

(2009) 08 MAD CK 0225

Madras High Court

Case No: Original Side Appeal No. 157 of 2009 and M.P. No. 1 of 2009

21st Century Management
Services Ltd.

APPELLANT

Vs

Gujarat Industrial Investment
Corporation Ltd.

RESPONDENT

Date of Decision: Aug. 28, 2009

Acts Referred:

- Companies Act, 1956 - Section 111A, 433, 434(1)

Citation: (2011) 162 CompCas 206

Hon'ble Judges: R. Subbiah, J; M. Chockalingam, J

Bench: Division Bench

Advocate: A.V.K. Ezhilmani, for the Appellant; T.K. Seshadri for R.P. Parthen, for the Respondent

Final Decision: Dismissed

Judgement

R. Subbiah, J.

Challenge is made to the order of a learned single Judge of this Court dated 02.09.2008 made in Company Petition No. 158 of 2002, whereby the company petition filed by the respondent against the appellant herein was admitted and notice was ordered to the appellant and the Provisional Liquidator was also appointed.

2. The facts, which led to the filing of this appeal, are as follows:

The respondent company is a Gujarat Government Undertaking company, engaged in, inter alia, extending industrial finance in the form of term loan, corporate loan etc. to various industrial enterprises within the private section of industry in the State of Gujarat. The respondent company, a public limited company, was engaged in capital market operations, investment banking and asset financing. The appellant had approached the respondent to rediscount bills and make advances against the

security etc., and the respondent had accepted the request of the appellant and accordingly, sanctioned the bill re-discounting facility vide its letter dated 08.07.1996. For the said purpose, the appellant company entered into an agreement with the respondent company and executed an agreement dated 09.09.1996 accepting the terms and conditions set out in the said agreement. The appellant had also pledged 18,05,000 equity shares of Rs. 10/- each and another 40,000 equity shares of Rs. 10/- each of IVR Constructions Limited, a Public Limited Company. The limit was Rs. 75 lakhs and the discount rate was 24.5% (additional charges at 2% per annum if not paid in time) The appellant had also executed a promissory note for Rs. 75 lakhs on 11.07.1996 in favour of the respondent payable with interest at 24% per annum for the value received. But, subsequently, the appellant had been consistently defaulting in making payments in respect of the bills discounted. Hence, a legal notice dated 18.12.1997 was issued, terminating the contract and calling upon the appellant to pay the outstanding dues. Since the appellant had not complied with the demand made by the respondent, a civil suit in C.S. No. 1588 of 1998 has been filed before the City Civil Court, Ahmedabad against the appellant and also as against one Sunder Iyer and one J. Chandramouli, who have executed Undertaking Agreements in favour of the appellant by pledging their shares in favour of the respondent, arraying them as defendants 2 and 3 for recovery of a sum of Rs. 61,91,412.13 together with interest at the rate of 36% per annum from 01.03.1998 till payment of realisation, of which a sum of Rs. 57,13,276.10 being principal and the balance amount being towards interest. Pending the suit, the respondent requested the appellant to transfer the shares in their name and thereafter to sell the said shares in market and adjust and appropriate the sale proceeds thereof towards the amount due and payable by the appellant to them. But, the appellant did not respond. Hence, the respondent sent letters dated 29.01.2000 and 15.02.2000 requesting the appellant to deliver the said shares duly transferred to the respondent in a week's time. Since the appellant failed to comply with the said demand, the respondent approached the Stock Exchange, Mumbai, by a letter dated 30.06.2000 for effecting the transfer of shares in the name of the respondent. They have also filed a petition u/s 111-A of the Companies Act, against the appellant before the Company Law Board, Mumbai. Subsequently, the respondent had also sent various letters to the appellant, but the same were neglected by the appellant. Hence, the respondent sent a statutory notice on 30.05.2001 under the provisions of Section 433 of the Companies Act, calling upon the appellant to pay a total sum of Rs. 1,36,37,042/- together with interest at 36% per annum from the date of notice till the date of repayment within a period of 21 days. Even then, the appellant had neither paid the amount within the stipulated time nor sent any reply. Hence, the respondent was constrained to file the company petition for winding up of the appellant company.

3. The appellant resisted the company petition by filing a counter. The main defence in the counter was that the appellant had already paid a sum of Rs. 1,20,44,462/-

and according to them, only a sum of Rs. 38,16,900/- alone is due and payable towards principal. With regard to the interest, it had to be decided by elaborate trial in the suit pending before Ahmedabad Court. If the payments so far made have been properly accounted for, the amount due and payable would be only Rs. 38,16,922. The appellant prayed for the dismissal of the company petition since there is a dispute about the rate of interest.

4. After hearing both sides, the learned single Judge has rejected the arguments advanced by the appellant and admitted the company petition as stated supra. Aggrieved over the same, the present appeal has been brought forth before this Court.

