

MANU/MH/1059/2004

Equivalent Citation: III(2005)BC233, 2005(2)BomCR155, (2005)3CompLJ114(Bom)

IN THE HIGH COURT OF BOMBAY

Company Petition No. 222 of 2003

Decided On: 14.10.2004

Appellants: **Vaishali Aromatic (India) (P) Ltd.**
Vs.

Respondent: **Deogiri Nagri Sahakar Bank Ltd.**

Hon'ble Judges/Coram:

S.J. Vazifdar, J.

Counsels:

For Appellant/Petitioner/Plaintiff: B.B. Parekh, Adv.

For Respondents/Defendant: S.C. Naidu, Adv., i/b., C.R. Naidu and Co.

Case Note:

Company - Due of amount - Notice issued stating that the balance outstanding was Rs. 1,90,16,803 under challenge - Held, it was clear that in any view of the mailer, and even as per the company's own case, an amount of Rs. 45,00,000 was due and payable by the company to the Petitioner - On the other hand, Petitioner had not seriously disputed the fact that the principal borrower owns an extremely valuable immovable property - In such the circumstances, company was directed to deposit Rs. 45,00,000.

JUDGMENT

S.J. Vazifdar, J.

1. The petitioner served a statutory notice dated 27 July 2002. In the said notice, it is stated that the balance outstanding as on 6 December 2001 was Rs. 1,90,16,803. Mr. Naidu, the learned counsel appearing on behalf of the company does not deny the fact that an amount in excess of Rs. 80,00,000 is due to the petitioner.

2. Mr. Naidu however, submitted that the amount of Rs. 1,90,16,803 stated in the statutory notice is not accurate. He, therefore, submitted that the company petition is not maintainable. The argument is not well founded. There is nothing in Section 434 of the Companies Act, 1956 that warrants the view that merely because the amount stated to be due in the statutory notice is not the exact amount actually due to the petitioner, a petition for winding up is not maintainable.

3. Mr. Naidu relied upon the judgment of a learned single judge of this court in *Shantilal Khushaldas and Bros. v. Smt. Jayabala Suresh Shah* MANU/MH/0096/1993 : 1994(1)MhLj432 . Assuming the judgment supports Mr. Naidu's contention, it is per incuriam and impliedly overruled. It is per incuriam in view of a judgment of the Division Bench of this court in *Pfizer Ltd. v. Usan Laboratories (P) Ltd.* MANU/MH/0017/1984 : (1985) Mh. LJ 554. It is impliedly overruled by a Division Bench judgment of this court in *Tata finance Ltd., Mumbai v. Kanoria Sugar and*

General Manufacturing Company Ltd., Mumbai MANU/MH/0543/2001 : (2002)1BOMLR187 . Suffice it to refer to the following observations of the Division Bench in the judgment in Tata Finance Ltd. (2002) 2 Com LJ 187 (Bom):

"11. It is true that there is some dispute about the claim of enhanced lease rentals on account of disallowance of claim of depreciation by the Income tax Department. There is, however, absolutely no dispute for the outstanding lease rentals which are in the range of nearly rupees thirty lakhs. The terms of agreement are also very clear and in case of default, the company is liable to pay the service charges. When a part of claim made by the creditor is seriously disputed; but the remaining portion prima facie appear to exceed the limit of Rs. 500 indicated in Section 434 of the Act, it would be unjust to refuse wind up order on the ground that there is dispute as to precise amount owed. In re Tweeds Garages Ltd. (1962) 1 Ch 406, it was clearly held that it would be unjust to refuse a winding up order to the petitioner who has admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. Almost to the same effect are the observations in Cardiff Preserved Coal and Coke Co. v. Norton (1867) 2 Ch App 405.

12. The learned single judge of Calcutta High Court in Ofu Lynx Ltd. v Simon Carves India Ltd. MANU/WB/0079/1970 : AIR1970Cal418 has observed:

'I, therefore hold that a notice under Section 434 of the Companies Act, 1956, will not be rendered invalid only because of the fact that the amount of debt mentioned in the notice may not be exactly correct amount of the debt due, provided the amount mentioned in the notice includes debt due and exceeds a sum of Rs. 500.'

13. The judgment of single judge of Calcutta High Court has been cited with approval by the Division Bench of this court in Pfizer Ltd. v Usan Laboratories (P) Ltd. MANU/MH/0017/1984 : (1985)87BOMLR12 . Therefore, merely because a part of the claim was disputed by the company, the defence cannot be said to be legitimate and bonafide."

4. Mr. Naidu also relied upon the following observation from the judgment of a learned single judge of the Calcutta High Court, In re Jambad Coal Syndicate Ltd. ILR (1934) Cal 294:

"The law requires that a demand must be made for a debt that is due, and it is not permissible to support a petition by alleging that something else is due."

4.1 The reliance upon this judgment is not well founded. It is clear from a reading of the judgment as a whole that in that case, the basis of the claim was different from , the basis on which the petitioner's therein sought to support their case. This is clear from what followed the above words relied upon by Mr. Naidu. The judgment reads as under:

"The company, therefore, cannot rely on any admission that Rs. 13,000 and not Rs. 72,000 is due under the former lease if it is in force, nor is it sufficient to allege that Rs. 60,000 is due under the old lease.

The demand was not made for rent or royalties under the old lease."

5. The company's liability is in respect of the corporate guarantee furnished by the company for the due of Vaishali Pigments (P) Ltd.

6. Mr. Naidu submitted that the petitioner has already obtained a recovery certificate on 2 March 2001 under Section 101 of the Maharashtra Co-operative Societies Act against the principal borrower in the sum of Rs. 1,85,00,000. He further submitted that the principal borrower has been paying the amount in small installments. This is, however, is no ground to deny the petitioner its dues.

7. Mr. Naidu further submitted that the company had made an offer for a onetime settlement under the Reserve Bank of India Guidelines. The proposal, he stated, offered a payment of about Rs. 45,00,000 within one year.

8. Mr. Naidu further alleged that the petition was mala fide as the petitioner has not proceeded against the principal borrower despite the fact that it holds securities , for payment of the said amount and despite the fact that the principal borrower owns a valuable immovable property.

9. From the above facts, it is clear that in any view of the mailer, and even as per the company's own case, an amount of Rs. 45,00,000 is due and payable by the company to the petitioner. On the other hand, Mr. Parekh has not seriously disputed the fact that the principal borrower owns an extremely valuable immovable property.

10. In the circumstances, the following order is passed:

(i) The company is directed to deposit Rs. 45,00,000 on or before 1 August 2005.

(ii) In the event of the amount being so deposited and in the event of the petitioner filing a suit for recovery of the amount claimed in the petition within eight weeks of such deposit being made, the amount shall stand transferred to the credit of the suit. In the event of the suit not being filed, the amount shall be returned to the company.

(iii) In case of failure on the part of the company to deposit the aforesaid amount, the petition shall stand admitted and shall be advertised in the Free Press Journal, Navshakti and Maharashtra Government Gazette.

(iv) The petitioner shall deposit an amount of Rs. 2,000 with the Prothonolary and Senior Master of this court within four weeks from the date of default towards the cost of advertisement.

(v) The operation of this order is stayed for a period of twelve weeks from today to enable to the parties to carry the matter higher.

11. Parties to act on an ordinary copy of this order duly authenticated by the Company Registrar/court stenographer of this court.

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