

(2012) 09 CAL CK 0020

Calcutta High Court

Case No: APO No. 349 of 2012

Ravi Cement Product Limited

APPELLANT

Vs

Kankani Construction Pvt. Ltd.

RESPONDENT

Date of Decision: Sept. 6, 2012

Acts Referred:

- Companies Act, 1956 - Section 434
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2013) 1 CHN 278 : (2013) 179 CompCas 11

Hon'ble Judges: Shukla Kabir (Sinha), J; Banerjee, J

Bench: Division Bench

Advocate: S.N. Mitra, Puja Das Chowdhury, P. Jewrajka and S.P. Sharma, for the Appellant;
Manju Bhuteria, Aniruddh Poddar and Anurag Bagaria, for the Respondent

Final Decision: Dismissed

Judgement

1. This appeal would relate to a claim for the value of two dishonoured cheques amounting to Rs. 43.4 Lacs issued by the respondent in favour of the appellant as a part consideration of a flat at Picnic Garden. The respondent in its winding-up petition claimed that they had sold and conveyed a flat at Picnic Garden for a sum of Rs. 48.4 Lacs paid through three account payee cheques for Rs. 5 Lacs, Rs. 25 Lacs and Rs. 18.4 Lacs respectively. Upon receipt of the entire consideration the respondent duly conveyed the flat in favour of the appellant through a registered Deed of Conveyance. The first cheque of Rs. 5 Lacs was honoured by its banker. It is contended by the respondent, on the request of the appellant two cheques of Rs. 25 Lacs and Rs. 18.4 Lacs were not presented in the bank for sometime as they were in financial difficulty. Ultimately, on presentation, those two cheques were dishonoured by the banker on January 10, 2011 and the cheques were returned on the next day. The respondent issued a notice of demand u/s 138 of the Negotiable Instruments Act on January 21, 2011, followed by a subsequent notice on February 7, 2011 u/s 434 of the Companies Act, inter alia, demanding the said sum. The

respondent filed the winding up petition on March 16, 2011, followed by a suit on the self-same cause of action on March 29, 2011. However, the respondent in its suit claimed for cancellation of the Conveyance. The company contested the winding up petition by filing affidavit-in-opposition. In the affidavit they took a plea consistently with the reply to the notices mentioned above. According to the appellant company, the cheques were handed over not for presentation but for an arrangement made by and between the parties under which the appellant was to secure the said flat in question as a guarantor in respect of a financial accommodation extended by the State Bank of India to one company by the name of Metalite Coke And Coal Pvt. Ltd. It is pertinent to note that Ravi Cement, the appellant, carries on business from the same office at 24, Harrington Mansion, 8, Ho-Chi-Minh Sarani, Calcutta where Metalite is also carrying on business. The respondent claims that they do not have any relation with Metalite. In the affidavit-in-reply, the respondent denied the story so advanced by Ravi Cement in their affidavit in opposition. The Learned Judge rejected the contention of Ravi Cement, the appellant and admitted the winding up petition. According to His Lordship, the defence was not a bona fide one. Hence, this appeal before us. At the stage of admission, we enquired whether the appellant was in a position to secure the claim. The answer was in the negative. Today at the hearing of the appeal, Mr. S.N. Mitra, learned senior Counsel appearing for the appellant, reiterates on that score. On enquiry we come to know that the company, although a non-banking financial institution, does not have any asset except the office premises mentioned above, that too, mortgaged with the State Bank of India. Mr. Mitra also informs this Court on instruction, they do not have sufficient funds in their bank account. On factual matrix, Mr. Mitra contends before us that the winding up petition was not maintainable in view of the fact that the petitioning creditor, being the respondent abovenamed, prayed for cancellation of the Conveyance in their suit. Once such suit is decreed in favour of the respondent, the money would not be due and payable by the company. In such event, the Learned Company Judge should have waited till the disposal of the suit. Mr. Mitra also refers to his suit filed on April 1, 2011 as against many parties including Metalite and Kankani Construction to contend, for Metalite, they suffered financial crunch, that too, at the instance of Kankani Construction and its promoter. Mr. Mitra has drawn our attention to paragraphs 15 and 16 of the petition to say that the averments are contradictory. According to Mr. Mitra, in paragraph 15 the respondent claimed that it was entitled to statutory presumption of insolvency in view of the failure on the part of the appellant company to make payment of the amount claimed whereas in paragraph 16 they contended, the appellant company wrongfully withheld the amount just due to the respondent. According to Mr. Mitra, these two contradictory statements would not deserve any discretion of the Learned Company Judge being exercised in their favour to have an order of admission. According to him, it could not be said, it would be just and equitable that the company should be wound up.

2. Per contra, Ms. Manju Bhuteria, learned Counsel appearing for the respondent contends, there was no bar in proceeding with the suit simultaneously with the winding up petition. According to her, the reliefs claimed in both the proceedings are distinct, although based on identical cause of action. According to her, in the suit the respondent claimed cancellation of a document whereas the winding up petition was based on presumption of insolvency as the company failed and neglected to make good the amount covered by the dishonoured cheques.

3. Mr. Mitra cites three decisions to support his contentions. Ms. Bhuteria distinguishes the same. In the case of [Euro Containers Vs. Morepen Laboratories Ltd.](#), the Division Bench of the Himachal Pradesh High Court declined to interfere with the order of the learned Single Judge dismissing the winding up petition considering the fact that a civil suit was pending on the self-same issue. While deciding on the issue the Division Bench noted the fact that the learned Single Judge was satisfied that the liability to pay was disputed and such dispute was pending adjudication in a civil suit. In the case of [Rediffusion-Dentsu, Young and Rubicam P. Ltd. Vs. Solidaire India Ltd.](#), the Division Bench of the Madras High Court was of the same view while dismissing the appeal. The Division Bench observed that perusal of the plaint in the suit made it clear that the appellant had sought a money decree against all the defendants "jointly and severally", the Division Bench also observed, the dispute raised by the respondent was "actually bona fide" and the parties had to await adjudication of the liability of the respective sides. In the case of [Hind Overseas Private Limited Vs. Raghunath Prasad Jhunhunwalla and Another](#), the Apex Court observed, in an application for winding up of a company under the just and equitable clause, adjudication in the petition are of primary importance. The Apex Court further observed, even admission of a petition which will lead to advertisement of the winding up proceedings is little to cause immense injury to the company if ultimately the application has to be dismissed.

4. On a combined reading of all the three decisions referred to and discussed above, our understanding of the law is, a winding up petition should not be received when Court is satisfied that the dispute raised by the company is bona fide and there is every likelihood that such claim could be effectively resisted by the company. Mere pendency of a civil suit on the self-same cause of action, in our view, would not ipso facto make a winding up petition not maintainable. In this regard we would refer to a decision in the case of [Central Bank of India Vs. Sukhani Mining and Engineering Industries Pvt. Ltd. and Others](#), The learned Single Judge of the Patna High Court observed, there is no such provision, the reason being that a winding up proceeding is not merely for the benefit of the petitioner but of all shareholders, creditors or contributories of the company. Therefore, winding up proceedings could not be stayed merely because the creditor has filed a suit against the company.

5. Coming back to the factual matrix, we would find that the property was duly conveyed by the petitioning creditor to the company upon receipt of consideration

for the same. Two of the cheques valued at Rs. 43.4 lacs got dishonoured. This admitted fact could not be disputed by the company.

6. In such view of the matter, the learned Judge very rightly admitted the winding up petition that would deserve no interference by us. The appeal fails and is hereby dismissed.

7. There would be no order as to costs.

8. The stay prayed for, is considered and rejected. Urgent certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.