(2012) 06 CAL CK 0021

Calcutta High Court

Case No: Company Application No. 215 of 2012 in Company Petition No. 382 of 2001

Ashok Kumar Deora		APPELLANT
	Vs	
Baljit Securities Limited		RESPONDENT

Date of Decision: June 26, 2012

Acts Referred:

- Companies Act, 1956 - Section 433, 434, 443

Citation: (2013) 1 CompLJ 161

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Ravi Kapoor and Ms. Noelle Banerjee, for the Appellant; Arijit Banerjee, Soumabho Ghose and R.L. Mitra, Advocates, for the company, for the Respondent

Judgement

Sanjib Banerjee, J.

A short question of some significance has arisen in course of the proceedings. The application is by a petitioning-creditor seeking an order of winding-up and has been necessitated since the order of admission was passed some ten years back and an appeal from the order of admission stood dismissed in the year 2009. The petition was admitted on 7 August, 2002, when the court adjudged that the company was indebted to the petitioner in the principal sum of Rs. 1.75 lakh. The order of admission also found the company liable to pay interest at the rate of 18% per annum from the date of the payment by the petitioner to the company till the realisation thereof. Costs were also assessed against the company at 300 GM. In appeal, the operation of the order of admission was temporarily stayed but the appeal stood dismissed on 7 April, 2009, when the parties do not appear to have been represented before the appellate court. The appellate order recorded specifically that there was no illegality or irregularity in the order appealed against and found the appeal to be devoid of merit. The order of admission was affirmed.

2. The company has used an affidavit at the post-advertisement stage and supplementary affidavits have also been filed. The company seeks to rely on further documents that have been disclosed by it which would reveal, according to the company, that it has a complete defence to the claim. In the alternative and without prejudice to the company''s submission that it has a more than plausible defence to the claim, it is suggested that the company may be permitted to furnish security of the entire sum as due today in terms of the order of admission and the claim of the petitioner relegated to a suit.

3. It is in such circumstances that the primary question that arises is as to whether a company can seek to re-agitate the merits of the claim and contest the same at the post-admission stage of a creditor''s winding-up petition. The ancillary issue that is raised is whether the company can offer to furnish security at the post-advertisement stage and seek a direction that the claim be relegated to a suit.

4. In support of the rival contentions, three division bench judgments of this court have been referred to which, in chronological order, are as follows: an unreported judgment rendered on 10 February 1999 in ACO No. 16 of 1999, CP No. 432 of 1997:Khaitan Paper Machine Ltd v. Wires and Fabrics (SA) Ltd.; a judgment reported a SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., ; and, another unreported decision delivered on 14 September, 2004 in T. No. 318 of 2004: Dhariwal Steel Private Limited v. Bengal Rolling Shutters & Engineering Works.

5. The company says that in view of the opinion in Dhariwal Steel, it cannot be said that it is not open to a company to urge that the claim is unmeritorious, irrespective of the petition having been admitted and advertisements published. The petitioning-creditor, however, refers to the previous judgment in Khaitan Paper to suggest that there is a categorical finding therein that the decision as to the existence of the debt rendered at the time when the order of admission is made attains finality and cannot be reopened. The petitioning-creditor also refers to the SRC Steel judgment where the same division bench which subsequently delivered the verdict in Dhariwal Steel had taken an apparently different view and one that appears to be more in consonance with the opinion expressed in Khaitan Paper.

6. It is necessary in the present context to appreciate the practice that is followed in this court in respect of creditors'' winding-up petitions. Such practice was noticed and its rationale explained more than half a century back in the Bharat Vegetable Products Ltd. judgment reported at 56 CWN 29. The practice in this court is that upon a creditor bringing a petition for winding up a company on the ground of its inability to pay its debt to the creditor, the court directs a copy of the petition to be served on the company and, then, upon the company''s stand on merits coming on record, decides on affidavits as to whether the petition should progress to advertisements. The creditor''s winding-up petition does not automatically proceed to be advertised in the usual course in this court for the matter to be straightaway heard in a representative capacity. At the preadmission stage, as per the practice

followed in this court, only the petitioning-creditor and the company are heard on the merits of the claim and a decision taken whether the petition should be advertised or not. Such order is appealable.

7. There is good reason for such a procedure to be adopted by this court as noticed in the Bharat Vegetable judgment and in the SRC Steel and Dhariwal Steel cases. Upon a creditor''s winding-up petition being advertised, there is considerable prejudice suffered by the concerned company since a doubt is cast as to the creditworthiness of such commercial entity. Experience also shows that other creditors not immediately pressing for payment would rush to seek the instant release of the monies due upon the advertisement of a winding-up petition relating to the concerned company. It is in such circumstances that the process has been split up, so to say, in this court where, at the initial stage, the matter is confined to the merits of the claim and only if the petitioning-creditor makes out a case of an indisputable debt remaining outstanding that the matter progresses any further. If the debt is bona fide disputed in the sense that a triable issue is raised, the Company Judge would arrest the proceedings and relegate the claim to a regular action. Such order--generally, in the form of permanently staying the creditor''s petition, which is an euphemism for effectively dismissing the action--is, again, appealable.

