

(1996) 06 AP CK 0001

Andhra Pradesh High Court

Case No: Company Petition No. 42 of 1994

M/s. Multimetals Limited

APPELLANT

Vs

M/s. Suryatronics Privated
Limited

RESPONDENT

Date of Decision: June 5, 1996

Acts Referred:

- Companies (Court) Rules, 1959 - Rule 21
- Companies Act, 1956 - Section 209, 433, 434
- Interest Act, 1978 - Section 3
- Sales of Goods Act, 1930 - Section 61(2)

Citation: AIR 1997 AP 13

Hon'ble Judges: S. Dasaradharama Reddy, J

Bench: Single Bench

Advocate: Y.N. Lohitha, for the Appellant; B.V. Subbaiah and B.S. Prasad, for III Party, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S. Dasaradharama Reddy, J.

1. The petitioner filed this petition seeking to wind up the respondent-company on the ground that it has failed to pay Rs. 4,16,239/- including interest and bank charges of Rs.2,405/- which represents the amount due by the respondent in respect of the brass tubes supplied to it by the petitioner. The respondent filed counter contending that though the three invoices were raised on 29-3-1991, goods were actually despatched long afterwards, that the balance of Rs. 1,10,620/-only remained payable which was being remitted on 4-11-1994 and that there is no stipulation for payment of interest The petitioner filed rejoinder stating that the Chief Executive of the respondent-company agreed to make balance payment together-with overdue interest from 24-5-1991 and that the petitioner has not

received the cheque for Rs. 1,10,620/- referred to in the counter. However, it is now admitted by both sides that the cheque for Rs, 1,10,620/- dated 4-11-1994 has since been received by the petitioner through its counsel in December, 1994.

2. The following issues were framed:

(1) Whether the respondent is liable to pay interest on the value of the goods supplied by the petitioner?

(2) Whether the respondent-company is liable to be wound up for inability to pay the amount?

3. On behalf of the petitioner, its Marketing Manager was examined as P.W. 1 and Exs. A-1 to A-18 were marked, while the Accounts Officer was examined on behalf of the respondent-company-who got marked Exs. B-1 to B-9.

ISSUE No. 1:

4. It is well settled that a Company can be wound up only when it is proved that the debt claimed against it is ascertained, definite and undisputed and that the Company has failed to pay the same and winding up cannot be ordered if there is bona fide and substantial defence denying the liability. So, the question that has to be examined is whether the liability of the respondent-company to pay interest on the overdue bills is definite, ascertained and undisputed?

5. P.W. 1 has deposed that as per the sale contract Ex. A-3 dated 22-3-1991 issued by the petitioner to the respondent-company, overdue interest at 2% per month was stipulated if documents are not retired within 7 days from the date of presentation or within 25 days from the date of despatch, whichever is earlier. Ext. A-11 dated 6-5-1992 is written on the letter head of the Company addressed to one Rajesh stating that "Mr. Naidu" and Mr. Babla are with me regarding interest and balance of Rs. 75,000/- is pending."

6. In Ext. A-10, dated 13-4-1992, the respondent-company has instructed its client M/s. S.S.S. Kharkhna Limited, Yashwant-nagar to pay Rs. 2,84,839/- on its behalf to the petitioner. Relying on these documents, Mr. Y.N. Lohita, teamed counsel for the petitioner contended that the parties have stipulated payment of interest on overdue bills.

7. On the other hand, the contention of Mr. B.V. Subbaiah, learned counsel for the respondent is that as per purchase order Ex. A-2, 5% advance has to be paid after acceptance of the order, another 5% two weeks thereafter and 80% against delivery, while 5% is payable against bank guarantee and 5% towards performance for two full seasons and that there is no stipulation for payment of interest. He submits that Ex.A-3 described as sales contract stipulating interest at 2% per month was neither signed nor received by the respondent and was brought into existence for the purpose of this petition and that it was not referred to in the 1st legal notice Ex.

A-12. He further submits that at the bottom of the second page of Ex. A-3, date was mentioned as 26th March whereas at the top of the page endorsement was shown as 28th March. As per Ex.B-7, dated 20-5-1992, which is the letter written by the petitioner to the respondent-company asking it to confirm balance as on 31-3-1992, the amount was shown as Rs. 1,10,620/- and there was no reference to interest.

