*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

+ **COMPANY PETITION No.64 of 2001**

% Dated 26.12.2012

Vee Bee Industries

…. Petitioner

And

$ M/s. Sanghi Spinners (India) Ltd.,

… Respondent

! Counsel for the petitioner: Sri Gurrala Arun

^ Counsel for respondent: Sri C. Nageswara Rao

<GIST:

> HEAD NOTE:

? Citations:

[1] (1998) 7 SCC 184
[2] (2007) 15 SCC 58
[3] (2000) 3 SCC 250
[4] (2000) 6 SCC 659
[5] (2003) 114 Comp Cas 193 (Cal High Court DB)
[6] (2004) 3 SCC 155
[7] AIR 1964 SC 1882
[8] (1989) 3 SCC 476

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

COMPANY PETITION NO.64 OF 2001

ORDER:

This Company Petition is filed by Vee Bee Industries seeking winding up of the respondent under Section 433(e) & (f) and Section 439 of the Companies Act, 1956 (hereinafter called the "Act") read with Rule 95 of the Companies (Court) Rules, 1959 ("the Rules" for short). Sri G. Arun, Learned Counsel for the petitioner, submits that it would suffice if this Court were to examine the petitioner's contention that the respondent should be wound up under Section 433(e) read with Section 434(1)(a) of the Act; and this Court need not adjudicate their plea that the respondent is also liable to be wound up under Section 433(f) of the Act.

The petitioner is a partnership firm engaged in fabrication of pressure vessels, boilers, process and steam piping, and in executing turnkey projects. The respondent is a company registered under the Act on 19.1.1992 with its registered office at Hyderabad. The authorized share capital of the respondent is Rs.60.00 crores divided into 6.00 crore equity shares of Rs.10/- each. Its issued, subscribed and paid up capital is Rs.38,83,75,000/- divided into 3,88,37,500 equity shares of Rs.10/- each. The main objects, for which the respondent was incorporated, are to carry on business of spinning cotton, viscose, synthetics and blended yarn cone and hank form; to carry on liaison work, act as agents, distributors, stockists and to represent manufacturers, producers, mills, power-looms, handlooms, exporters and importers of cotton yarn and cotton waste, viscose, synthetic textiles, textile goods, various allied items, ready made garments, colours and chemicals, various machineries, electrical items, equipment, spare parts or allied products to be marketed in India for both Indian and foreign companies, firms, merchants and individuals.

For the spinning mill, then being set up at Sanghinagar, the respondent requested the petitioner to install and commission piping etc., for compressed air, cooling water, etc., for its factory. The respondent placed an order with M/s Albaj Engineering Corporation, Mumbai for supply of material, and an order with the petitioner on 01.09.1995 for erection and commissioning of piping and utilities for compressed air pipe work, cooling water for compressing air, air dryer pipe work, chilled water pipe work, condenser water pipe work, drain pipe work etc., The said order dated 01.09.1995 contains the terms and conditions of supply of material, technical, financial and commercial matters with regard to installation and commissioning of piping work for the plant. It is the petitioner's case that they completed erection work at the respondent's factory site by December, 1996, but did not receive payment in time for the work done; the respondent made part-payment from time to time, despite which they completed the work believing the assurances and promises made by the respondent's management that payment would be promptly made after the work was completed; they completed the job of installation, testing and commissioning of the plant entrusted to them at the factory site to the satisfaction of the respondent; they raised final invoice dated 30.10.1998 for Rs.48,53,443.65 ps; the said invoice was accepted by the respondent, and their consultants M/s Gherzi Eastern Ltd; by their certificate dated 28.12.1998, the consultants confirmed the value of the work done by the petitioner as Rs.48,53,443-65 ps; the respondent failed to make the payment due and outstanding; after deducting the payments received of Rs.5,39,058/-, the outstanding dues were for Rs.43,14,386/-; the last part- payment made by the respondent to the petitioner was on 16.4.1999; and, for belated payment, they are entitled for interest at 18% per annum from the due date till the date of realization. The petitioner claims to have addressed letter dated 27.7.2000 requesting the respondent to make payment and, as there was no response, they issued legal notice dated 29.8.2000 claiming Rs.43,14,385.65 towards the debt due, with interest at 18% per annum; and, in their reply thereto, the respondent is said to have raised false, frivolous and untenable pleas to avoid the payment due to the petitioner, and to have tried to set up a defence which was neither bonafide nor borne out by the facts on record. The petitioner would contend that the respondent had failed and neglected to pay the amounts admittedly due and payable to them in the ordinary course of business, and had rendered itself liable for being wound up; the respondent was in a bad financial position, and was unable to pay its admitted dues; the respondent was unable to pay its debts generally, and was commercially insolvent; and it would, therefore, be in the interests of the creditors to have the respondent wound up.