8. A further practice has developed in this court where even if the Company Judge finds that there is an indisputable debt and the company has no defence to the petitioner''s claim, the company is offered a choice to ward off advertisements, Ordinarily, when the court finds. a debt due to the petitioner, the company is permitted to pay off the amount adjudged to be due by the order of admission on such conditions as the court, in its discretion, may impose. It is only in default of the company availing of such opportunity that advertisements are directed to be issued. It is, in such milieu, that the division bench opinions rendered in the aforesaid three judgments have to be appreciated.

9. In Khaitan Paper the issue that arose in the appeal was whether a company had the right to file an affidavit to oppose the winding-up petition though it may not have disputed the debt on which the winding-up petition was filed by a creditor. Such question was framed in the second paragraph of the judgment. The court noticed that section 433 of the Companies Act, 1956, provided that if the grounds for winding up of a company were established by a creditor, the company may be wound up by the court. The division bench also referred to rules 95 and 96 of the Companies (Court) Rules, 1959. The court concluded, on a reading of the rules, that the effective hearing on whether the company should be wound up follows the publication of the advertisements. It construed rule 96 to leave it to the discretion of the Company Court to direct notice to be given to the company before issuing directions for publication of advertisements. The division bench thereafter noted the practice in this court under-which affidavits are exchanged at the pre-admission

stage and "(t) here is a full scale hearing". The division bench observed that only after the Company Court "comes to a conclusion that the ground made out by the petitioner falls within the ground as mentioned in section 433 the court then directs admission".

10. The division bench noticed a previous appellate pronouncement reported at John Herbert and Co. Pvt. Ltd. Vs. Pranay Kumar Dutta, that a prima facie view is taken by the Company Judge at the time of admission of a creditor"s winding-up petition and held that such "prima facie view at the time of the admission must mean a prima facie view as to whether the company should be wound up u/s 443". The division bench in the Khaitan Paper case went on to add,--

... It cannot be said, having regard to the practice of this court, that the court forms a prima facie view as to the ground on which the winding up petition is admitted. Thus if a petitioning creditor files a winding up petition on the ground that the company is unable to pay its debt and the company opposes the application by filing an affidavit seeking to establish before the court that the debt was a disputed one and the court comes to a conclusion that the company"s dispute is not a bona fide one, it must be held that the finding as to the existence of the debt by the court is a final one. However, it does not follow from this, having regard to sections 433 and 443, that the company must be wound up.

11. The division bench also observed that even if there was a finding of the inability of the company to pay its debt u/s 433, the company or its creditors or others connected therewith could bring relevant facts to the notice of the court to dissuade the court from winding up the company u/s 443 of the Act. But the court hastened to issue a caveat that,--

This should not be taken as a licence to the company to reopen the issues determined by the finding of the company court on affidavits at the time of admission of the petition.

12. In SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., it was held at paragraph 56 of the report that "for admission of a winding up petition, the debt owed by the company has to be indisputable, and not merely owing prima facie". The court opined that something cannot both be prima facie as well as indisputable at the same time". The division bench noticed the judgments of the Company Court and the appellate court in In Re: Pandam Tea Co. Ltd., and Pandam Tea Co. Ltd. Vs. Darjeeling Commercial Co. Ltd.,] (reported at In Re: Pandam Tea Co. Ltd., and Pandam Tea Co. Ltd. Vs. Darjeeling Commercial Co. Ltd., respectively; the division bench view in Bangasri Ice and Cold Storage Ltd. [Bangasri Ice and Bangasri Ice and Cold Storage Ltd. Vs. Kali Charan Banerjee,) and John Herbert and Co. Pvt. Ltd. Vs. Pranay Kumar Dutta, Upon reading such authorities, the division bench in SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., observed as follows at paragraphs 59 to 61 of the report:

59. So, as per the authorities, the view formed at the stage of admission of the winding up petition is a prima facie view only. There is at least another division bench decision of the Calcutta High Court, which was referred to by Mr. Sen, but not actually cited, as the point, although serious and important in itself, did not assume the place of primary importance in our case. It is the case (of) Rangpur Tea Association Ltd. Vs. Makkanlal Samaddar,], where, if we understood Mr. Sen correctly, a view was taken that the finding at the stage of admission is not binding upon the Company Court at the final stage of hearing of the winding up, just as an interlocutory decision in a suit is not binding at the time of passing of the final decree--

60. The general view and also our view that the formation of the opinion of the Single Judge at the admission stage that the debt of the company is indisputable, and the binding and final nature of that opinion, does not really come in conflict with these dicta of the division bench. The reason is this: at the stage of admission the parties present before the court are the company and the petitioning creditor. The decision of the court that the debt of the company is final and binding binds them, and all other Courts in the same manner as a summary decree does. This is putting the matter on a very high pedestal, but it is, both logically and as matter of law already placed on that high pedestal.