8. Ext.A-2 as well as invoices Exs. A-7, A-8 and A-9 are silent regarding the payment of interest. No doubt in Ex.A-3 described as sale contract, it is mentioned that interest will be payable at 2% per annum if documents are not retired within 7 days from the date of presentation or within 25 days from the date of despatch whichever is earlier. But this Ex.A-3 was not mentioned in Ex.A-12 first legal notice. It is referred to for the first time in Ex.A-14 which is second legal notice. It is significant to note that it is not signed by the respondent.

9. Mr. B.V. Subbaiah, learned counsel for the respondent explained that the admission of the respondent in Ex.A-10 agreeing to pay Rs. 2,84,839/- is a mistake. In this connection, Section 209 of the Companies Act which was amended by the Companies (Amendment) Act, 1988 has to be noticed.

Section 209: Books of Account to be kept by Company:

(1) Every company shall keep at its registered office proper books of account with respect to--

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place;

(b) all sales and purchases of goods by the company;

(c) the assets and liabilities of the company;

(d) in the case of company pertaining to any class of companies engaged in production, processing, manufacturing or mining activities, such particulars relating to utilisation of material or labour or to other items of cost as may be prescribed, if such class of companies is required by the Central Government to include such particulars in the books of account:

Provided that all or any of the books of account aforesaid may be kept at such other place in India as the Board of Directors may decide and when the Board of Directors so decides, the company shall, within seven days of the decision, file with Registrar a notice in writing giving the full address of that other place.

(2) Where a company has a branch office, whether in or outside India, the company shall be deemed to have complied with the provisions of sub-section (1), if proper books of account relating to the transactions effected at the branch office are kept at that office and proper summarised returns, made up to dates at intervals of not more than three months, are sent by the branch office to the company at its registered office or the other place referred to in sub-section (1).

(3) For the purpose of sub-sections (1) and (2), proper books of account shall not be deemed to be kept with respect to the matters specified therein--

(a) if there are not kept such books as are necessary to give a true and fair view of the state of affairs of the company or branch office, as the case may be, and to explain its transactions; and

(b) if such books are not kept on accrual basis and according to the double entry system of accounting

(4) xxxxx (4-A) xxxxxxxxxxxxxxxxxxxxxxxxx

(5) If any of the persons referred to in sub-section (6) fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both;

10. As per the double entry system which is also otherwise called as Merchantile system of accounting, the petitioner ought to have shown the interest due from the respondent company and debited the same either to the account of the respondent company or to a separate head of account and credited interest account. The petitioner has failed to produce its books of account and as such inference has to be drawn that it has not charged interest to the account of the respondent. The petitioner cannot rely on Ex. A-18 which gives particulars of the amount claimed unless it is established that they are reflected in the account books.

11. In view of the above discussion, it has to be held that the parties have not stipulated payment of interest on over due bills.

12. The next contention of Mr. Y.N. Lohita, learned counsel for the petitioner is that in the absence of stipulation of interest, the petitioner is entitled to interest u/s 61(2)(a) of the Sale of Goods Act which reads as follows:

Interest by way of damages and special damages:

(1)xxxxxxxxxxxxxxxxxxxxxxxxxx

(2) In the absence of contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of price--

(a) to the seller in a suit by him for the amount of the price -- from the date of the tender of the goods or from the date on which the price was payable;

(b)xxxxxxxxxxxxxxxxxxxxxxxxxx

13. I agree with the contention of Mr. B.V. Subbaiah that this section gives discretion to the Civil Court to award interest in the absence of stipulation of interest in the

contract that too in a suit for recovery of money or damages and as the winding proceedings are not in the nature of suit for recovery of money, the petitioner cannot invoke that section.

