it sustained loss and therefore the value of the returned materials and also the damages for the loss

sustained by it has to be recovered from the respondent Company and for this reason it has withheld the payment of the said amount to the respondent Company. But the case of the respondent Company is that the value of the said materials was already deducted by the appellant Company while making payment in respect of the materials supplied to it by the respondent Company earlier to the supply of the materials under the said four bills, the price of which has remained unpaid. However, neither the appellant Company has stated in its statement or additional statement of objections as to what was the exact cost of said materials which were returned by it to the respondent Company nor has the respondent Company stated, in the affidavit of its officer sworn to in response to the additional statement of objections of the appellant Company, as to what was the exact value of the said material. Besides this, it is also not stated in the said affidavit when the value of the said returned materials came to be deducted by the appellant Company while making payment of the price of the materials to the respondent Company on earlier occasion. Therefore, having regard to these facts of the case it is quite clear that there exists dispute between the parties as to the exact amount due by and against each other.

7. It is the contention of the learned Counsel for the respondent Company that the appellant Company should have taken the said defence at the earliest opportunity when it received the legal notice from the respondent Company demanding payment of the said amount with interest thereon but, instead of doing so, it stated the facts constituting the said defence in its additional statement of objections filed before the learned Company Judge and therefore the learned Company Judge has rightly held the same as not bona fide one. As against this, the learned Counsel for the appellant Company contended that only on this ground of not taking the said defence by the appellant Company at the earliest opportunity when it received the said legal notice, it cannot be said that the said defence was not bona fide one. The observations of the learned Company Judge in the impugned order, in this regard are as under:

The conduct of the respondent clearly disclose that even though the respondent Company is capable of paying the dues, it has no intention to pay the dues payable to the petitioner Company and the defence now raised is only to postpone the payment of dues payable to the petitioner Company and therefore the said submissions cannot be accepted as bona fide.

It is pertinent to note that in the affidavit sworn to by Sri S. Kannan, the Manager of the respondent Company in response to the additional statement of objections of the appellant Company, has only stated that the materials which were returned to the respondent by the appellant under Annexures-R1, R3 and R5 did not pertain to the transactions covered under the company petition but they pertain to a period much prior to the said four invoices in respect of which the money is due and that the appellant Company debited a portion of the bill and deducted that portion of money in respect of the said rejected materials is not further stated in the said affidavit as to which particular period or transaction

the rejected materials pertain, and what was the exact value of the said materials and under which bills it came to be deducted by the appellant Company. Therefore it is contended that having regard to these undisputed facts it could not be held that the dispute raised by the appellant Company has not been bona fide one. This being so, we are of the considered view that the learned Company Judge committed an error in law in making the above observations based on which he recorded his finding that the defence raised by the appellant was not acceptable as bona fide one, which is erroneous in law.

9. The learned advocates for both the parties have placed their reliance on the same judgment of the Hon''ble Supreme Court in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, wherein it is held as under:

(A) Companies Act (1 of 1956), Section 433(e) - Company - Nonpayment of disputed debts - Court can rightly refuse a petition for winding up of the Company when the claim of the petitioner is bona fide disputed by the Company (Para 21).

The principles on which the court acts are first that the defence of the Company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends. (Para 21)

9. Further, the learned Counsel for the respondent Company herein has placed his reliance on the decision of this Court in *Divya Export Enterprises v. Producin Pvt. Ltd.* reported in (1991) 70 Comp Cas 692 wherein it was observed as under:

The question as to maintainability of a petition u/s 433 of the Companies Act, 1956, depends upon the nature of the petitioners' claim and the relationship between the parties. If, on the proved facts and circumstances, it is found that the validity of the petitioners' claim is genuinely disputed by the respondent on substantial grounds, the court would not proceed further in exercise of its discretionary jurisdiction u/s 433 of the Act

A mere assertion of a debt payable by the company is not sufficient to attract the discretion of the Court in favour of the petitioner seeking winding up of the Company.

It is further observed at page 701 as under:

A detailed examination of the merits will be necessary in case the petition for winding up has to be considered after advertising the petition. At this stage the court has to examine whether this petition deserves to be advertised. In other words, the question is whether the petitioner has made out a prima facie case and whether the respondent company has a bona fide and substantial defence against the petitioner's claim u/s 433(e) of the Act.

It is also observed further at page 702 of the above decision as:

Under Section 433(e) of the Companies Act a company may be wound up by tide

court if the company is unable to pay its debts. The provision vests a discretion in the court. But the discretion has to be exercised in the manner in any other judicial discretion is to be exercised; it is a judicial power warranting a proper exercise to grant relief in appropriate cases.

If the respondent company pleads defence in good faith and puts-forth a substantial case against the petitioner's case the petition for winding up will be rejected. A mere assertion of a debit payable by the respondent company is not sufficient to attract the discretion of the court in favour of the petitioner.