5. Learned Counsel for the appellant contended that the total bill re-discounting facility is only Rs. 75 lakhs and an agreement as well as the promissory note were executed to that effect in favour of the respondent and a sum of Rs. 1,20,44,462/- was paid and only a sum of Rs. 38,16,922/- was due; but the respondent has filed a civil suit before the City Civil court, Ahmedabad, claiming a sum of Rs. 61,91,412.13 with further interest at 36% per annum. As per the original agreement, the interest payable was only 24% per annum, but in the statutory notice, it was claimed at 36% per annum, which is totally contrary to the agreed rate of interest. Further, it was contended by the learned Counsel for the appellant that had the proper credits been given by the respondent for the amounts paid by the appellant, the balance amount towards principal would be only Rs. 38,16,922/- and not Rs. 61 lakhs and odd, as stated by the respondent. Therefore, there was a dispute with regard to the payment towards the principal and interest and therefore, the company petition for winding up of the appellant company is not sustainable and the necessary forum for determination of such dispute existing between the parties is only before the City Civil Court, Ahmedabad and when already a suit has been pending before the said City Civil Court, the present company petition is not maintainable and the company petition cannot be devised to pressure the parties to pay the amount.

6. In this regard, the learned Counsel for the appellant invited the attention of this Court to the plaint filed before the Ahmedabad City Civil Court in C.S. 1588 of 1998 and the statutory notice dated 30.05.2001 issued by the respondent and also the written statement filed in the said suit and demonstrated that there is a contradiction in mentioning the amount. Similarly, the respondent has given a go-by to the agreed rate of interest at 24% per annum and made a claim by applying the rate of interest at 36%. Hence, it needs elaborate trial before the City Civil Court. Therefore, the company petition is not maintainable. The learned Counsel also invited the attention of this Court to the documents in the typed set of papers to show that the appellant company had settled the dues in respect of other creditors and hence, the order passed by the learned single Judge has got to be set aside.

7. Per contra, the learned senior counsel for the respondent contended that the pendency of the suit cannot be a bar for filing a company petition for winding up.

The suit was filed in March, 1998 as against the appellant as well as the guarantors for recovery of the amount due. There is no bona fide dispute with regard to the sum payable towards the principal. Hence, the creditor is at liberty to file a company petition and the civil suit cannot be a bar for the same. In support of his contention, the learned senior counsel also relied upon the judgment in *Tube Investments (I) LTD. v. Rim & Accessories (P) LTD.* (1990) 3 COMP.L.J.322 and submitted that for filing a company petition for winding up u/s 433(e) of the Companies Act, there must be a debt and the company must be unable to pay the same. If there is any dispute with regard to the outstanding principal amount, the said dispute should be a bona fide one. In the instant case, when legal notice was issued by the respondent before filing the suit and thereafter when a statutory notice was issued before filing the company petition, the appellant has not chosen to send a reply disputing the amount mentioned in the notices. u/s 434(1)(a) of the Companies Act, on receipt of the statutory notice, the company has three weeks" time to pay the amount and if the company neglected to pay the same to the reasonable satisfaction of the creditor, it shall be deemed to be unable to pay the dues. Under such circumstances, the creditor company is entitled to file a company petition for winding up and therefore, it cannot be said that the civil suit is a bar for filing the company petition and at no point of time, the appellant has not made any attempt to show his bona fide. Further, the learned senior counsel for the respondent submitted that the dispute with regard to the interest can never be a ground for rejecting the company petition for winding up. In this regard, he relied on the decisions reported in [Vijay Industries Vs. NATL Technologies Limited.](#)

8. The Court has paid its anxious consideration on the submission made and looked into the materials available.

9. It is not in controversy that the appellant had availed a bill re-discounting facility from the respondent to the extent of Rs. 75 lakhs. Pursuant to the default in making the payments in respect of the bills discounting, there was an outstanding to the extent of Rs. 61 lakhs and odd towards the principal and interest as on March, 1998. Hence, a civil suit was filed in C.S. No. 1588 of 1998 before the City Civil Court, Ahmedabad, for a sum of Rs. 61 lakhs and odd consisting of principal amount of Rs. 57,13,276.10 and balance towards interest. Pending the suit, a statutory notice u/s 433(e) of the Companies Act was also issued, calling upon the appellant to pay the outstanding amount of Rs. 1,36,37,042/- including principal and interest as on 31.05.2001 with further interest at 36% within a statutory period of 21 days. On failure to comply with the demand, the present company petition has been filed by the respondent. In view of the submission made by the learned Counsel on either side, the following questions would emerge for consideration to decide the dispute raised in the appeal.

(1) Whether there is a bona fide dispute with regard to the principal amount payable by the appellant?

(2) Whether the existence of a dispute with regard to payment of interest is a ground for existence of a bona fide dispute relegating the parties to decide such a dispute before the Civil Court?

(3) Whether the company petition is maintainable when the suit is pending before the City Civil Court, Ahmedabad?

