(2003) 12 DEL CK 0060

Delhi High Court

Case No: Company Petition: 331 of 1999 and CA No. 1241/99, 239, 594 of 2000, 1127 of 2001, 161 and 1313 of 2002

Victor Company of Japan Ltd.		APPELLANT
	Vs	
J.V.C. Nova Magnetics Pvt. Ltd. Nova Electro Magnetics Ltd.		RESPONDENT

Date of Decision: Dec. 10, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 152
- Companies Act, 1956 - Section 243, 428, 433, 433(c), 433(d)
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 16

Citation: (2003) 2 ILR Delhi 599

Hon'ble Judges: Dr. M.K. Sharma, J

Bench: Single Bench

Advocate: R.K.P. Shankardas, Mr. Rajiv Nayar, with Mr. Mansoor Ali and Mr. Amar Gupta, for the Appellant; Manmohan with Mr. Manish K. Jha, Ms. Tarunjot Kaur and Mr. Chatrasal Singh, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Dr. Mukundakam Sharma, J.

This petition is filed by the petitioner company praying for an order of winding up the respondent No. 1 company. The respondent No. 1 company was incorporated with two shareholders M/s Ravinder Singhania and Mr. Jagdish Kumar Gupta, each subscribing to one share of Rs. 10/-. The Board of Directors of the respondent No. 1 company is constituted of four nominee directors of the petitioner company and three nominee directors of the respondent No. 2. The respondent No. 1 company came to be incorporated after the petitioner and the respondent No. 2 companies entered into a joint venture agreement in which it was stipulated that the respondent No. 2 would acquire technical know how and also suitable equipments, plant and machinery from the petitioner company for production of VHS Video Tape

Products conforming to international standards. The said joint venture agreement between the petitioner and the respondent No. 2 was entered and executed on April 6, 1995. According to Article 8, the said agreement was valid for a period of seven years. As a result of the aforesaid joint venture agreement, the respondent No. 1 company was incorporated as a joint venture company to carry on trading activities of import and export of video cassettes and allied products. Pursuant to the aforesaid joint venture agreement, further agreements were entered into between the parties, like, technical collaboration agreement, sale and purchase agreement, die coater lease agreement, etc. In order to enable the joint venture company to function properly, both the petitioner and the respondent No. 2 deposited share application money with the respondent No. 1. However, subsequent thereto the respondent No. 2 suffered a financial crunch due to a fire at the factory premises of respondent No. 2 consequent to which the net worth of the respondent No. 2 became negative. On a reference being made, a case was registered before the Board for Industrial and Financial Reconstruction (BIFR) under the provisions of Sick Industries Companies (Special Provisions) Act (SICA). The BIFR conducted an enquiry as envisaged u/s 16 of the SICA and by an order passed some time in the month of November 1997 it declared the respondent No. 2 as sick and appointed the IDBI as the operating agency. On July 22, 1998, the petitioner terminated the joint venture agreement by sending an intimation to the respondent No. 2 in that regard. The respondent No. 2 and its promoters filed a suit in this Court seeking for a decree of declaration and mandatory and permanent injunction against the respondent No. 1 and the petitioner which was registered as Suit No. 1649/98. In the said suit, an application was filed which was registered as IA No. 9201/98. By an order dated March 11, 1999 followed by an order dated April 5, 1999 passed on the aforesaid application IA No. 9201/98 arising out of Suit No. 1649/ 98, the court directed the defendant No. 1 (Respondent No. 1 herein) to expeditiously authorize the bank to return 90% of the amount subscribed by the plaintiff and the defendant No. 2 in the said suit. The plaintiff in the suit was the respondent No. 2 herein, whereas the defendant No. 1 was the respondent No. 1 herein. The aforesaid order came to be passed on the basis of the statements made by both the parties, namely, the plaintiff, namely, the plaintiff and the defendant No. 2 that the parties should be allowed to take back the share subscription amount contributed by them towards share capital of respondent No. 1 (defendant No. 1 in the said suit) and the said refund should be allowed only after the Reserve Bank of India gives its approval for repatriation of the amount to defendant No. 2. In terms of the aforesaid agreement between the parties the aforesaid direction was issued by the court directing the defendant No. 1 to expeditiously authorise the bank to return 90% of the amount subscribed by the plaintiff and the defendant No. 2 along with the following additional conditions:-

