
(2001) 07 BOM CK 0049

In the Bombay High Court

Case No : Company Petition No. 237 of 2001

Virgin Records (I) P. Ltd.

APPELLANT

Vs

Milestone Music Distribution (P.) Ltd.

RESPONDENT

Date of Decision : 18-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2
Companies Act, 1956 — Section 397, 398, 433, 433(2), 434

Citation : (2001) 07 BOM CK 0049

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Virag V. Tuljapurkar, for the Appellant; D.H. Mehta and S.V. Uttam, for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioners have prayed for an order of winding up of the respondent-company under Sections 433 and 434 of the Companies Act, 1956 and for appointing the official liquidator to take charge of the assets, books of account and the properties of the company with all powers under the provisions of the Act as the respondent-company has been indebted to the Petitioner-company to the tune of Rs. 82,78,806 as principal amount and interest and other charges have increased the debt to the tune of Rs. 10,120,999 as set out in the particulars of claim at Exh.O to the Petition and as set out in paragraph 5 of the petition. From the averments in the petition the debt appears to have arisen from the business transactions between both the parties. The respondent-company was a distributor of the products of the petitioner-company in India under their mutual distribution agreement dated 3-9-1998 which appears to have expired on 31-3-2000. Both the parties were to abide by the terms and conditions of the said distribution agreement. The said agreement appears to have been further proposed to be modified in terms of letters dated 16-6-1999 addressed by EMI International, the principal of the petitioner-company, to the respondent company. In this proposed modification interest at the rate of 18 per

cent per annum for late payments was provided. The respondents were required to confirm the said proposals. There appear to have been exchange of letters between the parties.

2. The respondents in their letter dated 4-5-2000 accepted the fact that they were liable to pay the amount of Rs. 1,51,40,590 as outstanding on 31-3-2000. However the said letter further points out that it was subject to current realities of sales return, trade receivable and amount recoverable from the petitioner-company. The respondents have therefore in their working reduced the aforesaid amount to the tune of RS. 56,41,917.22 payable by them to the petitioners. The respondents have further assured the petitioners that they will try and keep releasing payments every month-end so as to conclude their account settlement by 4-7-2000. Along with the said letter the Respondents have enclosed a cheque dated 4-5-2000 for Rs. 14 lakhs as part payment, thereby reducing the outstanding to the tune of Rs. 42,41,917.22. In the books of the respondents in the ledger account of the Petitioner-company, credit closing balance to the tune of Rs. 42,43,024.10 is reflected as the debt of the petitioner-company. It further appears that as the Respondents did not make further payments towards the outstanding of the petitioners, the petitioners caused a statutory notice to be served on the respondents on 10-10-2000 calling upon the respondents to make payment of the aforesaid admitted amount with interest at the rate of 18 per cent per annum within three weeks from the date of receipt of the said notice failing which the respondents were warned of winding up petition being filed against them. In a very detailed reply sent on behalf of the respondents there is denial of liability to pay to the petitioners the amount of Rs. 42,43,024.10 with interest as demanded by the petitioners. There are several disputes and contentions raised in the said reply on the basis of which the respondents denied the claim of the petitioners debt and contended that in fact the petitioners were liable to make payment to the respondents on account of huge losses suffered by them at the instance of the petitioners. It was a case of counter claim set up by the respondents against the petitioners. This reply of the respondent company has attracted the present company petition.

3. Shri Tuljapurkar the learned counsel for the petitioners has vehemently submitted that the respondent company had admitted the out standing claim of the petitioners in their letter dated 4-5-2000. They had also reduced the said amount of outstanding to the tune of Rs. 56,41,917. The learned counsel further pointed out that from the aforesaid amount they had paid Rs. 14 lakhs leaving as an admitted debt a sum of Rs. 42 lakhs. The learned counsel has pointed out that that was the net debt of Rs. 41,00,000 after the adjustment of all the debit notes for return of the material. According to Shri Tuljapurkar, the distribution agreement had expired on 31-3-2000 and his clients were not bound to accept any return of the material after June 2000. Shri Tuljapurkar pointed out that on 4-10-2000 the respondents had sent back a truck load of material worth of Rs. 12 lakhs which his clients were not Under obligation to accept and, therefore, the said amount cannot be adjusted. He has emphasised the fact from the

distribution agreement that the petitioners were not bound to take back the stock from the respondents-company after 30-6-2000 and, therefore, the Petitioners were not liable to give any credit to the respondents for the goods sent back by the respondents on 4-10-2000. Shri Tuljapurkar has further submitted that under the modified agreement payment of interest was provided at the rate of 18 per cent per annum for late payments and since the respondents have made late payments the petitioners are entitled to get interest for such late payments from time to time as calculated by the petitioners.

