(2004) 06 AP CK 0006

Andhra Pradesh High Court

Case No: CP No. 60 of 2003

Maharashtra Apex Corporation Ltd.		APPELLANT
	Vs	
Spartex Ceramics India Ltd.		RESPONDENT

Date of Decision: June 18, 2004

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34
- Companies Act, 1956 - Section 433(E), 434, 434(A), 434(C), 439(B)

Citation: (2004) 5 ALD 316 : (2005) 57 SCL 467

Hon'ble Judges: V.V.S. Rao, J

Bench: Single Bench

Advocate: D. Gopala Krishna, for the Appellant; V.S. Raju, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V.V.S. Rao, J.
M/s. Mahsrashtra Apex Corporation is the petitioner. The petition under Sections 433(e) and 434 read with Section 439(b) of the Companies Act, 1956 (for short, the Act) is filed for winding up of the respondent company, namely, M/s. Sparten Ceramics India Limited. This Court ordered Notice before admission on 30.4.2003. After receiving notice, the respondent company entered appearance and filed counter-affidavit opposing the Company Petition. Thereafter, the matter has been coming up for admission, and for orders as to publication of petition under Rule 99 of the Companies (Court) Rules, 1959 (for short, the Rules).

2. The averments made in the petition for the purpose of this order, in brief, are as follows. The respondent company was incorporated under the Act in the State of Andhra Pradesh having its Registered Office at Mittapalem in Chittoor District. The authorized share capital of the respondent as on 31.3.1999 is Rs. 30,00,000/-

(Rupees thirty lakhs only) divided into 2,97,000 equity shares of Rs. 10/- (Rupees ten only) each., and 3,000 cumulative shares of Rs. 10/-(Rupees ten only) each. The company was incorporated with the object of manufacturing and marketing all kinds of ceramic goods. It is the case of the petitioner company that respondent has taken SACMI make spray dryer on lease from the petitioner and executed lease agreement. The period of lease is sixty months commencing from 10.8.1995 and the respondent has to pay a monthly rent of Rs. 5,50,000/- (Rupees five lakhs and fifty thousand only). As per the terms, the interest at 3% per month is chargeable.

3. It is stated that on 28.10.1998 the respondent approached the petitioner for restructuring lease rentals on the ground that rentals are on the high side. The request of the respondent was considered and the lease rentals were accordingly re-structured at the rate of Rs. 4,00,000/- (Rupees four lakhs only) from 10.9.1998 to 10.11.1999; Rs. 5,50,000/- (Rupees five lakhs and fifty thousand only) from 10.12.1999 to 10.3.2000; Rs. 5,72,000/- (Rupees five lakhs and seventy two thousand only) from 10.4.2000 to 10.3.2001; Rs. 6,72,000/- (Rupees six lakhs and seventy two thousand only) from 10.4.2001 to 10.3.2002; and Rs. 7,72,000/-fiom 10.4.2002 to 10.3.2003. The respondent, it is alleged that, agreed to reimburse lease tax and other taxes payable to the Government from time to time and also agreed to pay interest at 36% per annum on the overdue lease rentals. A deed of modification was also executed by respondent on 28.10.1998 in favour of petitioner. However, the respondent committed default in payment of monthly rents from 10.12.1999 and is liable to pay an amount of Rs. l,38,10,567/- (Rupees one crore thirty eight lakhs ten thousand, five hundred and sixty seven only) as on 15.5.2001 towards lease interest overdue and overdue interest. As the respondent failed to pay the said amount as demanded in notice dated 31.5.2001, the matter was referred to Arbitration as per the terms of the lease agreement. The Arbitrator gave an award on 17.2.2002 for an amount of Rs. 3,17,04,600/- (Rupees three crores seventeen lakhs four thousand and six hundred only) with future interest at the rate of 24% per annum on Rs. 2,63,92,000/-(Rupees two crores sixty three lakhs and ninety two thousand only). The respondent company filed O.P. No. 2 of 2002 on the file of the Court of Principal District Judge, Chittoor, and the same is pending.