In their counter affidavit, the respondent would contend that the petitioner's sister concern M/s Albaz Engineering Corporation was required to supply material which the petitioner was required to install, test, and render other services; as M/s Albaz Engineering Corporation failed to supply material, no work was executed and the entire work was incomplete; there was no assurance or promise to make payment;

merely because final invoice dated 30.10.1998 was raised did not mean that the respondent was liable to make payment; the respondent and its consultants did not agree on the certificate dated 28.12.1998 regarding the value of the work; the said certificate shows that it is only a running bill, and only a payment of Rs.21.00 lakhs and odd was recommended; this payment certificate cannot be relied upon as it is only a part payment certificate of the completed work, whereas the terms of agreement provided for completion of the entire work; as the work was half done and incomplete, the respondent was not liable to pay any amount as there was breach of the contract; the petitioner was put to strict proof regarding the payment made on 16.4.1999; they were not entitled for payment of either the principal or interest as claimed; the respondent is financially sound, and is able to pay its debts; the agreement dated 1.9.1995 has a default liability period; the petitioner had supplied sub-standard material such as the air dryer; they failed to supply proper drawings of even the material supplied; the agreement clauses show the petitioner’s liability to complete the work as per the terms; the petitioner had failed to act according to the terms of the agreement; the respondent is a world class hundred percent export oriented unit having one lakh spindles under a single roof with latest machinery from Germany, Japan, Switzerland, France and USA; all the machines are computerized and fully automated with minimum handling of products so as to maximise the quality of the product, and make them suitable for the export market; the respondent had, with a view to provide atmospheric conditions i.e., temperature and humidity suitable for spinning, ordered for a chiller plant to work at 27 degrees of relative humidity levels varying from 55% in spinning and 65% in winding; the computerized controls require standard atmospheric and humidification conditions to function satisfactorily, failing which the results would be highly erratic; the entire product, and its quality parameters, depend upon standard atmospheric conditions; failure of the petitioner to execute the contract was evident from the correspondence undertaken by the respondent from the date of the agreement, more particularly the letter dated 24.11.1995 wherein it is stated that, even after two months of payment of the advance, work had not been started; there were various defaults by the petitioner; the letter dated 23.4.1996 also showed the petitioner's failure to execute the work properly; several other works, required to be executed by the petitioner, were not completed; the works required to be completed included establishment of transformers, construction of water tanks, purchase of highly sophisticated equipment such as computers, and other civil works for Rs.1.00 crore; the respondent had entered into a contract with L & T for construction of a part of the chiller plant; L & T had completed the work, and the respondent had to pay them for the work done; the petitioner had breached the contract necessitating the respondent to complete all the work incidental to the work required to be executed by the petitioner; the petitioner had abandoned the project in 1996, and was now pressurising them for payment; the petitioner's claims are barred by limitation as the agreement was entered into on 1.9.1995 and, while they claim that the work was completed in 1996, the Section 434 notice was issued only on 29.8.2000; and the company petition has been filed only to harass the respondent.

