

(2003) 05 CAL CK 0031

Calcutta High Court

Case No: C.P. No. 235 of 2002

Motilal Agarwal

APPELLANT

Vs

Diabari Tea Company Ltd.

RESPONDENT

Date of Decision: May 19, 2003**Acts Referred:**

- Companies Act, 1956 - Section 433, 434

Citation: (2005) 128 CompCas 672**Hon'ble Judges:** Ashim Kumar Banerjee, J**Bench:** Single Bench**Advocate:** Ratnanka Banerjee and Ritabrata Mitra, for the Appellant; Dhruba Ghosh, for the Respondent**Final Decision:** Dismissed

Judgement

Ashim Kumar Banerjee, J.

The petitioner was carrying on business under the name and style "O. Sing and Company". At the relevant time the petitioner supplied chemical and organic fertilizer, pesticides, etc., to the company. On account of supply there had been an outstanding of Rs. 11,61,794.16 as on December 31, 2000. The company made a part payment of Rs. 2 lakhs on January 12, 2001, thereby leaving a sum of Rs. 9,61,794.16 which was confirmed by the company on February 23, 2001. After such balance confirmation the company during the period March, 2001, to April, 2001, made diverse part payments aggregating to Rs. 2.32 lakhs leaving a balance sum of Rs. 7,29,794.16. The petitioner caused a statutory notice of demand served at the former registered office of the company and thereafter initiated the above winding up proceeding.

2. In the affidavit-in-opposition the company contended that since the notice was not served at the registered office of the company the winding up petition was not maintainable and was liable to be dismissed.

3. On the merits, it was contended in the affidavit that the management of the said company had changed hands on April 30, 2001. The present management had no records to verify the claim of the petitioner. The balance confirmation being relied upon by the petitioner as well as the part payments made by the company would show that everything happened when the company was being controlled by the erstwhile management. At the time of taking over the erstwhile management did not inform the present management about the claim of the petitioner. It was also contended that no documents barring the balance confirmation, in support of such claim had been produced by the petitioner. Hence, the winding up petition was not maintainable.

4. Mr. Ratnanka Banerjee, learned Counsel for the petitioner, contended that service of statutory notice of demand was effected at the recorded address of the registered office of the company as he had no knowledge of change of the registered office. Mr. Banerjee further submitted that even if the notice was not served at the registered office the petitioner being a creditor of the said company was entitled to maintain this winding up petition. Mr. Banerjee further submitted that the claim of the petitioner stood admitted in view of the balance confirmation as well as in view of a letter written by the present management to the erstwhile management demanding recovery of the present claim. In the said letter of the present management a certificate of the auditor had also been enclosed for ready reference which would prove the existence of the petitioner's claim. Mr. Banerjee submitted that since the admitted claims were not paid by the company it would be deemed that the company was insolvent and was unable to pay its debts and as such the petitioner was entitled to have an order of admission.

5. In support of his contention Mr. Banerjee relied on the following decisions :

(1) Pandam Tea Co. Ltd. v. Darjeeling Commercial Co. Ltd. [1977] 47 Comp Cas 15 (Cal) ;

(2) Manganese Ore (India) Ltd. v. Sandur Manganese and Iron Ores Ltd. [1999] 98 Comp Cas 755 (Karn) ;

(3) Ramdas and Co. v. Kitti Steels Ltd. [2001] 103 Comp Cas 199 (AP);

(4) [2000] WBLR 256 (Cal) ;

(5) Unreported Division Bench decision of this Court in the case of Jupiter Rubber Pvt. Ltd. v. S.K. Trading Company (A. C. O. No. 85 of 2000).

6. Relying on the aforesaid decisions Mr. Banerjee submitted that the winding up petition should be admitted and direction for advertisement should be given.

7. Mr. Dhruba Ghosh, learned Counsel appearing for the company, contended that since the statutory notice of demand was not delivered at the registered office of the company, the petitioner was not entitled to have the rebuttable presumption u/s

434 of the Companies Act, 1956. Since rebuttable presumption was not available to the petitioner the petitioner was not entitled to have an order of admission on the basis of the averments made in the petition.

8. On the merits Mr. Ghosh contended that the company had no records to find out justification of the claim of the petitioner. Hence, by a letter dated May 2, 2002, the company through its advocate on record wrote to the erstwhile management by making demand of the sums including the claim of the petitioner which were not reflected in the books of account at the time of take over.

9. Mr. Ghosh in support of his contention relied on the following decisions

(1) Bukhtiarpur Bihar Light Railway Co. Ltd. v. Union of India [1954] 24 Comp Cas 507 (Cal) ;

(2) N. L. Mehta Cinema Enterprises P. Ltd. v. Pravinchandra P. Mehta [1991] 70 Comp Cas 31 (Bom) ;

(3) B. Viswanathan v. Seshasayee Paper and Boards Ltd. [1992] 73 Comp Cas 136 (Mad) ;

(4) Sandur Manganese and Iron Ores Ltd. v. Manganese Ore (India) Ltd. [2001] CLC 1715 (Karn)

10. To decide the issue let me first deal with the cases cited by the parties.

11. (1) [Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India \(UOI\) and Another,](#)
: Unless there is a valid statutory notice the winding up petition is not maintainable. The Division Bench of this Court also held that whether the substratum of the company is gone and the object with which it was formed has become impossible of further pursuit is usually the proper concern of only its shareholders and contributories, a creditor cannot properly be allowed to use it as a ground for breaking up the company unless by the disappearance of the substratum, the recovery of his debt has been imperiled.

