HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SRI JUSTICE S. RAVI KUMAR

O.S.A No.26 of 2015

Date:27-07-2015

Between:

M/S. Nandan Cleantec Limited, having its Registered Office at Sy.No.185 & 186, Kashimpur, Zaheerabad – 502318, Medak District, Rep. By its Chief Executive Officer, Mr. Ravi Chawla.

... Petitioner.

AND

Mrs. Gita Malik and another.

...Respondents.

The Court made the following :

HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SRI JUSTICE S. RAVI KUMAR

O.S.A No.26 of 2015

JUDGMENT: (Per Hon'ble Sri Justice Ramesh Ranganathan)

This appeal, under Section 483 of the Companies Act, is filed by the respondent in C.P.No.19 of 2015 aggrieved by the order of the Learned Company Judge admitting C.P.No.19 of 2015 by his order dated 27-04-2015. Parties shall, hereinafter, be referred to as they are arrayed in the Company Petition. In the Company Petition, whereby its winding up was sought under Sections 433 (e) read with Sections 434 and 439 of the Companies Act, the respondent-company contended that, as the statutory notice was not served on its registered office, the legal fiction under Section 434(1)(a) was not attracted.

In the order under appeal, the learned Company Judge held that service of the statutory notice, through registered post, was relevant only for the purposes of Section 434 (1) (a) of the Companies Act; if, for any reason, the creditor failed to comply with the requirements of the said clause, the company petition should be considered under clauses (b) and (c) thereof; there was no dispute that the respondent-company had suffered an arbitral award for a principal sum of Rs.35,00,000/- along with interest; the petition filed by them, for setting aside the award, was dismissed by the Additional District Court at Panchkula by its judgment in Arbitration Case No.01 of 2011 dated 23-12-2011; it was not the pleaded case of the respondent that the judgment of the Additional District Court was challenged by the respondent by availing further remedy; from this fact, it was abundantly clear that the respondent was indebted to the petitioner; it was reasonable to presume that the respondent-company was unable to pay its debts; the respondent had neither pleaded that it was disputing the debt nor that it was commercially solvent to pay the debt if proved; from the conduct of the respondent, the Court had no hesitation to hold that, because of its inability to pay the debt, the respondent was evading payment of the proven debt; and, for the aforementioned reasons, the company petition should be admitted.

Smt. P. Sundari, learned counsel for the appellant (the respondent in the Company Petition) would submit that the learned Company Judge had erred in holding that the respondent-company must be deemed to unable to pay debts under clauses (b) and (c) of Section 434(1) of the Companies Act; it is only if, after its execution, the award remains unsatisfied either in whole or in part would clause (b) of Section 434(1) be attracted; the onus, under Section 434 (1) (c), was on the petitioner to establish that the company was commercially insolvent, and was unable to pay its debts; the onus could not have been shifted on to the respondent-company; Section 434(1) required the Learned Company Judge to record his satisfaction, on the basis of the material placed on record by the petitioner, that the respondent-company was commercially insolvent, and was unable to pay its debts; and the learned Company Judge had erred in admitting the company petition on the ground that Sections 434 (1)(b) & (c) were attracted, and in holding that the respondent-company must be deemed to be unable to pay its debts.

Sri L. Ravichander, Learned Senior Counsel appearing on behalf of the petitioner, would fairly state that, since the execution proceedings filed by the petitioner to enforce the award passed by the Arbitral Tribunal is still pending, clause (b) of Section 434 (1) may not be attracted. Learned Senior counsel would, however, contend that the petitioner had specifically asserted, in the company petition, that the respondent-company was commercially insolvent and was unable to pay its debts; this assertion was not even denied by the respondent either in its counter-affidavit dated 20-03-2015 or in its additional counter-affidavit dated 28-03-2015; the petitioner had submitted an application to the Registrar of Companies requesting him to furnish copies of the annual returns and the balance sheets of the respondent-company; the Registrar of Companies had informed them that no such documents, in this category, were available in their office; as copies of the annual returns and the balance sheets of the respondent-company were not even available in the office of the Registrar of Companies, the petitioner cannot be expected to produce these documents to establish that the respondent-company is commercially insolvent; in such circumstances, the petitioner could only assert in the petition that the respondent-company was commercially insolvent; the respondent chose not even to deny this assertion, much less to file copies of the annual returns and balance sheets, along with their counter, before the learned Company Judge; and the learned Company Judge was, therefore, justified in placing the onus on the respondent-company to show that they were commercial solvent.