(1) The equipment and machinery imported for expansion of Plaintiff No. 1 production facility lying at the bonded warehouse of Madras Export Processing Zone

(MEPZ) authorities will be shifted to the premises of Plaintiff No. 1 within the MEPZ on or before June 30, 1999. The plaintiffs and the defendants would co-operate with plaintiff No. 1 to arrange the shifting of the equipment and machinery. After shifting, the plaintiffs would be responsible for warehousing or any other expenses relating to the equipment and machinery in question.

(2) The amount retained in the bank account of defendant No. 1 company would be utilized for meeting insurance charges, payments to auditors, statutory dues and other liabilities including operating and provisional expenses of defendant No. 1 company.

(3) The plaintiffs would assume and be responsible for both the defence of and for any liability arising out of the Special Civil Suit No. 254 of 1998 titled Advance Reinforced Plastic Private Limited v. Nova Electro Magnetics Limited pending before the District Court of District Valsad, Gujarat.

2. Pursuant to the said order, 90% of the amount subscribed by the petitioner and the respondent No. 2 has been returned and received by the petitioner and the respondent No. 2. The present petition came to be filed thereafter in this Court praying for winding up of the respondent No. 1 company. In the cause title of this petition it is shown by the petitioner that the present petition is filed under the provisions of section 433(c), (d) and (f) of the Companies Act. The contention that is raised in this petition is that the respondent No. 1 company was incorporated with only two nominee shareholders, namely, Mr. Ravinder Singhania and Mr. Jagdish Kumar Gupta, and since out of the aforesaid two shareholders one shareholder, namely, Shri Jagdish Kumar Gupta, has expired on February 23, 1999, therefore, the respondent No. 1 company has only one shareholder which is in violation of the provisions of section 45 of the Companies Act and the respondent No. 1 is, therefore, liable to be wound up as provided for u/s 433 of the Companies Act. It is also submitted that the respondent No. 1 company has till date not commenced its business in terms of the objects of incorporation and in fact 90% of the share capital which constituted the only asset of the company has also been taken back and returned to both the petitioner and the respondent No. 2 and, therefore, there is a complete deadlock of the respondent No. 1 company and this company is not in a position to commence its business at any point of time thereby making out a case of winding up of the company u/s 433(c) of the Act. It was also submitted that the validity period of the joint venture agreement on the basis of which the joint venture company was incorporated has also expired as the same in terms of the agreement was valid only for a period of seven years and the said seven years period has expired on June 5, 2002. Kit was also submitted that there also exists a complete deadlock in the respondent No. 1 company since no Board meeting is being held since January 1998 and also because only one meeting of the shareholders of the respondent No. 1 company has been held ever since its incorporation. It was also submitted that, therefore, the company is required to be wound up even on the just

and equitable ground.

3. The said petition was contested by respondent No. 2 by filing a detailed reply. Each one of the aforesaid contentions has been sought to be refuted by respondent No. 2. The circumstances under which the Board meetings could not be held also has been explained in the reply filed by the respondent No. 2. On the basis of the pleadings of the parties I have heard the learned Counsel appearing for the petitioner as also counsel appearing for the respondent No. 2.

4. During the course of the aforesaid submissions, counsel appearing for the respondent No. 2 took up a preliminary objection to the maintainability of the petition contending inter alia that the petitioner has no locus standi to file the present company petition. It was submitted that the petitioner is neither the company itself nor a creditors or a contributory and, therefore, the petitioner did not have any locus standi to file present petition in terms of the provisions of section 439 of the Companies Act. It was also submitted that the present petition was not filed in accordance with the format prescribed under Rule 95 of the Companies (Court) Rules. It was also submitted that there is no pleading in the petition mentioning and establishing that the petitioner is a creditor and that the respondent is unable to pay its debt, and also in respect of contingent or prospective liabilities of the company and, therefore, the present petition is not maintainable.