10. With regard to the first issue, it is no doubt, when there is a bona fide dispute with regard to the debt, the prayer of winding up by the petitioning creditor need not be considered since it is a settled proposition of law that the jurisdiction of the Company Court u/s 433(e) of the Companies Act is a discretionary one. At this juncture, it has to be seen, whether such a bona fide dispute is in existence in this case or not? According to the appellant, only a sum of Rs. 38,16,900/- is an outstanding amount towards principal, whereas in the civil suit filed by the respondent, the outstanding amount was shown as Rs. 61 lakhs and odd. The contention of the appellant that had proper credits been given by the respondent for the amounts paid by the appellant, the outstanding would not be to the tune of Rs. 61 lakhs and odd cannot be accepted, since it is pertinent to note that when notices were issued on two occasions, namely, one prior to the commencement of the civil suit and another one prior to the filling of the company petition, the respondent did not take any steps to dispute the same by way of reply. But the learned Counsel for the appellant has submitted that in the written statement filed in the civil suit, it has been specifically mentioned the outstanding as Rs. 32,16,922/-. On a perusal of the said written statement, it shows that the same was drafted during April, 2007, i.e. much later than the filing of the company petition filed by the respondent. Further, the appellant has also not chosen to deposit the admitted amount before the Court to show his bona fide. Therefore, we are unable to accept the contention that there was a bona fide dispute with regard to the principal amount. Mere mentioning some figure as principal amount in the written statement filed before the Civil Court, that too after filing the company petition, cannot be construed that there was a bona fide dispute with regard to the principal amount, particularly when the appellant has not chosen to send any reply to the statutory notice.

11. With regard to the dispute raised by the learned Counsel for the appellant with regard to the rate of interest, no doubt, as contended by the appellant, originally the rate of interest agreed by the parties is 24% per annum. Subsequently, when the appellant had defaulted in making payments, the respondent had issued notice. Since there was no reply, the contract was terminated and a demand was made to pay the amount with interest at 36% per annum. Therefore, the rate of interest claimed by the respondent, after termination of the contract, cannot be a ground for disputing the debt.

12. In this regard, a useful reference could be made on the judgment relied on by the learned senior counsel for the respondent reported in (2009) 147 Company

Cases 490 (SC)(cited supra), wherein it has been held as follows:

Section 433(e) of the Companies Act, 1956, does not state that the debt must be precisely a definite sum. Failure to pay agreed interest or the statutory interest would come within the purview of the word "debt". It is one thing to say that the amount of debt is not definite or ascertainable because of a bona fide dispute raised thereabout or a dispute as regards quantity or quality of supply or such other defences which are available to the purchaser; but it is another thing to say that although the principal amount due resulting from the quantity or quality of supply of the goods stands admitted a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not. In the latter case the application for winding up cannot be dismissed. What is necessary for invoking Section 434(1)(a) of the Act is that despite service of notice, the company which was indebted in a sum exceeding one lakh rupees then due failed and/or neglected to pay the debt within three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor. It is not a requirement of the law that the entire debt must be definite and certain.

13. In another decision relied on by the respondent in 2005 Vol.124 Company Cases 473 (cited supra), it has been clearly held that to invoke Section 433 of the Companies Act, there must be a debt and the company must be unable to pay the same. In the said judgment, the Apex Court has referred to a judgment of this Court, namely, *Tube Investments of India Ltd v. Rim And Accessories (P) Ltd* (1990) 3 COMP.L.J.322, in which at page 326, this Court has evolved the following principles relating to the disputes with regard to the payment of interest and principal;

- (i) If there is a dispute as regards the payment of the sum towards principal however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a civil court;
- (ii) The existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to decide such a dispute before the civil court and in such an eventuality, the company court itself is competent to decide such a dispute in the winding up proceedings; and
- (iii) If there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.

14. Therefore, from the above decisions, it is very clear that the dispute with regard to the interest can never be construed as a bona fide dispute. Therefore, the submission made by the learned Counsel for the appellant that there was a dispute with regard to the interest and therefore, the same has to be elaborately adjudicated before the Civil suit has no force. So far as the pendency of the civil suit

is concerned, we are of the view that the civil suit is only for recovery of the balance amount; but the company petition is based on the inability to pay the amount. Therefore, the pendency of the civil suit cannot be a bar for filing a company petition for winding up.

15. Therefore, in our considered opinion, the object of filing the civil suit and the company petition are based on two different footings. Therefore, the pendency of the civil suit cannot be a bar for filing this company petition. What is to be seen is the necessary ingredients of filing a company petition for winding up are, firstly, there must be a debt due and secondly, the company must be unable to pay the same. In the instant case, the materials on record would show that in spite of the notices sent by the respondent, the appellant did not care to send any reply by disputing the amount claimed by the respondent and he has not deposited the admitted amount to show his bona fide at any point of time. The appellant has never disputed the amount claimed by the respondent all along till the date of filing of the company petition, except saying in the written statement filed in the civil suit pending before the City Civil Court, Ahmedabad that the outstanding amount was mentioned as Rs. 38 lakhs and odd.

16. In fine, we are of the considered opinion that the appellant has not made out a case, warranting this Court to interfere with the order passed by the learned single Judge of this Court and under such circumstances, the appeal has got to be dismissed. Accordingly, the appeal fails and is dismissed. No costs. Consequently, connected M.P. is closed.