
(2008) 12 AP CK 0005
In the Andhra Pradesh High Court
Case No : O.S.A. No. 21 of 2008

Walnut Packaging P. Ltd.

APPELLANT

Vs

Sirpur Paper Mills Ltd. and Another

RESPONDENT

Date of Decision : 31-12-2008

Acts Referred:

Companies Act, 1956 — Section 433, 434, 483

Citation : (2009) 148 CompCas 330

Hon'ble Judges : Vilas V. Afzulpurkar, J;A. Gopal Reddy, J

Bench : Division Bench

Advocate : S.R. Ashok and M. Ravindranath Reddy, for the Appellant; V. Srinivas, for the Respondent

Final Decision : Dismissed

Judgement

Vilas V. Afzulpurkar, J.—The unsuccessful creditor before the company court has filed this appeal assailing the order of the learned company judge dismissing the company petition in C. P. No. 200 of 2004, dated March 18, 2008 (Walnut Packaging Private Limited Vs. The Sirpur Paper Mills Limited and Another, , filed for winding up of the respondents-companies, at the admission stage.

2. This appeal u/s 483 of the Companies Act, 1956 (for brevity "the Act") was heard at length by us as several questions of fact and law were elaborately argued by learned senior counsel appearing for the appellant and learned Counsel for the respondents.

3. The first respondent-company is carrying on business of manufacture of pulp and paper boards, incorporated on November 17, 1938, and is a reputed company having share capital of Rs. 25 crores of which the subscribed and paid-up share capital is Rs. 8,34,06,690. Except the allegation that the second respondent-company is a subsidiary of the first respondent-company, there has admittedly been no dealings between the creditor/appellant and the first respondent-company and there is no direct link of the appellant against the first

respondent. All the transactions, which are subject-matter of the present dispute, are only between the appellant and the second respondent-company.

4. The second respondent-company is a wholly owned subsidiary of the first respondent-company and has authorised share capital of Rs. 25 lakhs and paid-up share capital of Rs. 15,01,800. The second respondent-company carried on business of manufacture, trade, import, export in all kinds of stationery products, which include educational and office stationery, computer stationeries and other allied paper products.

5. The appellant is a small scale industry and is engaged in the business of manufacture of pre-printed cartons made out of paper boards, note books and otherwise equipment like calendars machinery, etc. It is alleged that in December 2000, the second respondent-company approached the appellant to process their products and in the said business relationship between the appellant and the second respondent, goods were sent by the second respondent for being processed by the appellant, as a job work, as per specifications of the second respondent and while sending the finished products, the appellant would send invoice for the total amount. The appellant alleges that certain amounts fell due in this transaction on the second respondent-company which led to the correspondence between the appellant and the second respondent and ultimately led to the appellant filing the present company petition, for winding up of the second respondent as well as the first respondent-companies.

6. The synopsis of the dispute as appearing from the record is chronologically enumerated as follows:

(a) Under letter of the appellant, dated June 5, 2001, the second respondent was informed that as against the material supplied by the appellant, for total invoice value of Rs. 4,80,951, the second respondent has paid only Rs. 1 lakh leaving the balance of Rs. 3,80,951. The appellant had called upon the second respondent to initially pay this amount, failing which, interest would be charged at 2 per cent, per month, if payment is not made within three days from the date of receipt of demand. It was also mentioned that extra quantity of the board (material belonging to the second respondent) which was lying with the appellant was withheld towards the security for the amount due and unless the amount together with interest, if any, is not secured, the material would not be returned. A statement was enclosed to the said demand. In reply thereto the second respondent under their letter, dated June 12, 2001, informed that a sum of Rs. 50,000 was paid towards outstanding bills with a promise to clear the dues latest by month end. However, the material was requested to be returned. In the reply of the appellant, dated July 6, 2001, it was pointed out that regarding the wastages allowable was not adequate and the appellant, experienced problems while executing the job work, requested the second respondent to revise rates to allow for the excessive wastage and after adjusting Rs. 50,000 paid by the second respondent, the balance amount of Rs. 3,33,951 was requested.

(b) Thereafter, the second respondent, under their letter, dated July 11, 2001, informed the appellant to return the material lying with them and it was also pointed out that on their failure to return the material, the cost of material of Rs. 80,300 will be deducted from the appellant's account. It appears that thereafter, there were still discussions between the parties as to allowing of the percentage of wastage as the appellant was demanding that the wastage percentage be raised from 1.5 per cent, to 4.5 per cent, and under the second respondent's letter dated August 1, 2001, the appellant was informed that the said office of the second respondent has agreed allowing wastage of 4.5 per cent, as requested and once again called upon the appellant to return its material immediately to enable the second respondent to process the payment to the appellant. Under further letter of the second respondent, dated September 14, 2001, the appellant was informed that wastage of 4.5 per cent, was allowed on defective boards and 2.25 per cent, for normal board was already allowed by the second respondent and requested for the return of balance material.