4. Shri Tuljapurkar has taken me through the affidavit in reply filed by the respondent-company setting up its defence. Shri Tuljapurkar has pointed out that the respondent-company had no defence at all and that there was no bona fide dispute of the debt of which clear admission was given by them in their letter dated 4-5-2000. The learned counsel has also criticised the vague claim of the so called counter claim whispered in the affidavit in reply. Shri Tuljapurkar further submitted that the debt is an admitted amount and clearly crystallised one, though the respondents have tried to put forth some pretext of defence. He has relied on a judgment of the Supreme Court in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, . He has relied on the following two paragraphs viz. In support of his contentions :

"20. 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 Bea204.

21. Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the Company chooses not to pay that particular debt (See *Re. A Company* 94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the Court will make a winding up order without requiring the creditor to quantify the debt precisely (See *Re. Tweeds Garages Ltd.*[1962] Ch. 406). 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." (p. 2604)

On the point of counter claim of the respondent-company for damages Shri Tuljapurkar has relied on the judgment of the Supreme Court in *Union of India (UOI) Vs. Raman Iron Foundry*, . Shri Tuljapurkar has submitted that the so called claim for damages as counter claim was totally vague and was not spelt

out in any manner. According to the learned counsel, therefore, such a vague counter claim cannot be considered at all. What Chief Justice Chagla had said in the said judgment of *Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros.*, has been approved by the Supreme Court and it received full assent to the following statement of law laid down by the learned Chief Justice of Bombay High Court:

"... In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party, complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant." (p. 425)

Shri Tuljapurkar has therefore strongly submitted that the so called claim for damages has not been adjudicated and determined, and, therefore, it cannot be a bona fide defence in good faith. Shri Tuljapurkar has relied on the following judgment of our Division Bench (S.K. Desai and Aggarwal, JJ.) in the case of *Pfizer Ltd v. Usan Laboratories P. Ltd* [1985] 57 Comp. Cas. 236. The counsel has relied on the said judgment to meet the contention of the respondent that the claim of the statutory notice was different from the claim in the company petition and that there was a great discrepancy in the figures worked out by the Petitioner-company deserving its dismissal on that count. Shri Tuljapurkar has pointed out that even if there is some discrepancy and assuming the contentions of respondent-company to be correct the total balance of the debt would definitely exceed Rs. 500 and, therefore, the statutory notice u/s 433 could not be held to be invalid. The learned counsel has relied on the following observation of the Division Bench :

"In our opinion, the aforesaid decisions out the correct principle and once we have reached the conclusion, it will have to be held that the dismissal of the winding up petition on the basis indicated in the impugned order would be clearly bad and the order required to be set aside. Merely because there could be a serious dispute as to the liability to pay interest at all or at the rate of 18 per cent would not render the statutory notice invalid or result in a dismissal of the winding up petition. The company judge was required to consider the claim of

the petitioners in respect of the principal amount and to come to a conclusion whether or not there was any real and substantial dispute with regard to the said claim. If there was a genuine and bona fide dispute, then certainly it was within his discretion and jurisdiction to dismiss the petition and relegate the petitioners to claim the amount by a regular suit. However, he did not go into this aspect but chose to dispose of the winding up petition by dismissing the same on an erroneous basis which we have earlier indicated. If that be so, the impugned order will be required to be set aside and the petition will now go back to the company judge for reconsideration of the position and to decide whether it is required to be admitted and whether further directions after admission are required to be given." (p. 240)

