

(2002) 10 MAD CK 0092

In the Madras High Court

Case No : Company Petition No. 21 of 2002 and Company Application No. 141 of 2002

Yokogawa Blue Star Ltd.

APPELLANT

Vs

Soffia Software Ltd. (Formerly Soffia Infosys Ltd.)

RESPONDENT

Date of Decision : 11-10-2002

Acts Referred:

Companies Act, 1956 — Section 10, 433, 434, 9

Citation : (2004) 119 CompCas 929 : (2004) 55 SCL 340

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : V. Ramakrishnan and B. Senthilnathan, for the Appellant; T.K. Seshadri, for the Respondent

Final Decision : Dismissed

Judgement

P. Sathasivam, J.—The petitioning creditor has filed the above company petition under Sections 433(e), 434(1)(a) and 439(1)(b) of the Companies Act, 1956, for winding up of the respondent-company.

2. In the company petition, it is stated that the respondent-Soffia Software Ltd. was incorporated under the provisions of the Companies Act, 1956. The authorised share capital of the respondent-company is Rs. 2,99,50,500 divided into 29,95,050 equity shares of Rs. 10 each. The issued, subscribed and paid-up capital is Rs. 2,99,50,500 divided into 29,95,050 equity shares of Rs. 10 each. The main objects for which the respondent-company was incorporated are to carry on business in computer software development. The respondent is presently engaged in the business of software development. The petitioner is in the business of software consulting. The petitioner specializes in software design and development, computer consulting and contract programming services, etc. The respondent was carrying on business in the United States of America through its branch office under the name and style of Soffia Technologies Ltd. The petitioner entered into a client agreement dated September 26, 2000, with

the respondent. The agreement was executed between the petitioner's branch office in New Jersey and the respondent's branch office in California. Under the terms of the client agreement, the petitioner agreed to send its employees to work on the projects of the respondent as computer programmers/analysts. The respondent was to raise orders from time to time on the petitioner giving details of the employees required and the duration of the requirement. The respondent agreed to pay the petitioner the amounts mentioned under the invoices within 30 days of its receipts.

3. It is further stated that the respondent placed three orders on September 26, 2000, and October 23, 2000, requiring the services of 12 employees of the petitioner for a period of 12 months. The petitioner accordingly sent its employees to the respondent's project sites. The petitioner, thereafter, raised invoices on the respondent from time to time for the services rendered by its employees. The respondent paid the petitioner the amounts due on some of the invoices but failed to pay the amounts due on about 31 invoices. Since the respondent failed and neglected to pay the amounts due despite several reminders, the petitioner requested a meeting with the senior officials of the respondent. Accordingly, a meeting was held on August 9, 2001, between the managing director of the respondent, the general manager and the additional general manager of the petitioner. At this meeting the respondent admitted its liability to the petitioner for a sum of USD 1,83,744.50 for the invoices raised up to June, 2001, and promised to settle the amounts due before the end of December, 2001. The respondent also requested the petitioner to withdraw any legal action till the end of December, 2001. The respondent also promised to pay a portion of the dues before the end of August, 2001. The respondent failed to make any payment. The petitioner on September 26, 2001, sent a legal notice to the respondent u/s 434 of the Companies Act calling upon them to pay the amounts due. The respondent received the notice on September 28, 2001, but neither replied nor paid the amounts due. The respondent is presently due and payable to the petitioner a sum of USD 1,99,944.50 comprising USD 1,83,744.50 (equivalent to Rs. 95,97,336 at Rs. 48 per USD) and also liable to pay interest thereon at 24 per cent. per annum. Further, the financial status of the respondent-company is far from satisfactory. The losses of the respondent-company are mounting day-by-day and it is not in a position to out source orders or infuse funds for its business. The respondent is carrying on business only on borrowed funds. The respondent is commercially insolvent within the meaning of Section 433(e) and also u/s 434(1)(a) of the Companies Act and is liable to be wound up.