(c) In response thereto however the appellant sent a legal notice dated September 17, 2001, to the second respondent pointing out that Rs. 3,59,339 remains due which has not been paid in spite of demand. The appellant, therefore called upon the second respondent to pay the said dues with interest at 36 per cent, within three weeks and to treat the notice as one u/s 434 of the Act for winding up of the second respondent-company.

(d) Then in response thereto under the letter of the second respondent, dated October 6, 2001, it was pointed out that the material as requested by the second respondent was not yet returned and that without settling the outstanding material account, the main account cannot be settled.

(e) While the matter remained at that stage between the parties, the appellant issued another legal notice, dated April 8, 2003, once again calling upon the second respondent to pay the dues with interest. The reply of the second respondent dated October 6, 2001, referred to above, was acknowledged and it was alleged by the appellant that the material has been returned vide delivery challan, dated June 4, 2002. It appears thereafter that further discussion between the appellant and second respondent ensued and as per the said discussion, it was agreed between the parties that the second respondent should release the principal amount as per books of account on receiving the written request from the appellant. Accordingly, the appellant sent a letter, dated January 20, 2004, requesting the payment of principal amount without prejudice to the appellant's right to sort out differences in the books of account of both the parties, and without prejudice to the claim of the appellant for interest on delayed payments.

(f) However, even according to the appellant, the second respondent was not agreeable to accept the conditional offer made in the letter of the appellant, dated January 20, 2004, referred to above, and in spite of the alleged discussions between the appellant and the second respondent-company, the

matter remained pending. The appellant, thereafter, has issued third legal notice, dated July 23, 2004. The appellant, however, has addressed the aforesaid notice, to the first respondent also, on the ground that the first respondent has transferred to itself from the subsidiary company, i.e., the second respondent-company, huge amounts leaving the creditors of the second respondent unpaid and against the claim of Rs. 3,26,197 together with 24 per cent, interest, damages of Rs. 1 lakh towards harassment, Rs. 15,000 towards cost of three legal notices and Rs. 10,000 towards expenses incurred for pursuing the recovery proceedings, aggregating to Rs. 8,18,081 was demanded from the first and second respondents by specifically threatening u/s 433(e) of the Act as well as under the Central Act 32 of 1993.

(g) The said notice was replied to, separately, under reply, dated August 17, 2004, by the second respondent-company pointing out that even though the principal amount, which is being treated as a basis for reply of the appellant, was disputed, as there were delays in the execution of the orders by the appellant and that there was no default on the part of the second respondent-company and only as a goodwill gesture that a sum of Rs. 2.24 lakhs was offered to be paid in full and final settlement and as such the inability to pay will not arise as there is no default on the part of the company.

(h) The first respondent also separately replied under its reply dated August 20, 2004, pointing out that the first respondent cannot be roped into the day-to-day business dealings between the appellant and the second respondent and the first respondent as a holding company was not in the picture at any point of time and as such the question of winding up of the first respondent does not arise. Thereafter, the present company petition has been filed on November 26, 2004.

7. The first and the second respondents have filed separate counters before the learned company judge, and the appellant has filed separate reply affidavits to each of the said counters. The first respondent has further filed an additional counter.

8. The learned company judge heard the company petition at the admission stage and under the impugned order, came to the conclusion that the second respondent has bona fide disputed the debt and as such the winding up petition u/s 433(e) of the Companies Act is not maintainable. On the question No. 2, it was held that the first respondent-company though a holding company, is not liable to discharge the debt of the second respondent, and consequently, the third question did not survive for consideration.

9. Learned Counsel appearing for either of the parties have made elaborate and detailed submissions on all the three questions, and in fact, the concentration of learned senior counsel for the appellant has been on the second and third questions urging us to take into account the conduct on the part of the holding company, i.e., the first respondent.

10. From the narration of the facts, as above, it would be evident that the second

respondent's material was admittedly retained with the appellant in spite of liability of the appellant to return the same to the second respondent. In the correspondence, referred to above, particularly, the letters of the second respondent, commencing from June 12, 2001, the appellant was being asked to return the material immediately to process the payments. The said letter was followed by further demands dated June 11, 2001, August 1, 2001 and September 14, 2001. However, the appellant was withholding the said material and insisting on payment and the stand of the appellant in its letter of June 5, 2001, was as within law, it is entitled to hold entire material towards security for the amount. Thus, till the aforesaid stage, i.e., till the letter of the second respondent dated September 14, 2001, the appellant never envisaged any inability to pay on the part of the second respondent. The first legal notice dated September 17, 2001, threatening winding up of the second respondent, was, therefore, clearly without any basis from the point of view of Section 433(e) of the Companies Act.