In the order under appeal, the learned Company Judge has held that Section 434 (1) (a) of the Companies Act is not attracted. Since Sri L. Ravichander, learned Senior Counsel appearing on behalf of the petitioner, fairly admits that Section 434 (1) (b) is also not attracted, it is unnecessary for us to examine whether the said provision is attracted or not. The only question which, therefore, necessitates examination is whether the Learned Company Judge was justified in his conclusion that, because the respondent did not plead that it was commercially solvent to pay the debt if proved, clause (c) of Section 434 (1) was attracted.

An order under Section 433(*e*) of the Companies Act is discretionary. (**Mediquip Systems (P) Ltd. v. Proxima Medical System Gmbh**[1]). The words "*may*", used in Section 433, is indicative of the fact that even if one or more grounds mentioned in Section 434 is made out, and the company is deemed to be unable to pay its debt, it is still not mandatory but rests in the discretion of the Court whether or not to make an order of winding up. (**American Express Bank Ltd. v. Core Health Care Ltd.**[2]; **P. & J. Macrae Ltd., In re**[3]). The mere fact that the company is unable, as at present, to pay its debt does not justify its being wound up as the discretion to pass such an order even in the case of inability of the company to pay its debts is, by Section 433, vested in the Court and that discretion has to be exercised judiciously. (**Jugalkishore Benarsidas v. South India Saw Mills (P) Ltd.**[4]).

The Company Court is not bound to entertain a petition for winding up nor is it bound to order winding up even if a case to that effect on facts is made out. (**Premlal Birla v. Gilt Pack Ltd**[5]). A petition for winding up is filed in public interest, and is a representative action. An order passed in a winding up petition is an order in rem. The court is bound to keep in view the public interest. The Court is concerned not only with the interest of the petitioner or the creditors, but also the interest of the company's shareholders, contributories, etc. While ordering the winding up of a company, when it is unable to pay its debts, the Court should keep in view that (1) the winding up is for the benefit of all concerned; (2) the winding up does not result in conferring any special privilege on the petitioner, i.e the creditor or any other person making the application for winding up. (**Goetze India Ltd. v. Pure Drinks (New Delhi) Ltd**[6]).

The object and scope of winding up of a company cannot be confined to the claim of the petitioner alone but has to be viewed, judged and tested in its entirety, including the petitioner's claim, the defence taken by the company in relation to the claim in question, the financial position of the company, its viability, commercial sustainability in the market, etc. Petitions for winding up ought not to be entertained unless a very strong prima facie case is made out on facts. (**Mysore Sales International Limited, Bangalore v. United Breweries Limited, Bangalore**[7]; **Reliance Infocomm Ltd. v. Sheetal Refineries Pvt. Ltd**[8]). The petitioner is not entitled ex-debito justitiae to an order of winding-up on the mere plea that the debt was not paid. A petition presented ostensibly for a winding-up order but really to exert pressure will be dismissed. (**Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswamy**[9]; **Buckley on the Companies Act, 13th edition, page 451; Reliance Infocomm Ltd.**[8]). The machinery for winding up will not be allowed to be utilised merely as a means for realising the debt due from the company. (**P.G. Bhatia & Co. v. Softsule (P) Ltd.**[10]; **State Trading Corporation of India Ltd. v. Punjab Tanneries Ltd**[11]; **Kanchanaganga Chemical Industries v. Mysore Chip Boards Ltd.**[12]; **Pradeshiya Industrial and Investment Corporation of Uttar Pradesh v. North India Petrochemical Ltd.**[13]; **Mediquip Systems (P) Ltd.**[1]; **Reliance Infocomm Ltd.**[8]).