5. After hearing the counsel appearing for the parties at length, by order dated October 1, 2003 the judgment was reserved. However, during the course of preparation of the judgment it was noticed by this Court that there is a decision reported in Kalra Iron Stores Vs. Faridabad Fabricators P. Ltd. (No. 2), . wherein it was held by this Court that the company petition could be rejected if there be no pleading to the effect that the petitioner is a creditor and the respondent is unable to pay its debt and also to the effect of contingent and prospective liabilities of the company. This court also came across another decision of the Gujarat High Court in Registrar of Companies, Gujarat Vs. Kavita Benefit Pvt. Ltd., , wherein it was held that the debt due is a sum of money which is absolutely due in the sense that the creditor is entitled to claim its payment presently. Attention of the court was not drawn by the counsel for the parties during the course of their submissions to any of the aforesaid two decisions and since the principles of law enunciated in the aforesaid two decisions have relevance and bearing to the issues raised in the petition, it was deemed necessary by this Court to bring it to the notice of the counsel appearing for the parties in the interest of justice and also in order to provide them an opportunity of hearing before taking notice of the said two relevant decisions by this Court. The matter was accordingly directed to be listed in open court for directions on October 15, 2003 when attention of the counsel for the parties was drawn to the principles of law enunciated in the aforesaid two decisions. Being confronted with the aforesaid two decisions, the counsel appearing for the

petitioner sought for an opportunity to file an appropriate application seeking for amendment of the petition by way of abundant caution. The said prayer of the counsel appearing for the petitioner was accepted and the order dated October 1, 2003 to the extent of reserving the judgment was recalled, and the petitioner was given an opportunity to file an appropriate application in terms of the prayer. This court further observed that as and when such an application is filed, the same would be considered in accordance with law. However, instead of filing an application praying for amendment, an affidavit came to be filed by the petitioner. However, when the matter was listed before this Court on November 12, 2003, the learned Counsel appearing for the petitioner sought permission to withdraw the said affidavit and the same was accordingly allowed to be withdrawn with a further observation that the said affidavit would not form part of the case records. Thereafter, the petitioner filed an application which is registered as CA No. 1267/2003 u/s 152 of the CPC praying for review of the order dated October 15, 2003. The said application was listed for consideration on November 11, 2003. The counsel appearing for the petitioner at that stage submitted stated that no amendment is necessary or called for in the company petition as according to the counsel the aforesaid two decisions are not applicable to the facts and circumstances of the case. Since a stand was taken by the counsel appearing for the petitioner that no amendment is called for in the company petition, this Court passed an order on November 18, 2003 recalling the liberty granted to the petitioner to file an application seeking for amendment of the petition. It was, however, observed that it will be open to the petitioner to show and establish that the aforesaid two decisions are not applicable to the facts and circumstances of the present case, and that the present petition as it is cannot be dismissed for want of proper pleadings. The matter was accordingly directed to be listed for arguments. After hearing arguments in terms of the aforesaid orders, the judgment and order was reserved on November 24, 2003.

6. Mr. R.K.P. Shankardas, the senior counsel appearing for the petitioner, submitted that the case for admission of the present petition is prima facie made out as the pre-conditions for exercising the powers mentioned in clauses (c), (d) and (f) of section 433 of the Companies Act are satisfied in the present case. He submitted that since out of the two shareholders Mr. Jagdish Kumar Gupta expired on February 23, 1999, the respondent company is now a company with only one shareholder, and as the provision of section 45 of the Companies Act mandatorily requires two shareholders in the case of a private company, the respondent No. 1 company is liable to be wound up in terms of the provisions of section 433(d) of the Companies Act. It was also submitted by him that since the respondent No. 1 company has not only failed to commence its business within a year from its incorporation but also has not functioned and/or carried on business for more than three years during which period not a single meeting of the Board of Directors has been held, clause (c) of section 433 is also attracted in the present case and,