14. Mr. Lohita relied on a decision of the Madras High Court in *Rashid Leathers (P) Ltd., v. Super Fine Skin Traders* (1990) 68 Com Cas 684. In that case there was no agreement to pay interest on the delayed payments due for supply of goods. The supplier issued lawyer's notice to the company demanding payment of price with interest at 18% per annum. The company promised early settlement but failed to pay. Thereupon, the supplier filed petition for winding up of the company. Rejecting the contention of the company, it was held by the Division Bench that in all replies to the supplier's letters claiming interest, the company had been assuring that it will settle the claim and has never disputed its liability to pay interest and that the plea of non-liability of interest was raised for the first time before the company Court. Even though that was enough for the Court to sustain the order of winding up, the Division Bench went further - into the question whether the liability of interest can be determined by the company Court in winding up proceedings. The Madras High Court followed the decision of the Division Bench of Punjab and Haryana High Court in *Stephen Chemical Ltd. v. Innosearch Ltd.* (1996) 60 Com Cas 702 (P&H).

15. In *Stephen's case* (2 of supra), the debtor company admitted its liability regarding the price of the goods in question before the company Court and paid up the principal amount. It, however, disputed its liability regarding the payment of interest, contending that there was no agreement between the parties regarding the payment of interest and that there was no trade custom providing payment of interest and that remedy of the creditor-petitioner was to file civil suit. The Division Bench affirming the order of the learned single Judge and distinguishing the decision of another learned single Judge in *Unisystems Private Limited v. Stepan Chemical Limited* (1985) 58 Com Cas 875 (P&H) observed as follows:

In our opinion, where the company Judge was seized of the matter and when the liability to pay the principal debt had not been disputed by the company sought to be wound up and, in fact, paid up the debt in order to avoid winding-up, the forum of the company judge is the appropriate forum for determining as to whether the creditor was entitled to interest on the amount in question or not - The basic policy of law is to avoid multiplicity of litigation.

The learned counsel for the appellant also referred us to the order of Goyal, J. rendered in C.P. No. 77 of 1983 -- decided on July 20, 1984, *Unisystems(P) Ltd. v. Stepan Chemical Ltd.* (1985) 58 Com Cas 875 (P&H) wherein Goyal, J. had observed that where no agreement for the payment of interest existed and the creditor had claimed interest, no winding up order could be passed.

With respect, if the said observations are intended to cover the cases of the present kind, then we find ourselves unable to concur in that view. The said observations

may be correctly applicable to a case where winding-up initially is sought by a party on the ground that certain amount by way of interest was due from the other party which the other party had failed to pay up despite demand notice and the other party raises a bona fide dispute as to the right of the creditor to claim interest in the absence of any agreement regarding payment of interest or any other plausible ground, but the position would be entirely different where the amount alleged to be due from the company sought to be wound up included the principal amount of debt and the liability to the principal amount has been accepted before the company judge and the creditor is sought to be relegated to the civil remedy for getting the interest on the said principal amount."

16. In *Uni Systems case*, (1985) 58 Com Cas 875 (P&H) (3 supra), the judgment of the learned single Judge reads as follows:

The principal amount admittedly has been paid. The learned counsel for the petitioner, however, contends that the petitioner is entitled to get interest on the amount which was wrongly withheld. The learned counsel opposite has controverted this claim and states that there is no stipulation between the parties regarding the payment of interest. The learned counsel for the petitioner does not dispute the fact that there is no agreement for the payment of interest but he claims it on the basis of bills submitted. This claim thus being hotly disputed, no winding up order can be passed on its basis. This petition is dismissed. No costs.

17. It is well settled that winding up proceedings are not an alternative for recovery of the company for which civil suit is ordinarily the remedy. It is also well settled that for claiming winding up, the creditor has to establish that the respondent owes a definite and ascertained amount to it and that it has failed to pay the same in spite of reminders. The company Court cannot be used as forum by the creditor to establish its rights either regarding the debt or regarding the interest.

18. With respect I am not able to agree with the distinction drawn by the Division Bench of the Punjab and Haryana High Court in *Stephen's case* ((1986) 60 Com Cas 702) (P&H) (2 supra) between cases where the creditor seeks recovery of principal and interest and the debtor pays the principal and disputes the interest and cases where the creditor seeks recovery of only interest which is disputed by the debtor company. The principle that winding up proceeding is not a remedy for recovery of any amount does not admit of any such distinction.