12. (2) Pandam Tea Co. Ltd. v. Darjeeling Commercial Co. Ltd. [1977] 47 Comp Cas 15
: In the instant case the Division Bench of this Court held as follows (headnote) :

"It is an essential requirement of law that the requisite particulars of the indebtedness of the company on which the insolvency proceeding is initiated against such company should find place in the notice of demand u/s 434 as also in the petition for winding up. In the context of the circumstances of this case, the absence of the particulars of accurate statement about the claim could not affect the maintainability of the petition as there was clear and unequivocal admission of the debts in the last balance-sheet of the appellant for the year 1967. Accordingly, there was no question of any prejudice to the appellant-company."

13. (3) N. L. Mehta Cinema Enterprises P. Ltd. v. Pravinchandra P. Mehta [1991] 70 Comp Cas 31 : The Division Bench of the Bombay High Court held that the notice u/s 434 was to be served at the registered office of the company. If it was not so the petition was liable to be dismissed.

14. (4) B. Viswanathan v. Seshasayee Paper and Boards Ltd. [1992] 73 Comp Cas 136 : The learned single judge of the Madras High Court herein following [Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India \(UOI\) and Another](#), held that even if the notice was not served at the registered office the petitioner was entitled to show that the company was unable to pay debts.

15. (5) Manganese Ore (India) Ltd. v. Sandur Manganese and Iron Ores Ltd. [1999] 98 Comp Cas 755 : A learned single judge of the Karnataka High Court held that since the notice was served on the administrative office and was passed on to the registered office, it was a sufficient notice u/s 434 of the Companies Act, 1956. This decision of the learned single Bench was overruled by the Division Bench reported in Sandur Manganese and Iron Ores Ltd. v. Manganese Ore (India) Ltd. [2001] CLC 1715 (Karn) Here also the Division Bench considered Bukhtiarpur Bihar Light Railway Co. Ltd. v. Union of India [1954] 24 Comp Cas 507 (Cal) and held that there was no proper service of notice required u/s 434 of the Companies Act. The Division Bench, however, held that non-service of statutory notice could not call for dismissal of the winding up petition in limine. Considering the facts of the said case the Division Bench held that the creditor could not prove that the company was unable to pay its debts. Hence the winding up petition was dismissed.

16. (6) Ramdas and Co. v. Kitti Steels Ltd. [2001] 103 Comp Cas 199 : The learned single judge of the Andhra Pradesh High Court held that in the absence of proper notice u/s 434 of the creditor can maintain a winding up petition provided he can prove to the satisfaction of the court that the company is unable to pay its debts.

17. (7) [2000] WBLR 256 (Cal) : The learned single judge of this Court held that non service of notice of winding up cannot be a fetter on the question of maintainability of the winding up proceeding.

18. (8) Unreported decision of the Division Bench of this Court in Jupiter Rubber Pvt. Ltd. v. S. K Trading Company (A. C. O. No. 85 of 2000) : Here also the Division Bench held that even there was no proper notice the petitioning creditor was entitled to satisfy this Court on evidence that the company was unable to pay its debts and therefore it should be wound up.

19. Analysing the aforesaid decisions I am of the opinion that to maintain a winding up petition by a creditor it is mandatory to have statutory notice served upon the registered office of the company. Failure of service of an appropriate notice however does not disentitle the petitioner to maintain the winding up petition provided, however, it can prove that the company is otherwise insolvent and if the order of winding up is not passed it would imperil the chance of recovery of the claim of the

petitioner.

20. To maintain a winding up petition a creditor has to show that he has a just debt due which the company is unable to pay. The company is deemed unable to pay in case notice u/s 434 is given at the registered office of the company and the company has failed and neglected to pay such sum within 21 days from the date of receipt. Such presumption of insolvency is a rebuttable one and the company is entitled to rebut such presumption by raising a bona fide dispute. In the instant case the petitioner admittedly served notice at a place which was not the registered office of the company. Hence, the petitioner was not entitled to take the plea of deemed insolvency u/s 434 of the said Act. Hence, the plea that there had been an appropriate notice served by the petitioner was not tenable and the single Bench decision of this Court reported in [2000] WBLR 256 was not a good law and with all humility I am unable to agree with his Lordship.

21. There leaves us a question as to whether the petitioner was entitled to maintain the winding up petition in the absence of deemed insolvency.

22. It is well settled law that a creditor is entitled to maintain a winding up petition u/s 433 of the said Act, 1956, the admissibility of the said petition would depend upon two aspects namely : (i) there has been just debt due to the petitioner by the company; (ii) the company is insolvent and is unable to pay its debts. In the present case, the petitioner might be successful in crossing the first hurdle. The petitioner, however, had not been able to cross the second hurdle. The order of winding up is a discretionary one and such discretion should sparingly be used unless the situation calls for such interference. I have carefully scrutinised the averments made in the petition. Apart from the mechanical production of various sections of the said Act, 1956, relating to insolvency no case had been made out by the petitioner to show that the company was insolvent or was unable to pay its debts. It might be true that the erstwhile management was favourable to the petitioner. It from time to time paid diverse sums as and by way of part payment. It also acknowledged the debt by sending balance confirmation. Since the management had changed and since it was contended on behalf of the present management that the company had no records to verify the claim of the petitioner it was incumbent upon the petitioner to disclose further particulars in support of their claim. Similarly, since the company had denied receipt of the statutory notice at the registered office the petitioner should have amended his petition by incorporating sufficient materials to prove the case of insolvency. The same was not done in the instant case.

23. Assuming that the company had lost its substratum (although no such evidence was produced by the petitioner) the petitioner herein failed to show that disappearance of substratum had imperiled the chance of recovery of the claim of the petitioner.

24. In the result the winding up petition fails and is hereby dismissed. It is however/made clear that I have not gone into the merits of the claim which would be open for decision in an appropriate future proceeding, if brought against the company.

25. There would be no order as to costs.

26. Urgent xerox certified copy would be given to the parties, if applied for.