

(2004) 09 CAL CK 0061

Calcutta High Court

Case No: C.P. No. 137 of 2004

C.E.S.C. Ltd.

APPELLANT

Vs

Manoj Dhupelia

RESPONDENT

Date of Decision: Sept. 20, 2004

Citation: (2005) 128 CompCas 596 : 108 CWN 449

Hon'ble Judges: Ashim Kumar Banerjee, J

Bench: Single Bench

Advocate: A.K. Mitra, assisted by Abrajit Mitra and Joy Saha, for the Appellant; S.P. Sarkar, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

This winding up petition relates to a claim for money lent and advanced for a sum of Rs. 1 crore paid to the company by the petitioner.

2. The money was paid through a forwarding letter dated May 3, 2001, being annexure A to the petition which says that the money was paid on account of "short term deposit". The receipt of money, by the company, is not disputed.
3. The company by a letter dated July 12, 2002, addressed to M/s. Manoj Dhupelia Stock Broking Services Pvt. Ltd. with a copy endorsed to the petitioning creditor asked for adjustment of the amount being the subject-matter of the present petition as against their claim against the said Manoj Dhupelia Stock Broking Services Pvt. Ltd. (hereinafter referred to as the stock broking company).
4. The said letter was replied to by the stock broking company on September 2, 2002, by saying that the enclosures in the said letter did not disclose sufficient details and, as such, they asked for reconciliation statement.
5. The petitioning creditor on the next date being September 3, 2002, reacted by saying as follows :

"The deposit of Rs. 1 crore was given towards short term deposit and I request you to clarify as to why a copy of the letter has been marked to me."

6. The company filed three suits as against the said stock broking company, inter alia, alleging that they paid substantial sums to the stock broking company for purchase of Government securities and they were yet to receive securities for the equivalent amount.

7. When the said suits were pending before this Court the company allegedly gave a letter on October 7, 2003, said to be sent by registered post with acknowledgment due confirming adjustment of the said sum of Rs. 1 crore being the subject-matter of the present petition as against their claim against the stock broking company. The petitioning creditor, however, disputes the factum of validity of the said letter dated October 7, 2003.

8. On or about November 7, 2003, the company filed an application for amendment of plaint in one of the suits being C. S. No. 49 of 2003, inter alia, asking for amendment of the plaint by incorporating an adjustment recorded in the said letter dated October 7, 2003, as also for addition of the petitioning creditor as a party defendant in the said suit.

9. The petitioning creditor gave a statutory notice of demand on January 28, 2004. The said notice was not replied to. The petitioner approached this Court by initiating winding up proceeding on March 19, 2004.

10. When this matter came up for hearing after completion of affidavits it was contended before me that the application for amendment was pending before the interlocutory court. Hence, I adjourned the hearing of this matter to enable the parties to have the application for amendment adjudicated upon and disposed of by the learned interlocutory judge. Ultimately, Sub-hro Kamal Mukherjee J. by his Lordship's judgment and order dated September 13, 2004, allowed the application for amendment and added the petitioning creditor as a party defendant in the said suit.

11. The matter was thereafter heard by me on September 14, 2004, when it was contended before me by the petitioner that the very basis of the defence in this winding up proceedings as well as the application for amendment was the letter dated October 7, 2003. Despite repeated requests made on behalf of the advocate-on-record for the petitioning creditor, no inspection of the original of the said letter or the acknowledgment due card as the case may be, was given. I am told that the advocate-on-record for the petitioning creditor had to wait for three hours in the office of the advocate-on-record for the company to have the inspection of the said documents, even then he was not successful.

12. The company was represented before me by Mr. A. K. Mitra, learned senior counsel assisted by Mr. Abhrajit Mitra and Mr. Joy Saha. Mr. Mitra on said date

prayed for an adjournment to enable him to produce the acknowledgment due card. Accordingly, the hearing of the winding up petition was adjourned on that date. Today, when the matter was taken up for hearing before recess Mr. Joy Saha, learned Counsel appearing for the company, contended that they were unable to produce the acknowledgment card as the same was not traceable. However, the postal receipt was available and the same could be produced if the matter was taken up after recess. The matter is now taken up after recess. Mr. Mitra, appearing for the company, submits that he is neither able to produce the acknowledgment due card nor the postal receipt.