4. Even before passing award, respondent failed to pay the amount and therefore petitioner got issued a notice on 15.5.2001 calling upon the respondent to pay the amount with interest. After receiving notice, the respondent gave a reply on 31.5.2001. But, the amount was not paid. The respondent became commercially insolvent and unable to pay its debts. The respondent is also indebted to a number of persons and organizations. The petitioner alleges that the respondent is disposing of the immovable properties. Therefore, petitioner prays this Court to pass an order of winding up of the respondent company.

5. The Group Deputy General Manager filed a counter-affidavit on behalf of respondent company. It is stated that as per Clause 34(a) of the lease agreement

dated 10.8.1995 all disputes, differences and claims arising out of agreement shall have to be settled by arbitration, that there is a dispute in regard to appointment of Arbitrator, who passed an ex parte award on 17.2.2002 and that questioning the Award the respondent filed an application before the Court of District Judge, Chittoor, which is pending. As the petitioner has invoked arbitration clause under the lease agreement. Company Petition for winding up is not maintainable. As the Award is challenged u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, Arbitration Act), award as is not enforceable and therefore no finality can be attached to the same. Due to unenforceability of the arbitration Award, as per Section 36 of the Arbitration Act the Company Petition is not maintainable. The petition for winding up cannot be treated as an alternative to the suit or legal process of law.

6. Learned Counsel for the petitioner submits that there is no bar for the petitioner to file this petition for winding up even after obtaining Award of the Arbitrator. He placed reliance on judgment of Calcutta High Court in S.M. Enterprises v. S.H. Nicco Finance (1999) Comp. Cas 692 (Cal). He also submits that like a decree passed by Civil Court, an award of the Arbitrator under the Arbitration Act is also enforceable the moment the application u/s 34 of the Arbitration Act is disposed of. The respondent company did not pay the amount even after the receipt of the notice issued after passing of the Award by the Arbitrator. It should be presumed that the respondent company is unable to pay its debts.

7. Per contra, learned Counsel for the respondent has placed reliance on Talwar Brothers (P) Ltd. v. Punjab State Industrial Development Corporation Limited (1999) 4 Comp. LJ 310 (P & H), Indo French Time Industries, In re. (2002) 47 CLA 64 (Bom.), Manipal Finance Corporation Limited v. CRC Carrier Limited (2002) 1 Comp. LJ 71 (Bom), Rediffusion Dentsu, Young and Rubicam P. Ltd., v. Solidaire India Ltd 2003 114 Comp. Cas 721 (Mad), I.C.D.S. Ltd. Vs. Asha Latex and Allied Industries Pvt. Ltd., , and Marina World Shipping Corporation Ltd. v. Jindal Exports (P) Limited 2004 Comp. LJ 50 (Delhi), to submit that an Award passed by the Arbitrator Driver the Arbitration Act is not final unless and until application filed by respondent u/s 34 of the Arbitration Act is finally decided by the District Court. In view of unenforceability of the Award, Company Petition for winding up would not He.

8. Having regard to pleadings and rival submissions, the only point that arises for consideration is whether petitioner has made out any case for ordering publication of petition under Rule 99 of the Rules.

9. The question that falls for consideration is no more res Integra. It is settled that if a decree or order passed by Court or Judicial Forum is enforceable, and after receiving statutory notice an incorporated company fails to pay the amount, presumption can be drawn relying on Section 434 of the Act, that the company is unable to pay debts. In such an event, it would always be a different aspect of the matter whether the creditor could have moved the Civil Court for execution of the

decree. But, where the Award of the Arbitrator is obtained by the creditor and after receiving notice demanding payment of Award amount, presumption u/s 434 of the Act cannot be drawn especially in a case where Award is challenged by respondent company u/s 34 of the Arbitration Act. The fact that award has been passed by the Arbitrator would presupposes two things; that there is a dispute regarding the amount claimed and that Award passed has not attained finality and enforceability, especially when the same is challenged in the Civil Court.