The company petition was admitted on 28.3.2002. However publication was deferred to enable the respondent to pay the debts due to the petitioner. Thereafter, by order dated 24.4.2002, this Court permitted the petitioner to take out publication of admission of the company petition, as stipulated in Rule 99 of the Companies (Court) Rules, 1959, in Indian Express (English daily) and Vaartha (Telugu daily), Hyderabad editions. On 1.7.2011, an affidavit in lieu of chief examination was filed on behalf of the petitioner. Exhibits P-1 to P-7 were marked on 13.09.2011. On 31.8.2012 P.W.1 was cross-examined by Sri C. Raghu, Learned Counsel for the respondent. On 11.9.2012 Sri C. Raghu, Learned Counsel for the respondent, informed the Court that the respondent had no witnesses to examine on their behalf; and, as such, the respondent's evidence was closed.

In the affidavit filed in lieu of chief examination the partner of the petitioner firm reiterated what has been stated in the company petition. He also stated that, after completion of the job of installation, commissioning and testing of the plant, the petitioner had raised a final invoice dated 30.10.1998 for Rs.48,53,443.65 ps; the said invoice was accepted by the respondent's consultants M/s. Gherzi Estern Ltd. Bombay by their certificate dated 28.12.1998; taking into account the last part- payment of Rs.5,39,058/-, made by the respondent on 16.04.1999, Rs.43,14,386/- was still due towards the principal; the respondent was liable to pay interest thereon at 18% p.a., until realization; the respondent has failed to make payment for the work done by them; the petitioner had addressed letter dated 27.07.2000 seeking payment of the amount overdue; they sent legal notice dated 29.08.2000, calling upon the respondent, to pay Rs.43,14,386/- with interest at 18% p.a; in their reply, the respondent had raised false and frivolous pleas to avoid payment; the respondent is unable to pay its debts because of its deteriorated financial condition, and is commercially insolvent; on receipt of the statutory notice, issued under Section 434 of the Companies Act, the respondent had, by their reply letter dated 27.09.2000, denied liability; and the respondent was liable to pay Rs.43,14,386/-, together with interest at 18% p.a, on the date of filing of the company petition.

Ex.P-1 is the order dated 01.09.1995 issued by the respondent for installation, testing & commissioning of compressed Air Pipe work, cooling water for compressed air and air drier pipe work etc. Ex.A-2 is the statement of accounts of the respondent as on 23.02.2001. Ex.A-3 is the final invoice dated 30.10.1998. Ex.A-4 is the payment certificate issued by Gherzi Eastern Limited. Ex.A-5 is the letter dated 27.07.2000 addressed to the respondent demanding payment of the amount due latest by 30.09.2000; Ex.A-6 is the notice dated 29.08.2000 issued to the respondent under Section 434 of the Companies Act. Ex.A-7 is the reply letter dated 27.09.2000 issued by the respondent to the petitioner's notice dated 29.08.2000.

In cross-examination, P.W-1 stated that the petitioner was a registered partnership firm. He, however, admitted that he had not filed any document to show that the petitioner was a registered partnership firm. He denied the suggestion that the petitioner was not a registered partnership firm. He also denied the suggestion that he was not a partner of the petitioner firm. He admitted that the petitioner was liable to pay the amount since 1996, the work was completed in December, 1996, and they did not file the correspondence with the respondent from 1996-98. He admitted that he had denied the suggestion that Ex.A-3 had been fabricated for the purpose of this case. He admitted that Ex.P-1 contains a condition that the disputes, if any arises, would be resolved by arbitration. He also admitted that Ex.A-2 did not reflect the final invoice i.e., Ex.A-3. He denied the suggestion that his claim was barred by limitation, and that Ex.A-3 was fabricated. He denied that no document was filed, and stated that the last payment was made on 16.04.1999 as stated in Ex.A-5. He also denied the suggestion that they had not received any payment on 16.04.1999, and it was falsely stated for the purpose of saving limitation. He also denied the suggestion that he was not competent to depose on behalf of the petitioner or that their claim was misconceived or that the respondent was not liable to pay any amount to them. In re-examination P.W-1 stated that the document referred to in Ex.A-5 dated 27.07.2000, making a reference to the invoice dated 31.10.1998, was the same which was mentioned at para 9 of the winding up petition; and Ex.A-3 was the same document mentioned in Ex.A-5.