4. The respondent has filed a counter-affidavit disputing various averments made by the petitioner. It is stated that there is no privity of contract between the petitioner and the respondent. The agreement referred to by the petitioner was entered on September 26, 2000, between Soffia Technologies Ltd., a corporation organised and operating under the laws of California and having its principal office at 460, Bergeu Blvd 4,200, Palisades Part NJ-07650. In terms of the

agreement, the legal proceedings can be initiated only in the court of State of California, hence the present proceedings for winding up by the petitioner against the respondent are misconceived and abuse of process. No cause of action arises within the jurisdiction. The claim raised by the petitioner is disputed and it is not an ascertained sum. The respondent is not a creditor for the purpose of the provisions under the Companies Act. The petitioner having initiated action in the courts of laws of the State of California against Soffia Technologies Inc. in terms of the agreement dated September 26, 2000, there cannot be any parallel enquiry in relation to the claim more so under the agreement referred to in the petition. In any event, the assets of the respondent are more than the liabilities and the respondent-company is not commercially insolvent as claimed. The respondent does not admit that it owes any sum much less in USD 1,83,744.50 and the respondent is not liable to pay any interest and no ground is made out for winding up of the respondent-company.

5. Heard Mr. V. Ramakrishnan, learned counsel for the petitioner and Mr. T.K. Seshadri for the respondent.

6. The point for consideration is whether the petitioner has made out a case for ordering winding up of the respondent-company under Sections 433(e), 434(1) (a) and 439(1)(b) of the Companies Act ?

7. There is no dispute that the respondent, Soffia Software Ltd., a public limited company incorporated under the provisions of the Companies Act and having its registered office at No. 168, Soffia Towers, Eldams Road, Teynampet, Chennai 18. The main object of the respondent-company is to carry on business in computer software development, computer consulting, etc. Both the petitioner and the respondent were carrying on the business in the United States of America through their respective branch office. It is also not disputed that the petitioner entered into a client agreement dated September 26, 2000. Since the said client agreement is very relevant for deciding the issue in question, it is useful to refer the same :

"Client agreement

This agreement is made and entered into as of September 26, 2000, between Soffia Technologies, Inc. a corporation organised and operating under the laws of California and having its principal offices at 43123 Christy St., Fremont, C. A. No. 94538 (hereinafter referred to as the "client") and Yokogawa Blue Star Ltd., a company (hereinafter referred to as the "vendor") having its principal offices at 460 Bergeu Blvd 4,200, Palisades Park NJ-07650 and registered office at 40/4, Lavelle Road, Bangalore 56000 India."

8. It is clear that this agreement was executed between the petitioner's branch office in New Jersey and the respondent's branch office at California. The reading of the said agreement makes it clear that the same was made and entered on September 26, 2000, between Soffia Technologies Ltd., a corporation organised and operating under the laws of California and having its principal office at

43128, Christy St., Fremont, C. A. No. 94538 and the petitioner having its principal office at 460, Bergeu Blvd 4,200, Palisades Park NJ-07650. It contains various clauses. Among other clauses, Clauses 10 and 12 of the agreement are relevant :

"10. Notice

All notices to be given to the vendor or vendor's employee shall be sent by registered or certified mail to vendor's registered address as in this agreement. Notices to be given to the client shall be sent by registered or certified mail to company at 43128, Christy St, Fremont, C. A. No. 94538. Either party may change the address to which notices are to be sent by notifying the other party in writing. If mailed as provided in this agreement, notice shall be deemed to have been given as of the mailing date.

12. Governing law

This agreement shall be construed in accordance with the laws of the State of California. The parties shall hereto consent that any legal action or proceedings with respect to the agreement may be initiated in the courts of the State of California ; and by the execution and delivery of the agreement, the parties hereto submit to and accept with regard to any such action or proceeding for themselves and in respect of their property, generally and unconditionally, the jurisdiction of the aforesaid court."