therefore, the company is required to be wound up. By relying on the terms and conditions of the joint venture agreement and by way of reference to Article 8 of the joint venture agreement providing that the duration of the agreement would be for seven years, he submitted that the said seven years period having expired with effect from June 5, 2002, there is no possibility of the joint venture company having any business even in future and, therefore, the company is required to be wound up in terms of the provisions of section 433 of the Companies Act. He also submitted that there is a deadlock in the company as no meeting of the Board of Directors has been held for the last three years and since there is a conflict of interest between the petitioner and the respondent No. 2, it is just and equitable to wound up the respondent company.

7. Mr. Manmohan, senior counsel appearing for the respondent No. 2, however, refuted the aforesaid submissions and in addition he submitted that the present petition is not maintainable as the petitioner has no locus standi to file the present winding up petition. It was also submitted by him that in the petition the petitioner has not disclosed as to under which capacity the petitioner has filed the present winding up petition, nor there is any pleading in that regard in the petition and in that view of the matter the petition is required to be dismissed.

8. Since a preliminary objection is raised regarding the maintainability of the petition, it would be appropriate and necessary to take up the aforesaid plea of maintainability of the company petition first. My attention is drawn to the provisions of section 439 of the Companies Act. The said provision provides that a winding up petition can be filed by (a) the company, or (b) by any creditor or creditors including any contingent or prospective creditor, or creditors, or (c) by any contributory or contributories, or (d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately, or (e) by the Registrar, or (f) by any person authorised by the Central Government in that behalf in a case falling u/s 243 of the Companies Act. The word "contributory" is defined under the provisions of section 428 when it states that the terms "contributory" means every person liable to contribute to the assets of the company in the event of its being wound up and includes the holders of any shares which are fully paid up. It is an admitted position that no shares of the company, namely, the respondent No. 1, was allotted in favour of the petitioner and, therefore, the petitioner cannot be said to be a holder of any share, whether fully paid up or otherwise. Counsel appearing for the petitioner also conceded to the fact that the petitioner has not filed this petition invoking or exercising the status of a contributory. Therefore, the only status on the basis of which the petitioner could file this petition u/s 439 of the Companies Act is the status of a creditor. Counsel appearing for the petitioner during the course of his submissions vehemently submitted that the petitioner paid certain amount as share application money which was lying deposited with the respondent No. 1 awaiting allotment of shares in favour of the petitioner. Mr. Shankardas, during the course of his submissions, also submitted that although 90% of the aforesaid share

application money was paid back to the petitioner in terms of the order dated April 5, 1999, yet 10% of the said amount was retained in the bank account of the respondent No. 1 company and, therefore, the petitioner is a creditor and, therefore, it can maintain the present petition. Mr. Rajiv Nayar, who was also arguing in this petition on behalf of the petitioner in addition to Mr. Shankardas, during the course of his submissions, submitted that the petitioner supplied equipment and machinery to the respondent No. 1 for expansion of its production facility which was lying at the bonded warehouse of the Madras Export Processing Zone authorities which was directed to be shifted to the premises of the respondent No. 2 and since the respondent No. 1 has not yet made payment as against the said equipment to the petitioner, therefore, the petitioner is a creditor of the respondent No. 1.