5. Shri Mehta, the learned counsel for the Respondent-company has equal vehemently opposed the admission of the Petition. He has pointed out from the affidavit in reply that in fact if the accounts of both the parties are reconciled there was nothing due and payable but to the contrary it would be the respondents who would be entitled to get damages for the wrongful and injurious acts committed by the Petitioner-company causing huge losses to the respondent-company. According to Shri Mehta, though the distribution agreement between the petitioner-company was to expire on 31-5-2000 the parent company of the petitioner was in direct contact with the respondent-company and was contemplating to renew the same for further period up to 2004. Shri Mehta has pointed out from the affidavit in reply that the respondents were assured and the repeated that distribution agreement would be extended. Shri Mehta has further pointed out that the petitioners and EMI International both had committed breach of the assurance entitling the respondent-company to a counter claim of Rs. 2 crores conservatively estimated. Shri Mehta has relied on the correspondence between the respondent-company and the EMI International of which the petitioner was a subsidiary company. According to the respondent-company, the said parent company had entered into solemnly a stock option agreement with the respondent company to clear the stock option of the company on or after 1 -4-2001 but not later than 1 -4-2004 had agreed formally as stated in the said agreement. According to Shri Mehta, the arrangement or understanding that the respondent-company would be incorporated so as to provide a requisite infrastructure and create distribution market and that the respondent company subsequently would be purchased by the said EMI International vide the Stock Option Agreement. It is the case of the respondent-company that on the basis of the said distribution agreement dated 3-9-1998 separately entered into with the Respondent-company by the EMI International it was assured that the entire stock of the respondent company would be taken over and purchased by the said EMI International and it was on that assurance and promise that the Respondent-company was incorporated and huge investments were made in the said company. Shri Mehta has alleged against the petitioner-company that the second distribution agreement had relevance and in fact both the agreements were required to be construed and given meaning in

the light of each other but the petitioner-company had suppressed the other distribution agreement. Shri Mehta has further submitted that the claim of the petitioner-company was of commercial nature requiring full-fledged trial on the basis of evidence as there were number of facts which were disputed and which required adjudication, though in their letter dated 4-5-2000 the outstanding amount was said to be admitted. Shri Mehta has submitted that the petitioner-company has abused the process of winding up to pressurize the respondent-company for the purpose of recovery of their debt which was not clearly admitted or liquidated. Shri Mehta has further pointed out that the petitioners have suppressed several material facts which have been brought on record on the affidavit in reply filed by the respondents. Shri Mehta has also submitted that there has been a very vast and large discrepancy between the claim put forward in the statutory notice and in the particulars of claim in the petition. Shri Mehta has further pointed out that the claim of interest is totally baseless as in the original distribution agreement there was no such condition of payment of interest on late payment. He has also pointed out that though it was proposed by the parent company of the petitioner and respondent-company had never agreed to pay any interest to the petitioner company. Shri Mehta has therefore submitted that the claim of interest is totally outside the preview of the distribution agreement. According to Shri Mehta out of the claim of Rs. 42 lakhs his clients have returned goods worth Rs. 40 lakhs and, therefore, assuming the claim of the petitioner company to be right there would be only Rs. 2 lakhs as a debt but the petitioner company has mala fide inflated the claim to show it to the court that the respondent-company was heavily indebted and that they had failed and neglected to make payment requiring it to be wound up, as contemplated under Sections 433 and 434. Shri Mehta has further pointed out that the goods worth Rs. 12 lakhs sent by his client on 4-1-2000 were accepted by the petitioner-company and they were never rejected or sent back to the respondent-company. He has pointed out from the correspondence that the said goods were received and accepted by the petitioner company and that the respondents were informed that the petitioners were looking into the consignment. Shri Mehta has further pointed out that the respondent-company had all along discussion with one Mr. Chris Ancliff of the parent company in respect of the distribution agreement and other dealings and transactions but the said Mr. Chris Ancliff has not filed affidavit to deny the facts averred by the respondents-company.

6. I have heard both the learned counsel at length. I have also considered the proceedings and the material on record. I am satisfied that the present petition is filed only for the purpose of recovery of the debt which has been legitimately disputed by the respondent-company on several grounds. The Petitioner company itself is also not certain as to what exactly is the amount due from the respondent-company. There has been a vast and large discrepancy between the claims made by the petitioner-company in the statutory notice and in the petition. Not only the claim is not ascertained and liquidated but even the