61. But at the stage of the hearing of the winding up petition, the company has already, to a certain extent split up into the creditors and the contributors who come and make representations on their own behalf and by themselves, even apart from the submission which might be made by the company. The parties are different and many more than were present at the stage of admission. After hearing all those parties the Company Court could, at the final stage, take different view as to the debt than it has taken at the stage of admission. The admission stage view bound the company and the petitioning creditor finally, but not the others, and therefore not the Company Court also, when hearing the matter finally.

13. In the Dhariwal Steel judgment, there is a stray line in a different context that the company here seeks to clutch on to. The division bench disagreed with a suggestion made on behalf of the petitioning-creditor in that case that the case of a petitioning-creditor seeking admission of the petition called for a lesser scrutiny than the case of a plaintiff seeking a summary decree. It is in such light that the following sentence from the Dhariwal Steel judgment, on which the company lays great stress, has to be seen:

In our opinion, the legal right possessed by a company to re-agitate the issue of the petitioning creditor''s debt being indisputable, at the final stage of hearing of the winding up petition, does not at all make the receipt of the winding up petition, and its advertisement a matter of any lesser prejudice than the passing of a summary decree.

13.1 Though the company makes out as if there is an apparent conflict of opinions on a company''s right to reopen the merits of a claim at the post-advertisement stage, the rules as to the interpretation of judicial precedents would not permit a stray sentence in a judicial decision to be picked out as the authoritative pronouncement by disregarding the context of the observation or by discarding the other parts of the judgment.

14. The SRC Steel and the Dhariwal Steel judgments were rendered by the same division bench within a month of each other. The sentence in Dhariwal Steel that the company here harps on has to be seen against the backdrop of the more elaborate discussion on such aspect of the matter at paragraphs 59 to 61 of the SRC Steel report. If the sentence in Dhariwal Steel is read not as giving a company a licence to reopen a concluded issue at will, but for the issue to be re-agitated by some other at a subsequent stage, there would be no conflict between the view expressed in Khaitan Paper and the one reflected in the relevant sentence in Dhariwal Steel, though it must be admitted that Khaitan Paper did not take into account the circumstances referred to at paragraphs 59 to 61 of the SRC Steel report since the question that the division bench answered in Khaitan Paper was narrower than the discussion on the entire scheme of the creditors'' winding-up proceedings in SRC Steel.

15. On the strength of the dicta in Pandam Tea, Bangasri Ice and John Herbert, some observations have been made in judgments of this court to the effect that the prima facie view taken at the time of admitting a winding-up petition is more final and less tentative than what a prima facie view would ordinarily connote. Most notably, such observations find place in the Single Bench judgments reported at In Re: Raghunath Exports Ltd., and JMD Medicare Ltd. Vs. Siemens Aktiengasellschaft, . The observations to such effect in such Single Bench judgments have to be understood in the context of the elaborate discussion on such aspect at paragraphs 59 to 61 of the SRC Steel report and cannot be read to imply that the finding, at the time of admission, of the debt being due from the company to the petitioner is not final as between the principal dramatis personae at the post-advertisement stage.

16. It would, thus, follow that a company cannot, at the post-advertisement stage, disturb or unsettle the finality of a finding as to the indisputable nature of a debt rendered at the admission stage of a creditor''s winding-up petition. The judgments in both Khaitan Paper and SRC Steel instruct thus. SRC Steel lays down that even though the decision at the admission stage is final as between the company and the petitioning-creditor, others connected with the company who come in after advertisements may question the finding and the court may not feel constrained that it is bound by the finding. The judgment in Khaitan Paper is restricted only to the finality of the issue as between the company and the petitioning-creditor.

17. In the circumstances, it is not open to this company, particularly in the absence of anyone else coming in whether to support or oppose the prayer for winding up

the company, to have the merits of the claim reassessed since the court found the indisputable nature of the debt at the admission stage and such finding has attained finality. As a result, it is no longer open to the company to offer security or for the court to accept it. Security is offered or directed to be furnished where the adjudication as to the claim is not immediately made and the adjudication is postponed till a regular action in furtherance of the claim is brought by the petitioning creditor. Once a creditor''s winding-up petition is admitted, the adjudication of the claim must necessarily have been made and the debt found to be due and owing to the creditor. In such a situation there is no question of any security being furnished since the security is invariably in respect of an unassessed claim, but upon a creditor''s winding-up petition being admitted in this court the assessment would already have been made upholding all or a part of the claim.