9. I have considered the rival submissions of the counsel for the parties on the aforesaid preliminary objection. It is worthwhile to mention at this stage that the plea that the petitioner is a creditor of the respondent No. 1 does not find mention in the company petition at all. In the petition filed, facts are stated at length but in none of the said paragraphs where the facts are set out there is no specific pleading that the petitioner is a creditor of the respondent No. 1. In paragraph (c) of paragraph 9 where the facts leading to the filing of the present petition are set out at length, it is only stated that pursuant to the applications filed in the suit by the respondent No. 2 and others, an order was passed effecting return of 90% of the respective advances against equity. In paragraph 7 it is also stated that the respondent No. 2 has not been able to discharge its dues payable to the petitioner and its business associates for certain equipment supplied by them. In the light of the aforesaid pleadings in the petition, the only contention that is raised by the petitioner is that the respondent No. 2 has not been able to discharge its dues payable to the petitioner and its business associates for certain equipment supplied by them. What is sought to be said in the said paragraph is that the respondent No. 2 is a creditor of the petitioner which becomes obvious when the order dated April 5, 1999 is also closely scrutinised. In paragraph (1) of the aforesaid order it is categorically recorded that the parties had also agreed to the additional condition, namely, that the equipment and the machinery imported for expansion of respondent No. 2 production facility lying at the Bonded Warehouse of Madras Export Processing Zone authorities would be shifted to the premises of the plaintiff No. 1 (respondent No. 2) within the MEPZ on or before June 30, 1999. It is an admitted position that the said equipment and machinery is not shifted to the premises of the respondent No. 2 till date. Even if any payment is to be made in respect of the aforesaid equipment and machinery, as is disclosed from the aforesaid order and the pleadings of the petitioner itself, the said amount would be payable only by he respondent No. 2 and not by the respondent No. 1. Therefore, the submission of Mr. Nayar which was made on the basis of the pleadings in Company Application No. 1241/1999 that the respondent No. 1 has not yet made

payment for the said equipment to the petitioner cannot be accepted for it is not the respondent No. 1 who is to make such payment, if any, as against the said equipment to the petitioner but it is the respondent No. 2 who is to make the said payment if such payment is ordered to be made by any competent forum/authority at any point of time. At any rate, no such claim for payment could be made from the respondent No. 1 at this stage, nor any such claim for payment is made in the present petition by the petitioner and, therefore, the petitioner cannot be said to be a creditor of the respondent No. 1 on that count.

10. So far the contention with regard to the share application money is concerned, admittedly 90% of the share application amount was already returned to the petitioner in terms of the orders passed by this Court on April 5, 1999, i.e., prior to the filing of the present petition. So far the balance 10% is also concerned, the order dated April 5, 1999 clearly makes provision for utilization of the said amount also when it states that the said amount retained in the bank account of the respondent No. 1 company could be utilized for meeting insurance charges, payment to auditors, statutory dues and other liabilities including operating and professional expenses of the respondent No. 1 company. In the said order there is no direction even to make the balance payment, if any, back to the petitioner. In the entire company petition there is no averment that any amount is also due and payable on that count as on the date of filing of the company petition. The said amount is lying deposited in the bank account of the respondent No. 1 company for utilizing the same for meeting insurance charges, payment to auditors, other statutory dues and liabilities including operating and professional expenses of the respondent No. 1. So long the said dues are not determined and paid and the balance amount, if any, payable is worked out, it cannot be said any amount is due and payable to the petitioner from that account also. There is no pleading to that effect in the petition at all in the absence of any categorical and specific pleading in that regard it cannot be said that the petitioner is a creditor of the respondent No. 1.

11. In National Textile Workers'' National Textile Workers'' Union and Others Vs. P.R. Ramakrishnan and Others, it was held by the Supreme Court that the right to apply for winding up of a company being a creature of the statute, none other than those on whom right to present a winding up petition is conferred by the statute can make an application for winding up a company. It was also held in the said decision that section 439 of the Companies Act stipulates as to who can file an application for winding up.

12. In Kalra Iron Stores v. Faridabad Fabricators P. Ltd. (supra) it was held by this Court that a company petition could be rejected if there be no pleading to the effect that the petitioner is a creditor and the respondent is unable to pay its debt and also to the effect as to what are the contingent and prospective liabilities of the company. Reference can also be made to a decision of the Gujarat High Court in Registrar of Companies, Gujarat v. Kavita Benefit Pvt. Ltd. (supra).