In the said decision the learned Judge of this Court has quoted with approval the relevant paragraph in the case of Amalgamated Commercial Traders Pvt. Ltd. v. A.C. Krishnaswamy reported in (1965) 35 Comp Cas 456 (relevant page 463) which reads thus:

It is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the Company. A petition presented ostensibly for winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court.

10. The respondent Company has filed its petition under Clauses (e) and (f) of Section 433 of the Act, which reads thus:

433. Circumstances in which company may be wound up by the Courts- A company may be wound up by the Court.-

(a)xxx....

(b)xxx....

(c)xxx....

(d)xxx....

(e) if the company is unable to pay its debts;

(f) if the Court is of opinion that it is just and equitable that the company should be wound up.

Though the said petition is filed under both the Clauses (e) and (f) of Section 433 of the Act, the grounds urged in the petition attract Clause (e) only. The appellant Company has deposited a sum of Rs. 3,27,488/- which is the principal amount claimed by the respondent Company as due to it by the appellant, It is the contention of the learned Counsel for the appellant that since it has returned some materials to the respondent Company the receipt whereof is admitted by the respondent, and therefore this appellant has withheld the payment of the said amount for the reason that it is entitled to recover from the respondent the loss sustained by it by reason of return of the Adhesive Tape by its customers which was manufactured by it by using the substandard materials of the respondent and therefore it cannot be said that the appellant company is unable

to pay its debt. He further urged that the appellant Company, by depositing the said amount in this case, has shown its bona fides in withholding the amount claim by the respondent and therefore the learned Company Judge could not have held that the appellant Company is "unable to pay its debts" so as to attract Clause (e) of Section 433 of the Act.

12. Though the learned Company Judge has referred to in the impugned order the above decisions in Madhusudhan Gordhan's case and Divya Export Enterprises case he has not fully considered and discussed the observations therein which are extracted supra. Further, in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , it is observed at para 18 of the judgment as under:

This Court in catena of decisions held that an order u/s 433(e) of the Companies Act is discretionary, There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression; unable to pay its dues; in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realising debts due from a company.

(emphasis supplied by us)

12. Applying the principles laid down by the Hon"ble Supreme Court in Madhusudan Gordhan's case, Mediquip Systems Pvt. Ltd.'s case and also the observations of this Court in the case of Divya Export Enterprises to the instant case we are of the view that the defence taken by the appellant Company is bona fide and one of substance and it is likely to succeed in law inasmuch as the respondent Company, having admitted the factum of return of some of the materials by the appellant Company, has not placed on record any material to prima facie substantiate its case that the value of the said returned materials was deducted by the appellant from out of the amount payable to the respondent under any specific bill prior to the supply of further materials by it to the appellant under the bills mentioned in the company petition.

13. The Division Bench of this Court in the case of Shakti Prakash Metal Finishers Private Limited, Bangalore Vs. Hindustan Machine Tools Limited (HMT Limited), Bangalore and Another, , while interpreting the provisions of Section 433 of the Act, has observed thus:

Any violation of the terms of the contract cannot ipso facto come within the purview of the Section. It is not the legislative intent that Company Court should be converted itself into an ordinary Civil Court and proceed to hold a trial at the instance of individual claiming to be a creditor of the Company on the basis of a contract

Non- payment of bill amount under a contractual agreement cannot be said to be

an admitted debt, even when it is disputed. Debt is something which is borrowed by a person on settled terms and conditions and at settled rate of interest and it can also be resettled between the parties.

Respondent" Company deposited the amount and disputed the claim for interest. Petitioner withdrew the amount without prejudice to its rights. Held, order of Company Court refusing to order for winding up of the respondent - Company was proper and need no interference. Shakti Prakash Metal Finishers Private Limited, Bangalore Vs. Hindustan Machine Tools Limited (HMT Limited), Bangalore and Another, .

The above principles laid down by this Court aptly apply to the present case, therefore the same shall be applied to the facts of this case. For the reasons suited supra we hold that the impugned order is liable to be set aside

14. In view of our foregoing discussions we hold that the learned Company Judge was not justified in admitting the said company petition by exercising his discretion in favour of the petitioner therein, who is respondent in this appeal, and we answer the question of law formulated in this appeal "in the negative and in favour of the appellant".

15. In the result the impugned order is liable to be set aside and the said company petition is liable to be dismissed. Accordingly, this appeal is allowed, the impugned order is hereby set aside, and the said Company Petition No. 157/05 is hereby dismissed.

16. The respondent Company is at liberty to recover the amount claimed in the company petition from the appellant Company by resorting to such legal remedy as may be available to it under law and, in that event, the appellant Company would be at liberty to take all such defences as may be available to it under law. The appellant Company is permitted to withdraw the amount deposited by it in the said Company Petition. If the respondent company chooses to agitate its claim before the proper court, the court concerned shall not be influenced by the observations made by us in this appeal as to the merits of the case. There is no order as to costs.