10. The decision in S.M. Enterprises v. S.H. Nicco Finance (supra) relied on by the learned Counsel for the petitioner does not really decide the issue before this Court. In the said case, in a winding up petition, the respondent moved an application u/s 34 of the Arbitration Act, 1940 for stay of the winding up of the proceedings alleging that having regard to arbitration clause, Company Petition would not be maintainable. The creditor company however did not dispute the amount claimed. A learned Single Judge of Calcutta High Court rejected the application u/s 34 of the Arbitration Act, 1940 observing as under.

An application u/s 34 of the Arbitration Act for stay of proceedings in a suit must disclose the existence of a dispute between the parties which would oblige the parties under the arbitration clause in an agreement to refer the matter to arbitration. In the absence of such an allegation, an application for stay of the proceedings is not maintainable. This is the settled view of law. Reference may be made in this connection also to the decisions in Daman Anand and Another Vs. Hira Lal and Others, and Pearl Hosiery Mills, Ludhiana Vs. Union of India and Another, ...In my view, the proceeding for winding up of a company comes with the special jurisdiction which has been conferred only on the High Court. In fact, the proceedings under the provisions of Sections 433 and 434 read with Section 439 of the Companies Act, 1956, are completely of a different jurisdiction than the one regarding which remedy can be sought by way of arbitration under the clause in question. It is fallacious to conceive that the proceedings for winding up under the provisions of Sections 433, 434 and 439 of the Companies Act, are by way of recovery of amount touching the various provisions of the scheme. under the provisions of Section 433 of the Companies Act, the Legislature codified the circumstances/grounds on which a company may be ordered to be wound up by the Court. Section 434 provides as to under what circumstances a company may be deemed to be unable to pay its debts, whereas Section 439 makes provision for an application for winding up.

11. The decision relied on by the learned Counsel for the petitioner therefore is not of much assistance to the learned Counsel. In Talwar Brothers (P) Ltd. v. Punjab State Industrial Development Corporation Ltd. (supra) the Punjab and Haryana High Court considered the question whether it would be just, fair and proper for the Court to wind up an incorporated company when there is already arbitration Award. In a dispute between the landlord and tenant, on reference at the instance of

landlord, Arbitrator passed an ex parte Award. The parties were agitating before Delhi High Court as well as Supreme Court. In that background, still, the landlord moved the Company Court for winding up. After referring to Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , the Court declined to pass an order of winding up observing as under:

The entire controversy in the present case, can be viewed from another angle as well. It is a settled principle of law that if the dispute raised by the respondent company in a winding up petition is bona fide and just, the winding up Court would be very reluctant to pass any adverse order. I am of the considered view that the respondent company has a bona fide, reasonable and just dispute to the claim of the petitioner company. In fact, the order of Hon''ble Supreme Court of India is the complete defence of the respondent company at this stage. Furthermore, the objections relate to the very validity and legality of the impugned Award. One of the grounds raised is that the Arbitrator could not have passed an order of eviction in relation to the disputed property. It is not for this Court to comment upon the merits or otherwise of this dispute, but at least prima facie these disputes cannot be termed to be mala fide or totally unfair or unreasonable. In the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , the Hon''ble Court had enunciated the principle which will regulate the fate of the winding up petition in response to which a bona fide or a valid dispute has been raised.

Passing any order for winding up or even ordering the admission of this petition at this stage would apparently affect the proceedings before Hon''ble High Court of Delhi and would foreclose the merits of the objections filed by the respondent company before that Court, which are to be decided on merits by that Court in furtherance to the orders of the Hon''ble Apex Court