9. The reading of the preamble portion of the agreement and other clauses, particularly Clauses 10 and 12 leads to a conclusion that by consent, both parties, namely, Soffia Technologies Inc. and the petitioner agreed to initiate legal action or proceeding in respect of the client agreement in the court of the State of California. By pointing out the above clauses, Mr. T.K. Seshadri, learned counsel for the respondent, would contend that the present proceedings for winding up by the petitioner against the respondent is misconceived and an abuse of process. On the other hand, Mr. V. Ramakrishnan, learned counsel for the petitioner, by drawing my attention to Sections 9 and 10 of the Companies Act and to the fact that the registered office of the respondent is at Madras, irrespective of those clauses in the client agreement and in the light of the admission of its liability, the present company petition for winding up of the respondent-company is maintainable.

10. It is true that the respondent-company, namely, Soffia Software Ltd. was incorporated under the provisions of the Companies Act, 1956, and their registered office is at Chennai-18. In the light of Sections 9 and 10 of the Companies Act and in view of the fact that the respondent is having its registered office at Chennai, there is no difficulty in holding that the petitioner can very well maintain the winding up petition before this court. However, certain other facts are to be noted. The respondent was carrying on business in the United States of America through its branch office under the name and style of Messrs. Soffia Technologies Ltd. and not as described in the company petition,

namely, Soffia Software Ltd. I have already referred to the various clauses in the client agreement and noted that the said agreement was made between Messrs. Soffia Technologies Ltd. and the petitioner having its principal office at 460, Bergen Blvd 4200, Palisades Part NJ-07650 in United States of America. I have also referred to the salient features of those clauses and the parties agreed to initiate legal action or proceedings in respect of the agreement in question in the courts of the State of California. However, Mr. Ramakrishnan, by heavily relying on the minutes of the meeting held at Soffia Software Ltd., No. 168, Eldams Road, Chennai-18 on January 9, 2001, would contend that in view of the admission of their liability and of the fact that the same was agreed to in the meeting held at Chennai, this court has territorial jurisdiction to hear the company petition. In this regard, it is to be noted that I have already referred to the client agreement between the petitioner and Soffia Technologies, Inc. a corporation organised and operating under the laws of the State of California dated September 26, 2000, and the preamble portion of the agreement as well as the other clauses, more particularly Clauses 10 and 12 of the agreement. It is also seen from the counter-statement of the respondent that the petitioner had initiated action in the courts of laws of the State of California as against Messrs. Software Technologies Inc. in terms of the agreement dated September 26, 2000. In the reply affidavit the initiation of proceedings in the State of California has not been disputed. Therefore, as rightly contended by learned counsel for the respondent, there cannot be any parallel enquiry in relation to the claim more so under the agreement referred to in the petition. I am of the view that the parties to the agreement are subject to Clause 12 of the said agreement ; hence the present petition for winding up is misconceived

11. Regarding the acknowledgment of liability, learned counsel for the respondent, while disputing the claim of the petitioner, has brought to my notice the minutes of the meeting held at Soffia Software Ltd., No. 168, Eldams Road, Chennai-18 on August 9, 2001, wherein it is stated that "the amount of outstanding payable to Yokogawa as on end July, 2001, for the billing up to June is US\$ 1,83,744.50 as per your list submitted. This amount however is subject to confirmation and verification by Soffia's US office, as per the contracts executed between Yokogawa US office and Soffia US office." The same thing has been reiterated by Soffia Software in their letter dated August 9, 2001, addressed to the petitioner. Both the documents are available at pages 39 and 40 of the typed set of papers filed by the petitioner. A perusal of those documents shows that the respondent has not acknowledged its liability in clear terms and the liability mentioned therein is subject to confirmation and verification by Soffia's US office. Accordingly, I reject the contra argument made by learned counsel for the petitioner. Even if certain clauses in the client agreement dated September 26, 2002, are void u/s 9 of the Act, the same should be considered by the California court and not by this court.