By Ex.P.5 letter dated 27.7.2000, receipt of which is not disputed by the respondent, the petitioner informed the respondent that they had accepted the petitioner's final bill of Rs.48,53,443.65 against the final invoice No.VBI/98-10/W-2207 (which is the final invoice dated 30.10.1998 in Ex.P.3); and that the last payment made was on 16.4.1999. In the statutory notice in Ex.P.6 dated 29.8.2000, the petitioner reiterated that a final invoice dated 30.10.1998, for Rs.48,53,443.65, had been raised by them; receipt of the said invoice has been accepted by the respondent and their consultants M/s Gherzi Eastern Limited, Mumbai who had, by their certificate, confirmed the value of the work done by the petitioner as Rs.48,53,443.65; and, after taking into account the payment of Rs.5,39,058/- made earlier by the respondent, the balance due to them was Rs.43,14,385.65. In their reply thereto, by Ex.P-7 dated 27.09.2000, the respondent stated that a major portion of the amount had been paid to the petitioner, and its sister concern. The respondent further stated that the air dryer, supplied by the petitioner, was not working properly; the said fact was intimated to the petitioner, but no action was taken to rectify the defects; and the inaction of the petitioner had resulted in severe financial loss to the respondent. The respondent denied that a sum of Rs.43,14,385.65 was due towards the principal or that the petitioner was entitled to charge interest thereon. The respondent also denied their having neglected or to have failed to make payment, and stated that the petitioner had committed serious lapses and did not perform their obligations under the contract. Except for a vague denial the petitioners' assertion, both in their notice dated 27.7.2000 and in the statutory notice dated 29.8.2000, that a final invoice dated 30.10.1998 was raised by the petitioner has not been denied by the respondent. Except for a mere suggestion in cross-examination, the oral evidence of P.W-1 that the last payment made by the respondent on 16.04.1999 was for Rs.5,39,058/- has not been rebutted by way of any evidence adduced by the respondent. The respondent has not denied the petitioner's assertion, in their letter dated 27.09.2000 (Ex.P-7) sent in reply to the statutory notice, of their having accepted the final invoice dated 30.10.1998. As the final invoice dated 30.10.1998 for Rs.48,53,443.65 ps has been accepted both by the respondent and their consultants; as the evidence of P.W-1, that the last payment made by the respondent of Rs.5,39,058/- was on 16.04.1999, stands unrebutted by any evidence being adduced to the contrary; and as the said amount has, admittedly, not been paid despite issuance of the statutory notice in Ex.P.6 dated 29.8.2000; the legal fiction under Section 434(1)(a) operates and the respondent must be deemed to have neglected to pay the debt due to the petitioner. In their counter-affidavit the respondent admits that their consultants had recommended payment of Rs.21.00 lakhs, which they contend is not payable as the petitioner did not complete the work, and had committed breach of the contract. Even for failure to pay this sum of Rs.21.00 lakhs, the provisions of Section 434(1)(a) are attracted. The respondent has not adduced any evidence in support of their plea that the petitioner did not complete the entire work, and had committed breach of contract. While the presumption under Section 434(1)(a) is rebuttable the respondent, for reasons best known, has chosen not to adduce evidence to prove that there exists a bonafide dispute; they have not neglected to pay the amount due; and they are commercially solvent. In the absence of any evidence being adduced by the respondent, they must be deemed to be unable to pay their debts attracting Section 433(e) of the Act.