In cases where the presumption under Section 434 (1) (a) does not arise then, of necessity, the Court has to consider whether any such presumption arises under Section 434 (1) (c) and satisfy itself that, prima facie, the Company is unable to pay its debt as its assets are insufficient to meet all its liabilities, actual and contingent. (**Reliance Infocomm Ltd.**[8]; **Airwings (P). Ltd. v. Viktoria Air Cargo Gmbh Langer Kornweg**[14]; **American Express Bank Ltd.**[2]). Discretion under Sections 433 and 434 of the Companies Act is to be exercised only when it is proved that the company is unable to pay its debts to its creditors on account of the fact that it has become commercially insolvent, (**National Research Development**

Corporation v. Electro Flux (P) Ltd.[15]), and keeping in view the facts of each case. Section 434(1) (c) expressly authorises a winding up if the existing and probable assets are insufficient to meet the liabilities, taking into account not only liabilities presently due but also those which are "contingent and prospective", (**Registrar of Companies v. S. Sohanmull Gotcha P. Ltd.**[16]; **In re, European Life Assurance Society**[17]; **Buckley on the Companies Acts, 13th edition**), and it is unable to pay its debts as they become due, although its assets when realized, including uncalled capital, exceed its liabilities. (**S. Sohanmull Gotcha P. Ltd.**[16]; **Halsbury's Laws of England, Third Edition Volume 6, paragraph 1033**). The words "unable to pay its debts" in Section 433 (e) should be taken in the commercial sense in that the company is unable to meet its current demands i.e., it is plainly and commercially insolvent. (**Pradeshiya Industrial and Investment Corporation of Uttar Pradesh**[13]). Section 433(e) read with Section 434(1)(c) enables the Court to wind up the company if its existing and probable assets are insufficient to meet its liabilities taking into account not only its existing liabilities but also those which are contingent and prospective. It is only if it is proved to the satisfaction of the Company Court that the company, which is sought to be wound up, is unable to pay its debts, would the legal fiction under Section 434(1)[c] be attracted, and the court required to deem that the company is unable to pay its debts under Section 433 (e) justifying admission of the company petition. An examination of the company's solvency may be a useful aid in deciding whether the refusal to pay reflects an inability to pay. (**IBA Health (India) Private Limited v. Info-Drive Systems Sdn. Bhd.**[18]). One of the considerations, to determine whether the company is able to pay its debts or not, is whether the company is able to meet its liabilities as and when they accrue. That it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise. (**Mediquip Systems (P) Ltd.**[1]; **P.G. Bhatia & Co.**[10]; **Softsule (P) Ltd. Re**[19]**; Ranbaxy Lab Ltd v. M.S. Shoes East (I) Ltd.**[20]).

The phrase "plainly and commercially insolvent," to attract Section 434(1)(c), means that the assets of the company are such as to make it reasonably certain-as to make the court feel satisfied-that the existing and probable assets would be insufficient to meet the existing liabilities. The question is not whether, at the given time, the company can pay all its debts whether presently due or only in the future, and still continue to function. The question is whether it is able to meet its current demands-it would, of course, be insolvent if it cannot do that even if it has assets not presently available but more than ample to pay its debts and is in that sense rich-and whether its existing and probable assets would suffice to meet the future demands. (**V.V. Krishna Iyer Sons v. New Era Manufacturing Co. Ltd.**[21]; **In re, European Life Assurance Society**[17]).

A Company is commercially insolvent when it has not the wherewithal to meet its commercial liabilities. (**M/s.Excel Embroideries v. Trend Designs Ltd.**[22]). The petitioner is obliged to show that the financial status or the monetary substratum or the commercial validity of the company has gone so low and down that winding up is obviously, and evidently, unavoidable. (**Tata Iron and Steel Co. v. Micro Forge (India) Ltd.**[23]). The Court has to examine the company's inability to pay its debts with reference to the date when it became absolutely due for payment, along with the contingent and prospective liabilities of the company. (**Sri Shanmugar Mills Ltd. v. Dharmaraja Nadar**[24]; **S. Sohanmull Gotcha P. Ltd.**[16]).