12. Mr. Ramakrishnan, learned counsel for the petitioner, be relying on a decision of the Bombay High Court in the matter of Seksaria Cotton Mills Ltd., In re

[1969] 39 Comp Cas 475, would contend that in the light of non-payment of debt by the company and no reply for the statutory notice, the petitioning creditor is entitled to a winding up order. No doubt, in that decision, the Bombay High Court has held that if a company fails to comply with a statutory notice u/s 434(1)(a) and the court comes to the conclusion that there is no bona fide dispute in regard to the petitioner's debt, the creditor is entitled to a winding up order ex debito justitiae. In our case, I have already referred to the material placed by the respondent to show that there is no clear co-acknowledgement of liability and the amount mentioned in the minutes of the meeting dated August 19, 2001, is subject to confirmation and verification by the Soffia's US office. In such circumstances, I am satisfied that there is a bona fide dispute in regard to the petitioner's debts and the creditor is not entitled to an order of winding up as of right. Learned counsel has very much relied on a decision of the Punjab and Haryana High Court in D.C.M. Financial Services Ltd. v. Prithipal Singh Construction Co. [2002] 109 Comp Cas 654 : [2002] 39 SCL 94. In that case, the question raised before the Punjab and Haryana High Court was whether the arbitration clause ipso facto ousted the jurisdiction of competent court to entertain and decide the company petition ? and whether the court where the registered office of the company was situated would have jurisdiction ? A learned single judge of the Punjab and Haryana High Court, after referring to Section 10, read with Sections 433, 434 and 439 of the Companies Act, 1956, has answered the question in the affirmative. After going through the facts of that case, I am of the considered opinion that the same is not applicable to the facts of the case on hand. Further, before the learned judge the respondent-company failed to appear and contest the petition before admission and even at the time of final hearing none appeared on behalf of the respondent-company. Accordingly, the said decision is also not helpful to the petitioner's case.

13. In *Saral Enterprises v. India Automobiles Ltd*, [1982] 2 CLJ 701, the Allahabad High Court has held that if there was a bona fide dispute about the existence of the debt, the petition filed for winding it up for non-payment of such a disputed debt was not maintainable.

14. In *State Trading Corporation of India Ltd. v. Punjab Tanneries Ltd.* [1989] 66 Comp Cas 634, the Punjab and Haryana High Court has held that if the petitioner had already resorted to a civil suit for recovery of the disputed debt, the machinery for winding up could not be allowed merely as a means for realising a debt due from the company. In our case, I have already referred to the fact that based on the client agreement dated September 26, 2000, the petitioner has initiated recovery proceedings in the court of laws of the State of California, hence I am of the view that the machinery for winding up could not be allowed to realise the debt due from the company.

15. It is clear that if the debt is a bona fide dispute and the defence is substantial one, the court will not wind up the company. I have already concluded that the debt is not definite and even the amount of outstanding payable to the petitioner

as per the minutes of the meeting held on August 9, 2001, is subject to confirmation and verification by Soffia's US office. Further, the defence of the respondent-company is a substantial one. This aspect has also been considered by me in the earlier part of my order based on Clauses 10 and 12 of the client agreement. The said defence is valid and substantial one. It is also settled law that the claim made u/s 433(e) is a discretionary remedy. In the counter-statement the respondent has asserted that the company is a profitable one and that except the petitioner, no other creditor of the respondent has filed winding up petition. Though the respondent failed to send a reply to the statutory notice within the prescribed period, it is stated in the counter-statement that the respondent caused a reply on February 9, 2002, to be sent to the petitioner through its counsel. The materials placed show that the respondent is a growing concern and there is no other claim through any other creditor of the respondent. I am satisfied that winding up of the respondent is not in the interest of the company's shareholders and creditors. In the light of the settled legal position that the winding up petition was not a mode for recovery of money and in view of the materials placed, I am satisfied that the petitioner has not substantiated his claim for ordering winding up of the respondent-company. Since the parties have invited this court to go into the merits of the claim apart from considering the question relating to jurisdiction, this court has no other option except to answer the questions relating to the merits.

16. In the light of what is stated above, I am satisfied that no grounds are made out for winding up of the respondent-company, and the petition is liable to be dismissed ; accordingly dismissed. No costs. Consequently, Company Application No. 141 of 2002 is closed.