
(1998) 04 AHC CK 0042
In the Allahabad High Court
Case No : Special Appeal No. 10 of 1987

Ultimate Advertising and Marketing	Vs	APPELLANT
G.B. Laboratories Ltd., Kanpur		RESPONDENT

Date of Decision : 07-04-1998

Acts Referred:

Companies Act, 1956 — Section 433, 434
Interest Act, 1978 — Section 3

Citation : AIR 1998 All 320 : (1998) 2 AWC 1314 : (1989) 66 CompCas 232

Hon'ble Judges : D.P. Mohapatra, C.J;Sudhir Narain, J

Bench : Division Bench

Advocate : Bharati Sapru and Sudhir Agrawal, for the Appellant; R.K. Agarwal, for the Respondent

Judgement

Sudhir Narain, J.—The core question In this special appeal is as to whether the respondent having paid the principal amount as claimed by the appellant in the company petition for winding up the respondent company, is entitled to the interest on such amount. The facts in brief are that the appellant filed company petition for winding up the respondent-company u/s 433(e) of the Companies Act, 1956 (hereinafter referred to as "the Act").

2. The allegation of the appellant was that the respondent-company was Incorporated as a private limited company in the year 1977. It became a public limited company on 5.10.1982. Its object was to manufacture allopathic medicines, dry syrups, tablets, capsules, ointments and oil syrups etc. In April-May, 1984. the company was in the process of making public issue of its shares. It appointed the State Bank of India as the merchant bankers for the purpose of carrying out the public issue. It thereafter entered Into an agreement with the appellant and certain other agencies for handling various works in co-ordination with the State Bank of India to connection with above public Issue. The appellant was engaged to render certain advertising and publicity service in connection with the public issue of the shares of the company. It incurred the expenses in

making advertisement of the public issue. The company had paid only a sum of Rs. 75,000 as an advance before the public Issue was advertised. It was liable to pay balance amount of Rs. 2,22,289.23 p. The letters were sent for payment of the balance amount but that remained unpaid. A notice u/s 434 of the Act was given to the respondent for payment of Rs. 2,22,289.23 p. with interest at 18 per cent with effect from 1st June, 1984. The respondent sent a reply requesting to settle the accounts. A reply was sent by the appellant to the respondent on 7.7.1985. As the payment was not made, the appellant filed the Company Petition No. 11 of 1985 on 29.8.1985.

3. In the company petition, the respondent filed a counter-affidavit denying its liability. The appellant filed a rejoinder-affidavit.

4. When the matter came up for consideration as to whether the company petition be advertised, the learned counsel appearing for respondent company asked time to examine the vouchers and other papers and in the meantime, he may be permitted to pay a sum of Rs. 1,00,000 through bank draft within a month to prove the bona fide of the respondent company. On 20th October, 1986, a draft in the sum of Rs. 1,00,000 payable on the Punjab National Bank, Parliament Street, New Delhi, was handed over to the learned counsel for the appellant. Another sum of Rs. 1,22,289.23 p. was paid by another bank draft. The principal amount as claimed in the petition was fully paid. The only question remained as to whether the appellant was entitled to claim interest in the winding up petition. The learned single Judge on the finding that there was a bona fide dispute regarding the claim of interest, dismissed the winding up petition. The appellant aggrieved against this order has filed the special appeal.

5. Learned counsel for the appellant submitted that the liability to pay "principal amount having been accepted by making payment as claimed by the appellant from the respondent-company, it was further entitled to receive interest at the rate of 18% on such amount, even though there may not be any agreement relating to payment of interest on the principal amount, still the appellant is entitled to interest on the principle laid down under Section 34 of the CPC which provides that where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of suit to the date of the decree not exceeding six per cent per annum as the Court deems reasonable on such principal sum and in case the liability in relation to the sum so adjudged had arisen out of a commercial transaction the rate of such Interest may exceed six per cent. A reference was also made to Section 3(b) of the Interest Act, 1978 where the Court/Tribunal is entitled to award interest on the conditions being satisfied under the aforesaid provision.

6. The appellant had filed a company petition for winding up the company u/s 433(e) read with Section 434(a) of the Act. Section 433 of the Act enumerates the circumstances under which the Court may pass an order for winding up the company. Clause (e) provides that if a company is unable to pay its debts the

company may be wound up by the Court. Section 434 enumerates the circumstances when the company shall be deemed to be unable to pay its debts. The Court has to record a finding that there was a debt against the company and secondly, it was unable to pay the debt after receipt of a statutory notice given to it u/s 434(a) of the Act. The cause of action in winding up proceedings under sub-section (1) of Section 433(e) arises only when the company is unable to pay its debts.