Sri C. Raghu, Learned Counsel for the respondent, would contend that the very fact that, in their letter dated 27.7.2000, the petitioner admits to have waited patiently for more than three and half years for payment of their dues, was itself proof that their claim is barred by limitation. It needs to be noted that the said letter dated 27.7.2000 also records that the last payment was made on 16.4.1999. In his affidavit in lieu of chief-examination, P.W-1 stated that the last payment made of Rs.5,39,058/- was the part payment made by the respondent on 16.04.1999. No evidence, to contradict the oral evidence of P.W-1, was adduced by the respondent. The petitioner has also referred to the final invoice VBI/98-10/W-2207, for Rs. Rs.48,53,443.65, in their letter dated 27.01.2000 which is the final invoice dated 30.10.1998. The company petition was filed on 18.6.2001 which is less than three years from the date of the final invoice dated 30.10.1998, (acceptance of which has not been specifically denied by the respondents though the petitioner has referred to the said invoice in their letter dated 27.7.2000, and in their statutory notice dated 29.8.2000), and a little more than two years from the date of the last payment made by the respondent on 16.04.1999. As the company petition has been filed within three years from the date of the final invoice accepted by the respondent, and around two years of the part-payment made by the respondent on 16.4.1999, the petition has been filed well within three years and, as such, is not barred by limitation.

Sri C. Raghu, Learned Counsel for the respondent, would further contend that the company petition has been filed by an unregistered firm; and such a petition is barred under Section 69 of the Partnership Act. P.W.1 has, in cross-examination, denied the suggestion that the petitioner is an unregistered firm, and has stated that it is a firm registered under the Partnership Act. Even if we were to proceed on the premise that the petitioner is an unregistered partnership firm, the question is whether a petition for winding up, filed by an unregistered partnership firm, is barred under Section 69 of the Partnership Act. Section 69 of the Partnership Act bars, at the very inception, a suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party. To attract the bar, the following conditions must be satisfied: (i) on the date of the suit the plaintiff-partnership firm must not be registered under the provisions of the Partnership Act and consequently, or even otherwise, the persons suing are not shown in the Register of Firms as partners of the firm, on the date of the suit; (ii) such unregistered firm, or the partners mentioned in the sub-section, must be suing the defendant-third party; and (iii) such a suit must be for enforcement of a right arising from a contract between the firm and the third party. Sub-sections (1) and (2) of Section 69 of the Partnership Act strike at the very root of the jurisdiction of the Court to entertain a suit to enforce a right arising from a contract. (**Raptakos Brett & Co. Ltd. V Ganesh Property**[1]; and **Purushottam v Shivraj Fine Arts Litho Works**[2]). Having regard to the purpose which Section 69(2) seeks to achieve, and the interest sought to be protected, the bar must apply to a suit for enforcement of a right arising from a contract entered into by the unregistered firm with a third party in the course of its business dealings with such a third party. If the right sought to be enforced does not arise from a contract to which the unregistered firm is a party, or is not entered into in connection with the business of the unregistered firm with a third party, the bar under Section 69(2) will not apply. (**Purushottam**[2]; and **Haldiram Bhujiawala v Anand Kumar Deepak Kumar**[3]). In **Kamal Pushp Enterprises v D.R.Construction Company**[4], the Supreme Court held that the bar under Section 69 of the Partnership Act is not applicable at the stage of enforcement of the award, by passing a decree in terms thereof, as the award crystallises the rights of the parties; and what is being enforced at that stage is not any right arising from the objectionable contract.