13. Mr. Mitra, however, submits that even if this Court ignores the letter dated October 7, 2003, on the basis of the contemporaneous documents exchange between the parties this Court should refuse admission of the winding up petition. Mr. Mitra in support of his contention relied on two decisions of this Court in the cases of Dunlop India v. Anamika Udyog [1994] 1 CRN 409 and Vinayak Oil and Fats Pvt. Ltd. v. Andre (Cayman Islands) Trading Co. Ltd. [2004] 2 WBLR Cal 489. Mr. Mitra also contends that the amount was paid to secure the claim of the company on account of purchase of government securities. He also draws my attention to the forwarding letter which would show that there was no mention of payment of interest. He lastly contends that the company is a solvent company and a public utility concern and this Court should not exercise its discretion to admit the winding up petition.

14. Mr. S. P. Sarkar, learned senior counsel appearing for the petitioning creditor in reply, submits that since the statutory notice of demand was not replied to a statutory presumption should be taken into account by this Court as the company did not rebut the same by replying to the statutory notice of demand or by paying or securing the debt. He further contends that the defence of the company in the affidavit is based upon the letter dated October 7, 2003 and if that letter is not taken into account by this Court the defence raised by the company would automatically fail. According to Mr. Sarkar, the letter dated July 12, 2002, does not unilaterally constitute a contract as the petitioning creditor did not agree to such proposal of adjustment as contained in his letter dated September 3, 2002.

15. Mr. Sarkar lastly contends that the company might be a public utility concern, it might be a high mighty organisation. This court must not show any indulgence to the company because of the mala fide defence taken by them in the affidavit as well as before this Court while advancing argument on their behalf.

16. Although the company has tried to confuse the issue involved in this Court I have to examine on *prima facie* basis as to whether the dispute so far raised by the company as appearing from the admitted documents would constitute a triable issue. I am not here to adjudicate upon as to whether the defence appearing from the admitted documents would ultimately succeed or not. I am only to find out whether there is any chance of success or not. The stock broking company is

admittedly run by the petitioner himself as Mr. Sarkar in his usual fairness, on instruction, submits that the said company is being controlled by the petitioning creditor and his family members. Hence, if one lifts the corporate veil there might be a chance of success in respect of the defence raised by the company, specially when the interlocutory court allowed addition of the petitioning creditor as a party defendant in this suit. In such view of the matter, it would be proper for me to wait till the disposal of the suit.

17. Hence, this winding up petition is dismissed with liberty to the petitioner to approach this Court again after disposal of the suit or in case the petitioning creditor is deleted from the cause title of the suit being Civil Suit No. 49 of 2003.

18. Before parting with I like to penalise the company for wasting the court's time. As I have recorded hereinbefore, on September 14, 2004, the matter was adjourned at the instance of the company, so that they could produce the acknowledgment due card referred to above. Since before the said date there were letters to the effect asking for inspection of the said acknowledgment due card and specially when the same was not given, the company on that date could have submitted that the same was not traceable, instead they took adjournment.

19. When the matter was taken up today in the morning for the first time it was contended that the acknowledgment due card was not traceable. Even at that juncture time was again prayed for to enable the company to produce the postal receipt. Accordingly, the matter was adjourned till 2 O'clock. The company has now contended that the postal receipt is also not available. I am unable to appreciate the stand taken by the company while conducting this litigation before this Court. They have wasted court's time unnecessarily, they must pay cost as penalty assessed at Rs. 20,000 to be deposited by the company with the Registrar, Original Side, High Court by tomorrow during court hours.

20. Let xerox certified copy of this judgment and order be supplied to the parties, if applied for, upon completion of all formalities.