7. In case the debt is admitted or liability to pay is not denied, there is no difficulty and the Company Judge can pass suitable order for winding up of the respondent-company if such company falls to pay the amount. The difficulty arises when the claim is disputed by the respondent-company. The Company Judge in that situation has to examine whether the dispute is bonafide or it is only a pretext to deny its liability. If the learned Judge finds that there is a bona fide dispute, it will not relegate itself to a Court adjudicating the rights of the parties as in a regular suit.

8. In *Bengal Luxmi Cotton Mills Ltd. and Others Vs. Mahaluxmi Cotton Mills Ltd. and Others*, the Court held that if the ground on which the liability is disputed is substantial, it will ordinarily not proceed further and decide the dispute itself and determine whether or not a debt exists and has become payable. The Court made the following observations :

"In such a case, the Court will either dismiss the petition for winding-up or keep it pending till the creditor has established his claim in a regular action. The principle on which the Court will forbear from deciding the dispute and making a winding up order in case it decides it against the company, is that winding up proceedings are not intended to be exploited as a normal alternative to the ordinary mode of debt-realisation and that it is more convenient that claims should be investigated and decided in a regular action".

9. In *Amalgamated Commercial Traders (P.) Ltd. u. A. C. K. Krishnaswami and another* (1965) 35 Comp Cas 456 the Supreme Court on facts having termed that the debt in respect of which notice was given u/s 434 was bonafide disputed by the company, dismissed the winding up petition on the following principle of law laid down by it :

"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 a 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. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order."

10. In *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, , the Apex Court again cautioned the company Courts not to decide the controversy regarding the liabilities and observed as follows :

"Two rules are well-settled. First if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. The Court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable See *London and Paris Banking Corporation* (1874) 19 Eq 444. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed See *Re. Brighton Club and Norfolk Hotel Co. Ltd.* (1865) 35 Beav. 204."

11. Learned counsel for the appellant contended that once the liability to pay the principal amount is accepted, there cannot be a dispute in regard to the payment of the interest particularly in commercial transactions. Reliance has been placed upon the decision *Stephen Chemical Ltd. v. Innosearch Ltd.*, (1986) 60 Comp Cas 702 wherein the winding-up petition was filed on the allegation that the petitioner-company supplied goods worth of Rs. 48,302 to the respondent-company under an order but the amount was not paid, the Court on the admission of the respondent-company of its liability to pay the price of the goods, further directed to pay 12% interest on the principal amount. The Court observed as under :

"In our opinion, where the company Judge was seized of the matter and when the liability to pay the principal debt had not been disputed by the company sought to be wound up and, in fact, paid up the debt in order to avoid winding up, the forum of the company Judge is the appropriate forum for determining as to whether the creditor was entitled to interest on the amount in question or not. The basic policy of law is to avoid multiplicity of litigation."

It was further observed that where a winding up initially is sought by a party on the ground that certain amount by way of interest was due from the other party which the other party had failed to pay up despite demand notice and the other party raises a bona fide dispute as a right against the creditor to claim interest in the absence of any agreement regarding payment of interest or any other plausible ground, the position would be entirely different but where the amount alleged to be due from the company sought to be wound up included the principal, amount of debt and the liability to the principal amount has been accepted before the company Judge, it would not be appropriate that the creditor be relegated to the civil remedy for getting the interest on the said principal amount. The case of the Apex Court in *Amalgamated Commercial Traders (P.) Ltd. v. A. C. K. Krishnaswami* (1965) 35 Com Cas 456 was distinguished on facts wherein the Supreme Court had observed that winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide

disputed by the company. In Stephen's case (*supra*), the petitioner-company had supplied the goods on the orders issued by the respondent-company. There was nothing to show as to what was the contention raised on behalf of the respondent regarding the claim of interest. The Court did not hold that in every case whenever the claim of interest along with principal amount is made against the respondent-company, the Court must in all cases pass an order for winding-up the company.

12. In *Stephen Chemicals Ltd. v. Delhi Cloth and General Mills Company Ltd.* (1987) 61 Comp Cas 355 . the Court examined as to whether there was a bona fide dispute regarding the claim of payment of interest by the respondent-company. The Court found that the invoices mentioned that if the amount is not paid before a particular date, the respondent-company would be liable to pay the interest at the rate of 19.5 per cent. The goods were accepted by the respondent and no objection was raised regarding the said clause. The Court in those circumstances held that there was no bona fide dispute regarding the claim of interest.