It is only if a petition for winding up is held to be akin to a suit, or one for enforcement of a right arising out of a contract, would the bar under Section 69 apply. Clause (b) of Section 439(1) of the Companies Act confers wide powers on any creditor or creditors to file a winding up petition. An unregistered partnership firm can also be a creditor of a company. The Companies Act places no bar on an unregistered firm presenting a petition for winding up a company. Section 69(1) cannot be applied to a case where the petitioning creditor, being an unregistered partnership firm, has not instituted a petition against the firm or any partner of the said firm, but has instituted a winding-up petition against the company which is a third party. The first limb of Section 69(2) of the Partnership Act refers to the institution of a "suit". A petition for winding up, filed by the unregistered firm, is not a "suit" within the meaning of Section 69(2) of the Partnership Act. In a winding up petition, the court is only required to decide whether the company is commercially solvent or insolvent, and the lis is not merely between the petitioning creditor and the company sought to be wound up. Once the petition is admitted, the creditors, contributories, shareholders etc. seek redress in the proceedings, and can even oppose the winding up of the company. On the company being directed to be wound up, the assets of the company are taken over and distributed in accordance with the provisions of the Companies Act, and the rules made thereunder, which is a complete code by itself. All steps taken in a winding up proceedings are in public interest. This right, to have a company wound up, cannot be construed to be a right arising from a contract between the petitioning creditor and the company. A winding up petition is not filed to enforce a right arising from a contract. The application for winding up, filed by an unregistered partnership firm, is based on a statutory right under Section 433 read with Section 439 of the Companies Act. The enforcement of that right, under the Companies Act, has nothing to do with the contract between the parties. An obligation to wind up a company is based on a statutory right, and not one "***arising from a contract***" as specified in Section 69(2) of the Partnership Act. The petitioner is seeking enforcement of its legal right, for an order of winding up of a company, under Section 433 of the Companies Act on the ground that the company is commercially insolvent or is unable to pay its debts. (**Shree Balaji Steels v. Gontermann-Peipers (India) Ltd**[5]). I am in respectful agreement with the law laid down by the Division Bench of the Calcutta High Court in **Shree Balaji Steels**[5]. I am satisfied, therefore, that the bar under Section 69(1)&(2) of the Partnership Act would not apply in cases where an unregistered firm files a petition for winding up of a company.

Sri C. Raghu, Learned Counsel for the respondent, would further contend that a winding up petition would fall within the ambit of "***other proceedings***" under Section 69(3) of the Partnership Act. By virtue of sub-section (3) of Section 69, the bar enacted by sub-sections (1) and (2) also apply to a claim of set-off or '***other proceedings***' to enforce a "***right arising from a contract***". (**Firm Ashok Traders v Gurumukh Das Saluja**[6]). A liberal meaning must be assigned to the phrase "***other proceedings"*** in sub-section (3) of Section 69, untrammelled by the preceding words "***a claim of set-off***". The words "***other proceedings***" cannot be interpreted ejusdem generis with the preceding words "***a claim of set-off***". (**Firm Ashok Traders**[6]; **Jagdish Chandra Gupta v. Kajaria Traders (India) Limited**[7]; **Shreeram Finance Corporation v Yasin Khan**[8]). However as a winding up petition is not for enforcement of a right arising from a contract with third parties, the contention that, in view of sub-section (3) of Section 69 of the Partnership Act, the words used in the said sub-section, namely, "***other proceeding***", would also include a winding up petition, becomes academic. (**Shree Balaji Steels**[5]). As a petition for winding up of a company is not a proceeding, seeking enforcement of a right arising from a contract, Section 69(3) has no application. Both the objections raised by Sri C. Raghu, Learned Counsel for the respondent, must, therefore, fail. The respondent company is liable to be wound up under Section 433(e) of the Companies Act.

There shall, therefore, be an order winding up the respondent company. The Official Liquidator attached to the High Court of Andhra Pradesh shall be the liquidator of the respondent company. Rule 113 of the Companies Court Rules, 1959 requires the petitioner to advertise, the order of winding up of the respondent by this Court, in two daily newspapers one in English and the other in the vernacular. The petitioner shall advertise, the order of winding up in Form 53, in Andhra Prabha (Telugu daily), and New Indian Express (English daily), Hyderabad editions on or before 22.01.2013.

For Filing proof of publication, post on 29.01.2013.

(**RAMESH RANGANATHAN, J**)

26.12.2012

Note: L.R. copy to be marked
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[1] (1998) 7 SCC 184
[2] (2007) 15 SCC 58
[3] (2000) 3 SCC 250
[4] (2000) 6 SCC 659
[5] (2003) 114 Comp Cas 193 (Cal High Court DB)
[6] (2004) 3 SCC 155
[7] AIR 1964 SC 1882
[8] (1989) 3 SCC 476