11. In response to the said notice also, the second respondent once again reiterated demand for return of the material under their letter dated October 6, 2001, on the ground that without clearing the outstanding material account, the main account cannot be settled. It is only thereafter that the appellant has returned the material on June 4, 2002.

12. The appellant, however, sent the second legal notice, dated April 8, 2003, demanding the principal amount with interest at 36 per cent, and thereafter, there were admittedly discussions between the appellant and the second respondent which is evidenced by the letter of the appellant, dated January 20, 2004. At this stage also the appellant did not even envisage any inability to pay on the part of the second respondent.

13. In fact, the said letter of the appellant shows that it could receive the principal amount without prejudice to its claim for balance amount towards interest. The appellant, therefore, obviously, did not doubt the capacity of the second respondent to pay the principal amount as well as the balance and was, in fact, intending to recover the balance amount and as such reserved its right to proceed against the second respondent.

14. Even thereafter, the third legal notice, in paragraph 8, also shows that the appellant did not doubt inability of the second respondent and in fact, was insisting on the alleged promise that principal amount will be paid first, leaving the difference amount between both parties including right of the appellant's to claim difference to be settled later.

15. The only provocation in the third legal notice appears to be based upon the allegation that the first respondent as a holding company has transferred to itself funds from the second respondent-company. It is only on the aforesaid allegation that the third legal notice was issued to both the respondents threatening winding up. The counters, filed by both the respondents, separately, in the

company petition, clearly denied that there is any ascendant debt due and payable and also denied that the debt is otherwise in time. On the aspect of the allegation of the appellant that the first respondent also is liable for the debts of the second respondent, the additional counter filed by the second respondent mentions that though it was the holding company of the second respondent, all the shares held by the first respondent have been transferred with effect from September 30, 2004, to different entities and since then the first respondent ceased to be holding company of the second respondent.

16. Learned senior counsel for the appellant, no doubt, contended that the said transfer, of shares is sham and nominal and the first respondent is liable for debts of the second respondent, but however, the fact remains that the first respondent is no more holding company of the second respondent on the date of filing of the company petition.

17. In the circumstances, therefore, the three questions arise for consideration are : (1) whether, the appellant has been able to establish a debt as recoverable u/s 433(e) of the Act against the second respondent? (2) whether, the said debt is bona fide disputed by the second respondent? and (3) whether, the first respondent, in its capacity, as a holding company of the second respondent (at least up to September 30, 2004), is liable for the debts of the second respondent and if so, whether the first respondent is also liable to be wound up.

18. So far as the first and second questions are concerned, as briefly discussed above, the correspondence between the parties, up to the stage of issuing of the third legal notice, shows that while the second respondent had given extra wastage and agreed to give discounts for the alleged delays in execution of job work by the appellant and ultimately during the discussion, came to have agreed to pay Rs. 2.24 lakhs towards full and final settlement of the appellant while the appellant was insisting that it will receive the said amount without prejudice to its other claims and was insisting on entire due interest and additional amounts as claimed in the third legal notice. The claim of the appellant, therefore, was clearly made for unascertained and un-adjudicated amount, which was not admitted by the second respondent.

19. During hearing of this appeal, we had indicated to learned Counsel for the appellant, as to whether they would accept Rs. 2.24 lakhs as said to have been agreed between the parties towards full and final settlement. But obviously the same was not agreeable with the appellant, as their claim according to him was well justified.

20. The learned company judge has rightly relied upon the decision of the Supreme Court in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, . In terms of the principles therein, we agree with the view of the learned company judge that the debt is bona fide disputed by the second respondent. In fact, the third legal notice issued by the appellant, which has a very substantial time gap in between, itself shows that there were disputes with

respect to the appellant's claim and the negotiations between the parties were held to crystallise the said dispute and the said dispute remained un-settled, even when the last legal notice was issued by the appellant.

21. It is well-settled that the process of the company court cannot be used to pressurise the company when there is bona fide dispute with respect to the debt as alleged and there is no reason as to why the appellant should not be relegated to a common law remedy where all these questions as to the alleged entire claim of the appellant vis-a-vis the claim of the second respondent can be adjudicated.