petitioner-company is not sure and certain what is the amount of debt due from the respondent-company. The Petitioner-company has put its claim of interest at the rate of 18 per cent per annum on account of late payments made by the respondent-company. The amount of Rs. 12,05,646 is calculated and claimed by the petitioner company at the rate of 18 per cent per annum on account of delayed receipts from the respondent-company. In addition to the said amount it appears that an amount of Rs. 5,21,699 has been added at the foot of Exhibit-B. The petitioner-company is claiming this interest at the rate of 18 per cent which has not been agreed upon by the respondent-company obviously for the reason of peculiarity of the business of sale of cassettes etc. Shri Tuljapurkar however it right when he has pointed out that the amount of Rs. 42 lakhs for the goods returned was already adjusted and therefore the respondents cannot claim once again to adjust the said amount. I have however no doubt in my mind that the Petitioners have filed the present petition with a view to pressurize the respondent company to make payment of the demanded amount or vanish from the market. Even otherwise it appears that the parent-company of the petitioner had intention to purchase the respondent-company. In the affidavit in reply the respondent company has raised several questions of adjustments which have not been given by the petitioner-company. All these facts of allegations require evidence and they cannot be decided in a company petition for winding up. In my opinion Sections 433 and 434 are not provided as a substitute or an alternative for civil suit for recovery of the debts particularly when the debts or claims are not admitted and are not crystallised and are bona fide disputed. In the present case the petitioner-company itself is not certain about its debt recoverable from the respondent-company. The petitioners have not averred or even whispered in the petition that the respondent-company has become commercial insolvent and that it was unable to pay its debt. There is nothing on record or any submissions made by the learned counsel for the petitioner-company to show that there were several creditors of the respondent-company who are knocking its doors for recovery of their debts. The Respondents have seriously disputed the whole claim on sound basis and for cogent reasons and therefore, I agree with the submissions of Shri Mehta that the whole dispute would require evidence to ascertain the exact amount of debt if at all the respondents would be required to pay. It is the settled law that the Legislature has not provided this remedy to be used for recovery of the debts, which are of huge in nature running into lacs or crores of rupees. The Legislature was well aware of the dealings and transactions of the companies registered under the Act. It is very significant to note the reasons why a figure of Rs. 500 debt is mentioned in Section 433 for the failure of which the company should be wound up. The Legislature was very well aware of all the existing civil remedies for recovery of huge debts and large amounts. The Legislature would have provided for the minimum ceiling to the tune of Rupees some lakhs the failure of which would have attracted the drastic remedy of winding up of the company itself, but that is deliberately not done. The amount of Rs. 500 is still continued as the amount of a debt. If a company which fails to pay a debt of Rs. 500 then such a company has no right to survive or

exist in the commercial world and, therefore, it deserves to be wiped out or extinguished by the process of law. The minimum of Rs. 500 debt must be independently paid off by such companies and they cannot fail to pay off such small and paltry sums of small people. A second situation which can be envisaged is whether the debts are admitted and not disputed by the debtor companies but they deliberately fail and neglect to make such payments. In such situation, the company Court can exercise its discretion to grant relief to such bona fide and genuine creditors by issuing just and equitable orders against such defaulting debtor companies. The remedy under these provisions is to be resorted to only under extraordinary circumstances and not as an ordinarily civil remedy for recovery of the debts which are disputed and are not admitted.

Though it does prima facie appear that the Respondents have admitted the debt to be paid to the Petitioners, they have raised the aforesaid bona fide disputes and have sought adjustments. This exercise cannot be done in this petition but will have to be done in a civil suit wherein even the question of deposit to be made by the Respondents can be considered.

7. I am fully fortified in my view that the extraordinary remedy under Sections 433 and 434 is to be sparingly resorted to and not as a general provision under the general civil law. By the judgment of the Supreme Court in Hind Overseas Private Limited Vs. Raghunath Prasad Jhunhunwalla and Another, . Paragraphs 36 and 37 of the said judgment reads as under :

"36. Section 433(f) under which this application has been made has to be read with Section 433(2) of the Act. Under the latter provision where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

37. Again under Sections 397 and 398 of the Act there are preventive provisions in the Act as a safeguard against oppression in management. These provisions also indicate that relief u/s 433(f) based on the just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company." (p. 575)

It is not that the Petitioners have no other remedy to pursue for recovery of their debts. They can very well file a civil suit under the provisions of the CPC and pray for a decree. If according to them the suit claim is an ascertained and liquidated claim and cannot be disputed bona fide they can very well resort to the summary proceedings under Order 37 rule 2 of Code of Criminal Procedure. Instead of pursuing the aforesaid remedy which is available to them they are acting unreasonably in seeking to have this company wound up. As observed by the Supreme Court this remedy is not in the nature of a last resort when other remedies are efficacious enough to protect the general interests of the company.

It is not explained by the company why they are resorting to this last resort when there is other equally efficacious remedy available under the civil law. Delay in disposal of the civil suits is no ground, excuse or an answer to resort to this extraordinary remedy which is in the nature of the last resort. Beside, there is no material to show that winding up of the company would be in the larger interest of the society.

8. In the aforesaid circumstances, the petitioners will have to resort to a remedy of filing civil suit for recovery of their claim against the respondent-company. They are not entitled to get any relief under Sections 433 and 434. The respondent-company cannot be ordered to be wound up for payment of an unascertained and bona fide disputed claim made by the petitioner-company.

9. In the aforesaid circumstances, there is no substance in the petition and the same deserve to be dismissed and the same is dismissed with no orders as to cost.