Before admitting and advertising a petition for winding-up the Company Court should, after hearing the petitioning-creditor and the Company sought to be wound up, record its prima facie satisfaction, among others, on whether, from the material on record, the Company is commercially insolvent as contemplated under Section 434 (1)(c). (**Goetze India Ltd.**[6]; **Reliance Infocomm Ltd.**[8]; **Airwings (P). Ltd.**[14]; **American Express Bank Ltd.**[2]). The Company Court ought to examine the material placed before it by the petitioning-creditor and further evidence, if any, which it may require the petitioning Creditor to furnish. The Company Court must also examine the evidence placed before it by the respondent-company at the stage of admission. The balance sheet of the company is one such document which may be kept in view. On assessment of the evidence, let in by the petitioning-creditor and the contesting company, if the Company Court comes to the conclusion that the company, prima facie, appears to be commercially insolvent, a rebuttable presumption would arise under Section 434 (1) (c) that the Company is unable to pay its debts, and then admission and advertisement may follow. (**Airwings (P) Ltd**[14]; **Reliance Infocomm Ltd.**[8]).

As Section 434 (1) (c) of the Companies Act places the onus on the petitioner to prove and for the Company Court to record its satisfaction, on the basis of the documentary evidence on record, that the company is unable to pay its debts, meaning thereby that it is commercial insolvent, the initial onus cannot be placed on the respondent-company to prove that it is commercially solvent. Their failure to specifically deny the vague assertion in the Company Petition cannot, by itself and without anything more, justify admission of the Company Petition and the consequent advertisement.

The submission of Sri L. Ravichander, Learned Senior Counsel, that absence of the annual returns and the Balance Sheets of the respondent-company in the office of the Registrar of the Companies disabled the petitioner from producing documentary evidence to show that the respondent-company is commercially insolvent, has considerable force. However no such plea is to be found in the petition seeking winding up of the respondent-company. In any event, the Learned Company Judge has not considered this submission of the Learned Senior Counsel which appears to have been raised for the first time during the course of hearing of this appeal. Smt. P. Sundari, learned counsel for the respondent-company, would submit that, except for the balance sheet for the year ending 31-3-2015, all prior balance sheets are available, and would be produced before the learned Company Judge.

We considered it appropriate, in such circumstances, to set aside the order under appeal and remand the matter to the Learned Company Judge for his consideration afresh. Needless to state that it is open both to the petitioner and the respondent, if they so choose, to file additional affidavits and to place relevant documentary evidence before the Learned Company Judge for and against the plea that the respondent-company is commercially insolvent. O.S.A.No.26 of 2015 is, accordingly, disposed of. Miscellaneous Petitions, if any, pending shall also stand disposed of. No costs.

JUSTICE RAMESH RANGANATHAN

JUSTICE S. RAVI KUMAR

Date:27-07-2015
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[1] (2005) 7 SCC 42
[2] (1999) 96 Comp Cas 841 (Guj)
[3] [1961] 31 Comp Cas 424
[4] (1975) 45 Comp Cas 273 (Ker)
[5] (2004) 121 Comp Cas 802 (MP)
[6] (1994) vol. 80 Comp Cas 340
[7] (2005) 6 Kar. L.J. 615
[8] (2008) 142 Comp Cas 170
[9] (1965) 35 Comp Cas 456 (SC)
[10] (1977) 47 Comp Cas 438
[11] (1994) 2 CLJ 270
[12] (1998) 91 Comp Cas 646
[13] (1994) 3 SCC 348
[14] AIR 1995 Kar 69
[15] 2005 (2) ALD 531
[16] (1972) 42 Comp Cas 386
[17] (1869) L R 9 Eq 122
[18] (2010) 10 SCC 553

[19] (1997) 47 CC 438 (BOM)

[20] (1998) 93 Comp. Cas. 296

[21] (1995) Copmp. L.J. 179 = (1965) 35 Comp Cas 410 (Ker)

[22] AIR 1997 Ker 329

[23] (2001) 104 Copm Cas 533 (Guj)

[24] (1969) 39 Comp. Cas. 297 (Mad.)=AIR 1970 Mad 203