13. Mr. Shankardas, during the course of his submissions, sought to distinguish the ratio laid down in the aforesaid two decisions contending inter alia that the said decisions are not applicable to the facts of the present case as those cases were cases u/s 433(e) of the Companies Act. In my considered opinion, the aforesaid submission is without any merit as the requirement of pleadings and consequences of absence of proper pleadings is a matter which would be applicable in all cases whether it is a case of clauses (a), (b), (c), (d) and (f) or it is a case of only clause (e) of section 433 of the Companies Act. In the aforesaid decision rendered by this Court also, the petitioner did not specifically pleaded that the company was unable to pay its debt. The petitioners in the said case also did not state as to what are the contingent and prospective liabilities of the company. In the case of Kavita Benefit Pvt. Ltd. (supra) the Gujarat High Court has said that when a debt becomes absolutely due in the sense that the creditors is entitled to claim its payment presently, the same is a debt which is payable by a company within the meaning of section 433(e). It was further held that in the first instance, the court must be satisfied that there are in fact debts in the sense that there is a liability of the company in praesenti, and that unless the liability to pay a sum of money in praesenti is made out, it cannot be said that the person is in debt. The Gujarat High Court also referred to clause (c) of section 434(1) and in the context thereof held that it must be proved to the satisfaction of the court even in a case of clause (c) that the company is unable to pay its debt and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. Since it is the specific case of the petitioner that it has not filed the present petition u/s 433(e) of the Companies Act, therefore, clause 434(1)(c) or for that matter section 434(1)(a) would not be attracted to the facts and circumstances of the present case. There is neither any pleading in the petition claiming a right to file the present petition by the petitioner as a creditor. In the light of the facts stated in the petition it also cannot be held that the petitioner is a creditor of the respondent No. 1 company.

14. Counsel appearing for the petitioner also at one stage sought to rely on the latest balance sheet which was filed along with the affidavit filed by the petitioner which was filed on November 11, 2003. The said balance sheet is a balance sheet for the year ending on March 31, 2002, whereas the present petition was filed in this Court in the year 1999. In Abnash Kaur Vs. Lord Krishna Sugar Mills and Others, , a Division Bench of this Court has held that a winding up order relates back to the date of the petition and it would be refused if sufficient cause is not laid down in the petition, and that the petition has to decided on the facts as on the date of the filing of the petition and that subsequent events are not to be taken into consideration. The balance sheet on which reliance is sought to be placed to show that the petitioner is a creditor of the respondent No. 1, therefore, cannot be relied upon in the light of the aforesaid principles of law laid down by the Division Bench of this Court. Even otherwise, the aforesaid balance sheet is not approved by the

shareholders and the same is only prepared by the auditor pursuant to order dated March 20, 2003. In order to make the aforesaid balance sheet acceptable and valid in the eye of law and for enabling reliance on the same, the formalities as required under the Companies Act are required to be complied with before the same can be accepted as valid and binding on the parties. I have already pointed out that 90% of the share application money, which is the only asset of the respondent No. 1 company, is already returned to the petitioner and, therefore, so far that part of the amount is concerned the petitioner cannot be said to be a creditor of the respondent No. 1. So far the balance 10% is also concerned, provision has been made as to how the same is to be used and utilised and, therefore, the said amount is not to be returned to the petitioner by the respondent No. 1 as on the date of the filing of the petition and, therefore, the petitioner cannot claim to be a creditor of the respondent No. 1 also for the said amount.

15. In the light of the aforesaid discussion, it is, therefore, held that the present petition in not maintainable because the petitioner has not specifically pleaded in the petition that it is a creditor of the respondent No. 1 company. No statement nor any particular is set out in the petition to prove and establish that the petitioner is a creditor of the respondent No. 1. On the facts available on records, it also cannot be held that the petitioner is a creditor of the respondent No. 1. Therefore, it is held that the present petition is not maintainable. In view of the aforesaid conclusions arrived at by me it is not necessary to deal with the other contentions which were raised by the counsel appearing for the parties. The petition, accordingly, stands dismissed.