19. Hence, I am not able to agree with the decisions of the Division Bench of Punjab and Haryana High Court ((1986) 60 Com Cas 702) (2 supra) and of Madras High Court in *Rashid Leathers case* ((1990) 68 Com Cas 684) (Mad) (1 supra) which endorsed that decision.

20. The Bombay High Court in *Gangadhar Narsinghdas Agarwal v. Timble Pvt. Ltd.* (1992) 74 Com Cas 846 (Bom) has held that where there is no stipulation for payment of interest, winding up petition cannot be ordered on the ground that

interest is not paid by the company. In that case, the creditor claimed an amount of Rupees 3,86,677.93 which represents principal amount of Rs. 75,574.46 ps. and interest thereon at 18% per annum. The petitioner therein could not show any contract entitling it to charge interest. The company in one of its letters agreed to pay interest at the rate of 10% per annum. But the same was not accepted by the creditor. The company has admitted, as per its books of account, that it owes Rupees 73,952.66 only. The learned Single Judge dismissed the petition for winding up with a direction to the company to pay the admitted amount of Rs. 73,952.66.

21. I respectfully agree with the decision of the learned single Judge of Punjab and Haryana High Court in Unisystems case, (1985) 58 Bom Cas 8757 (P & H) (3rd supra) and of Bombay High Court in Gangadhar Narsinghdas case, (1992) 74 Com Cas 846 (4 supra).

22. For the same reasons, reliance made by the counsel for the petitioner on Section 3 of the Interest Act which is similar to Section 61(2)(a) of the Sale of Goods Act is of no assistance to him. Section 3 of the Interest Act reads thus :

POWER OF COURT TO ALLOW INTEREST:

(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say --

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings.

(b) If the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

This refers to the discretion of the Civil Court to award interest in a suit for recovery of money and cannot be invoked to establish the claim for interest in winding up proceedings.

ISSUE NO. 2

23. Even assuming that the petitioner is entitled to interest, its claim is not consistent. In Ex. A-12, it claimed interest of Rupees 1,74,219/- up to 6-5-1992,

whereas in the petition as well as in Ex. A-14, the interest claimed upto 6-5-1992 is Rs. 2,50,353/-. Again, in Ex. A-14, petitioner says that the respondent has agreed to pay on 6-5-1992 total sum of Rs. 3,59,838/- which includes interest of Rs. 2,49,219/ -. It is also to be noted that it is admitted by the petitioner that the documents for the invoices were despatched to its Bombay office on 20-6-1991, 8-7-1991 and 22-8-1991 respectively, while the goods were despatched on 5-8-1991, 11-9-1991 and 26-11-1991 respectively. The date of receipt of the documents by the respondent is not furnished. But in the bills, the date of despatch is shown as 29-3-1991. Mr. Y. N. Lohita, learned counsel for the petitioner explains this, discrepancy saying that they must have been raised before the financial year 1990-91 for Central Excise purpose. But even accepting this explanation, the petitioner has not explained how it is entitled for interest from 24-5-1991 when the documents were sent to its Bombay office long after that date and goods were despatched to the respondent still after a couple of months. Thus, I agree with the contention of Mr. B. V. Subbaiah, learned counsel for the respondent that even assuming that the petitioner is entitled to interest, its claim is not consistent or definite and accordingly the claim of the petitioner for winding up is negatived.

24. Before parting with the case, I have to observe that the petition ought not to have been numbered by the Registry as it is not in conformity with Rule 21 of the Companies (Court) Rules, 1959 which requires that in the case of the petition presented by a body corporate, it has to be verified by an affidavit in form No. 3 signed by a Director or Secretary or other Principal Officer and that permission of the Court has to be taken if any other person has to file the affidavit. The petition as well as the affidavit has been signed by one Prakash Purushottam Naik, who is the Marketing Manager. Registry has not noticed it. No doubt, this is a technical defect and had it been pointed out earlier, the petitioner would have filed a petition for leave in that behalf. Hence, I do not propose to rest the dismissal on this technical ground. Company petition is dismissed with costs.

25. Petition dismissed.