13. In *Southern Industrial Polymers (P.) Ltd. v. Amar Pharmalators and Electronics (P.) Ltd.*, (1984) 56 Comp Cas 77 wherein the agreed amount towards the principal amount was paid but the dispute was raised with regard to payment of the interest, the Karnataka High Court dismissed the winding-up petition in respect of the payment of interest of the principal sum on the ground that there was a dispute about the claim of interest. This decision was considered in *Rashid Leathers (P.) Ltd. v. Superfine Skin Traders, Madras* (1990) 68 Comp Cas 684 wherein there was no dispute that the petitioner-company had supplied skins of sheep and goats to the respondent-company on payment of the principal amount, the Court awarded the interest on the principal amount keeping in view the provisions of the Sales of Goods Act, 1930, the Interest Act, 1978 and the Code of Civil Procedure, 1908. In that case, the petitioner had given the notice against the respondent-company to pay not only a principal amount but also the amount of interest at the rate of 18 per cent per annum. There was no reply to the notice by the respondent. Considering the facts and circumstances of the case, the Court directed to pay the amount of the interest as well.

14. The Karnataka High Court in *Southern Industrial Polymers (P.) Ltd.* (*supra*) rejected the claim of petitioner company for payment of the interest after the principal amount was paid to the respondent-company. The Court made the following observation :

"But all outstanding claims except the amount arising out of the difference in the rate of interest calculated is outstanding. In my view, the scope of an inquiry u/s 433 cannot be extended to an enforcement of the memorandum of an agreement entered into during the pendency of the proceedings. The payment made by the respondent-company is clearly indicative that the respondent-company is commercially solvent. Therefore, an exercise of the Jurisdiction u/s 433 of the Act, admitting the petition merely because the rate of interest agreed to between

the parties in regard to the transactions is disputed, would be unjust."

15. From the cases referred to above by various High Courts, it seems that the company Judge has a power to direct the respondent-company to pay the amount of interest but in each case, the facts are to be examined as to whether there is bona fide dispute regarding the claim of the interest and if the Court finds that there is bona fide dispute, the petitioner-company cannot make a grievance that the company Judge failed to allow the company petition for winding up the company for payment of the Interest, Secondly, as the Karnataka High Court in Southern Industrial Polymers (P.) Ltd. (supra) has held that a company cannot be held negligent to pay the amount if it is found that it is a solvent and is able to pay the amount.

16. In the present case, the appellant was claiming the amount against the respondent as it incurred expenses in advertising and publicity in connection with the public issue of the shares of the respondent-company. In para 7 of the company petition, it has been stated that the company entered into an agreement with the appellant and certain other agencies for handling various works in co-ordination with the State Bank of India in connection with the publication. The appellant has not filed any copy of the agreement entered into between the parties in relation to the payment of amount of interest on the principal amount. The letter dated 17th April, 1984 sent by appellant to the Managing Director of respondent-company asked for certain amount and it was indicated that the rest bills will be settled within 15-20 days after the submission of final bill. The bill sent did not include the amount of Interest. Another letter dated 25th June, 1984, also does not make claim for payment of any interest. There is nothing to show that prior to the issue of statutory notice by the appellant to the respondent on 14.5.1985, any claim was made in respect of the payment of interest. The respondent had filed the counter-affidavit to the said company petition. In the counter-affidavit, the claim of the appellant was denied, inter alia, that respondent-company had appointed State Bank of India Merchant Banking Bureau as Managers to the public issue of shares and the appellant could not claim any amount directly against it. Secondly, the claim of the appellant was also denied in absence of proof. In such a situation, there was a bonafide dispute regarding the claim of Interest of the appellant. The appellant was of further establish that in such nature of the transaction, the provisions of the Sale of Goods Act. 1930 and the Interest Act, 1978 are applicable.

17. The company Judge further has come to the conclusion that the respondent-company is solvent and has not neglected to pay the amount. Considering the entire circumstances, the learned company Judge did not think it appropriate to pass an order for vinding up of the company only for payment of the interest which was bona fide disputed. It was the discretion of the Court. The exercise of discretion is based on sound reasons.

18. There is no merit in this special appeal. It is accordingly dismissed. The parties shall, however, bear their own costs.