22. It is also significant that mere existence of a debt also is not sufficient for ordering winding up ex-facie, when the appellant is unable to substantiate as to whether the second respondent is a debtor to any other secured or unsecured creditor. The inability to pay as envisaged u/s 433(e) of the Act is akin to commercial insolvency. A mere inability is, therefore, not sufficient unless the appellant is able to establish the commercial insolvency of the second respondent; regarding which there are neither pleadings nor any material. The aforesaid view is well-settled by the following decisions.

23. In fact, the Supreme Court in *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, , has considered the aforesaid aspect in paragraph 18 of the judgment, which is extracted hereunder (page 481):

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.

24. It is also to be appreciated that the second respondent-company had offered to pay the alleged agreed settlement amount towards full and final satisfaction, but the appellant was not agreeable to receive the said sum towards full and final settlement and was desirous of pressing its claim with respect to interest, etc., till future date, before the appropriate forum. This also establishes that "inability to pay" was not the stand of the appellant. Further, there is neither any pleading nor any material to establish that liabilities of the second respondent-company are disproportionate to its assets and as such the commercial insolvency of the second respondent-company has not been established by the appellant.

25. Learned Counsel for the respondent relied upon a decision in *Softsule P. Ltd., In re* [1977] 47 Comp Cas 438, a decision of the Bombay High Court, which was approved by the Supreme Court in *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, , as well as the decision of the Madras High Court in *Tube Investments of India Ltd. v. Rim and Accessories P. Ltd.* [1990] 3 Comp LJ 322. In *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, , the Supreme

Court held that a debt u/s 433 of the Act must be determined and the company must be unable to pay the same and that inability referred to in the expression "unable to pay its dues" should be taken in the commercial sense and that the machinery for winding up of the company will not be allowed to be utilised merely as a means of realising debts due from a company. The learned company judge has also appreciated the aforesaid, with which we are also in respectful agreement.

26. On both the aforesaid grounds, therefore, we are of the view that the first and second questions deserve to be answered against the appellant.

27. Before we go into the third question, incidentally, one more contention of learned senior counsel for the appellant needs to be considered here. A great stress has been laid by the senior counsel on the balance-sheets of the second respondent reflecting the amount payable to the appellant. Our attention has been drawn to the balance-sheets and annual reports of the first respondent which also covers the balance-sheets of the subsidiary company to contend that the amount of Rs. 2.24 lakhs is shown as payable to the appellant. However, the said aspect also has been rightly considered by the learned company judge. The learned company judge has rightly relied upon a Division Bench decision of this Court in *Smt. Vijayalakshmi v. Hari Hara Ginning and Pressing* [1999] 96 Comp Cas 723, and held that mere mention of an amount in the balance-sheet, cannot be termed as an acknowledgment in terms of the Indian Evidence Act, 1872.

28. On question No. 3, it is noticed as above, that the first respondent-company, though was a holding company of the second respondent till transfer of all its shares with effect from September 30, 2004, that by itself cannot make the first respondent liable to the day-to-day transactions of the second respondent, and the third parties including the appellant herein. The first and the second respondents are both juristic entities and even if they are managed by the same set of directors, the business liability of the subsidiary company cannot be placed on the first respondent-company.

29. A decision of the Supreme Court in *Punjab State Industrial Dev. Corporation Ltd. Vs. P.N.F.C. Karamchari Sangh and Another*, is directly on point. Their Lordships have held that both the companies have usual separate legal entities and even if the subsidiary company is promoted by the holding company; that is not enough to pass any liability on the holding company. A similar argument was also raised before the hon"ble Supreme Court by stating that the management is same. However, it was held that both the companies being separate legal entities and the liability of one cannot be passed on to the other, even if they are managed by the same board of directors. To the same effect, a decision of the Punjab and Haryana High Court by a learned single judge in *Punjab National Bank v. Bareja Knipping Fasteners Ltd.* [1995] 1 PLR 75 : [2001] 103 Comp Cas 958, is also relevant.

30. In the light of the above, therefore, even if the first respondent is a holding

company of the second respondent till September 30, 2004, it cannot be made liable and, the company petition as against the first respondent-company is liable to be dismissed. Further, it is also significant that the appellant also did not involve the first respondent in any of the correspondence or in the first two legal notices and had roped in the first respondent for the first time in the third legal notice. Since the company petition is not maintainable against the first respondent, irrespective of the maintainability vis-a-vis the second respondent, the third question framed for consideration, viz., lifting of corporate veil, etc., does not arise for consideration.

In conclusion, therefore, in view of the first and the second questions * having been answered against the appellant, the appeal is liable to be dismissed and the same is accordingly dismissed.