12. In Indo French Time Industries, In re. (supra), the trade union moved the Company Court, Bombay u/s 433 for winding up on the ground that the Company failed and neglected to pay to seventy seven (77) employees wages for December, 1999, gratuity, leave wages and dearness allowance. This was opposed by the Company disputing the amounts claimed. Inter alia, it was contended that all the employees have alternative remedies under various Industrial/Labour Laws and therefore the Company is not liable to pay the alleged debt, which is bona fide under dispute. Reliance was placed on the decision of the Supreme Court in National Textile Workers'' Union and Others Vs. P.R. Ramakrishnan and Others, , to conclude that workers have no right to file a petition for winding up. The Court also observed that when a legitimate alternative is available to recover the debt, a Company Petition for winding up is not maintainable. Indeed, it was so held by the Supreme Court in Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, . The Court further observed:

Malice, unterior motives, trade union rivalry and unscrupulous trade union leaders getting set up by the rivals in the trade and industry cannot be ruled out in the

present days when the tribe of honest dedicated trade union leaders is getting vanished. By construing Section 439 neither the trade unions nor the employees, even if unpaid, can be added as a class of creditors to exercise the right to file petition for winding up a company. It would prove to be an additional weapon in the hands of unscrupulous to terrorise the employers who refuse to yield to any unreasonable, unjust and illegal demands by them. These provisions even for genuine creditors are called as ''vehicle of oppression'' to pressurise the debtor-companies. No trade union leader can be allowed to sit on the steering wheel of this vehicle of oppression by stretching the definition of a creditor.

13. In yet another decision in Manipal Finance Corporation Limited v. CRC Carrier Limited (supra), Bombay High Court held that a Company Petition for winding up cannot be admitted on the ground that the Company is unable to pay its debts when the same claim is also subject-matter of arbitration proceedings. In yet another decision in ICDS Limited v. Asha Latex and Allied Industries Private Limited (supra), the same view was reiterated. The learned Company Judge dismissed the Company Petition holding thus:

The law is very well settled that the winding up proceedings cannot be resorted to by a creditor for recovery of a debt which is bona fide disputed. The respondents have disputed the said claim even prior to the filing of the petition in reply to the statutory notice. The petitioners have resorted to arbitration remedy which according to me, is the legitimate remedy available to them to resolve the differences and disputes which admittedly have arisen between the parties. There is no doubt in my mind that the petitioners want to be coercive and oppressive against the respondent-company with ulterior motives to pressurize the company to surrender to the dictates of the petitioners. The petitioners have also unlawfully taken away the property of the respondent-company worth Rs. 8/- lakhs and have kept the same with it. Such a conduct of the petitioner company has to be seriously viewed and deprecated. On top of everything the petitioners want this Court to pass an order of winding up of the respondent-company without any further material and evidence in respect of the financial position of the company. I have no doubt in my mind that the petitioners have abused the process of law and the Court by filing this petition though the arbitration proceedings were in progress.

14. In Rediffusion Dentsu, Young and Rubicam P. Ltd. v. Solidaire India Ltd (supra) Madras High Court held that when once the creditor resorted to civil suit for recovery of debts, winding up could not be allowed merely as a means of realizing the debt from the company. In Marina World Shipping Corporation Ltd. v. Jindal Exports (P) Limited (supra), Company Petition for winding up was filed alleging that respondent company therein was indebted to the creditor under a foreign Award passed in arbitration proceedings between the parties. By that time the respondent company raised objections with regard to existence and validity of arbitration clause, the proceedings u/s 49 of the Arbitration Act were not completed, in which

event the foreign Award would have become enforceable. The Delhi High Court therefore held that a company petition for winding up would not be maintainable and that only when enforceability of the Award is established in the Civil Court, the Company Court will have jurisdiction to entertain a winding up petition.

15. The various authorities cited by the learned Counsel for the respondent would support the view that when once arbitration proceedings are initiated, or when once the arbitration award is under challenge, and/or when once the arbitration award has not attained enforceability, it cannot be said that the debt is admitted and the company failed to discharge its debts. When the creditor has availed these remedies, a company petition for winding up would not be maintainable. In this case, the Award passed by the Arbitrator is already pending on the file of the Court of the Principal District Judge, Chittoor, and therefore, the company petition is misconceived.

16. The Company Petition, for the above reasons, is accordingly dismissed.