18. The presumption of inability to pay that arises u/s 434 of the Act is upon receipt by a company of a demand in writing in terms of sub-section (1)(a) thereof and the company neglecting to pay the same, or to secure or compound for it to the reasonable satisfaction of the creditor. The negligence on the part of the company to pay a demand would be if the company omits to make the payment without reasonable excuse. It is the reasonableness of the company''s excuse to not make the payment that is assessed at the pre-admission stage in this court. The company does not have to demonstrate a water-tight defence; just like a defendant in a summary suit does not have to conclusively demolish the claim to earn leave to defend the suit. The company has only to make out an arguable case to rebut the presumption of its inability to pay its debt. But upon the presumption arising and the company failing to rebut the presumption, the company is liable to be wound up. Even in such case the court is not bound to send the company into liquidation. The court still retains the discretion to not wind up the company and the post-advertisement assessment is based as much on the wishes of the others connected with the company as it is on the prospects of the company and divers other factors. In the practice followed in this court, a creditor is entitled ex debito justitiae to have his petition admitted if the debt is indisputable; but the unpaid debt is only one of the factors that the court takes into consideration at the post-advertisement stage to assess whether it ought to ring the knell heralding the civil death of the company.

19. When a creditor''s winding-up petition progresses to admission and publication of advertisements, the issue as to whether the company is liable to pay the petitioner must already have been conclusively answered. Once the issue is concluded, at least as between the company and the petitioning-creditor, the liability of the company crystallises and there is no further assessment necessary on such matter. It is in such circumstances that the Company Court, under the practice followed here, generally affords the company the liberty to pay off the amount assessed to be due and, only in default of such payment, would the petitioner be permitted to cause advertisements to be published.

20. The prayer made in a creditor''s winding-up petition is for winding up the company and never for a decree in respect of the claim or for a direction for payment thereof by the company. Indeed, the Company Court is not a debt-collecting forum. The petitioning-creditor can never insist that the Company Court direct the company to make the payment. Even if a direction is issued for the payment to be made, it is invariably to ward off the advertisements and it is open to a company to not make the payment, suffer the publication of advertisements and contend at the second stage that there are other grounds for not sending it into liquidation. It is possible that despite a concluded finding of the company''s inability to pay its debt, the court takes other factors into consideration and does not ultimately wind up the company. The petitioner in such case will have to look elsewhere for realisation of the money found to be due to it, but no petitioning-creditor can insist on the realisation of its claim, even if the court renders a finding that it is due, in course of the winding-up proceedings.

21. The company''s offer to secure the claim must be seen in the light of the practice followed in this court. The issue as to whether the company owes the debt to the petitioner has already been decided; it does not require any further adjudication. The security that a company furnishes is only to rebut the presumption of its inability to pay and for the claim to be relegated to a regular action for adjudication as to whether the debt is due. When a creditor''s winding-up petition progresses to be admitted, such adjudication is already made. In such circumstances, there is little meaning in a company offering thereafter for the claim to be secured, for the issue as to the company''s liability to the petitioner can no longer be reopened or reassessed in any other forum as it has attained finality as between the company and the petitioner.

22. There is no other significant ground which has been urged by the company for the court''s discretion to be exercised in its favour despite the apparent inability of the company to pay its debt. The company has, however, not been permitted to refer to the documents sought to be relied on in support of the company''s assertion that the petitioner is not entitled to the money claimed since such question has already been finally decided at the admission stage.''

23. Accordingly, the company, Baljit Securities Ltd., is directed to be wound up in accordance with the provisions of the Companies Act, 1956. The official liquidator shall forthwith take possession and control of all books, records, assets, documents and transactions of the company now in liquidation. The petitioner will cause a gist of this order to be published in the same newspapers where the petition had been advertised. The claim of the petitioner which has already been adjudged at the admission stage may be carried before the official liquidator and the money paid out according to the petitioner''s position and entitlement in the queue to receive payments. The order of winding-up will, however, not take effect if the company immediately pays off the entire amount owing from it to the petitioner in terms of

the order of admission. The company has a second chance to ward off its liquidation since no other creditor of the company has applied at the post-advertisement stage when the matter has assumed a representative capacity.

24. CA No. 215 of 2012 also stands disposed of without any order as to costs.

25. A prayer for the stay of the operation of the order is made, which is declined. Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.