

Sarabhai Machinery v. M/s Haryana Detergents Ltd.
(R. N. Mittal, J.)

adversely affected by the sale can apply to the Court to set aside the sale on the grounds specified therein. Article 127 of the Limitation Act prescribes a period of 60 days from the date of sale for filing objections. The only inference that can be drawn from the said provisions is that the Court is not empowered to confirm the sale till the period of limitation for objections has expired. If the sale is confirmed before the expiry of the said period, a very valuable right of a party is taken away and it is left without any remedy if it wants to challenge the sale. That cannot be the intention of the Legislature. In the present case the objections were filed by the appellant within the prescribed period of limitation but the sale had been confirmed before the date of filing objections. Therefore, in view of the above observations, the orders of the confirmation of sale and dismissal of objection petition are liable to be set aside.

(4) For the aforesaid reasons I accept the appeal, set aside the order of confirmation of the sale and dismissal of the objection petition and remand the case to the executing Court to decide the matter afresh after taking into consideration the observations made above. No order as to costs.

H.S.B.

Before R. N. Mittal, J.

SARABHAI MACHINERY,—Petitioner.

versus

M/S HARYANA DETERGENTS LTD.,—Respondent.

Company Petition No. 68 of 1982

April 11, 1985.

Companies Act (I of 1956)—Sections 433 and 439—Companies Court Rules, 1959—Rule 102—Award rendered by arbitrator in favour of creditor and against Company—Judgment of the Court making the Award rule of the Court—Notice served under section 434 by Creditor on Company before matter referred to arbitrator—Application filed by creditor for substituting it as petitioner in petition for winding up of the Company filed by another creditor—No efforts made to execute the judgment of the court—Petition for winding up in such situation—Whether maintainable—Creditor

allowed to file amended petition—Such petitioner—Whether liable to pay fresh court fee.

Held, that section 433 of the Companies Act, 1956 provides that a company may be wound up by the court if it is unable to pay its debts. The expression “when the company is unable to pay its debts” has been dealt with in section 434. It is evident from section 434 that a company is deemed to be unable to pay its debts if any of the condition in clauses (a) to (c) is satisfied. Clause (a) is a general clause and applies to all sorts of debts including a judgment debt. It is true that in the case of a judgment debt, the creditor can take benefit of clause (b), but that does not mean that he cannot take benefit of clause (a) as both the clauses are not exclusive of each other. Similarly if a creditor after serving notice on the company, obtains a decree against it, he can still take benefit of clause (a) as after the decree neither the character of the creditor nor that of the debt is changed. As such a decree holder without executing the order of the court can maintain an application under section 433 for winding up of the company, if he has served a notice of demand under clause (a) of section 434 of the Act. (Para 7)

Held, that a reading of rule 102 of the Companies Rules, 1959 provides that the amended petition shall be treated as the petition for the winding up of the Company and shall be deemed to have been presented on the date on which the original petition was presented. As such the substituted petitioner is not liable to pay fresh court fee on the amended petition. (Para 10)

Amended Company Petition Under Section 433, 434 and 439 of the Companies Act, read with rule 9 of the Companies (Court) Rules, 1959 praying that the respondent company be ordered to be wound up under the supervision of this Hon'ble Court under the provisions of the Companies Act.

R. L. Batta, Advocate, for the Petitioner.

R. K. Talwar, Advocate, for the Respondent.

JUDGMENT

Rajendra Nath Mittal, J. (oral).

(1) Briefly the facts are that M/s Delhi Cloth Mills filed the present petition under sections 433, 434 and 439 of the Companies Act, 1956 (hereinafter referred to as “the Act”) for ordering winding up of the respondent. After hearing the parties, the petition was ordered to be advertised,—*vide* order of this Court dated 20th October, 1983 under rule 96 of the Rules. It was accordingly advertised by the then petitioner.

Sarabhai Machinery v. M/s Haryana Detergents Ltd.
(R. N. Mittal, J.)

(2) M/s Sarabhai Machinery, the present petitioner filed C.A. No. 74 of 1984 under rules 101, 102 and 9 of the Companies (Court) Rules, 1959 in the main petition for substituting it as petitioner, in case M/s Delhi Cloth Mills abandoned the same. Subsequently, the respondent in view of the compromise arrived at between the parties, paid the amount of Delhi Cloth Mills and the latter agreed to get its petition dismissed. Consequently M/s Sarabhai Machinery was allowed to be substituted as the petitioner,—*vide* order dated 24th May, 1984. Later, it was allowed to file the amended petition,—*vide* order dated 13th December, 1984 within a period of three weeks. In pursuance of that order, the petitioner filed the amended petition on 10th January, 1985.

(3) It is averred in the petition that the petitioner installed Synthetic Detergent Plant of the respondent-company in pursuance of a contract dated 19th March, 1975 and that an amount of Rs. 21,67,208.15 is due from the respondent. In addition, the petitioner is entitled to charge interest on the said amount at the rate of 18 per cent per annum with effect from 1st December, 1979 till the date of realisation. In view of the arbitration clause in the agreement, the matter was referred to the arbitration of Mr. Ajit H. Mehta, Advocate who gave the award dated 27th June, 1983 (Annexed P. 1) and held that the above said amount was due to the petitioner from the respondent. The award was made rule of the court at the instance of the petitioner by the High Court of Delhi,—*vide* judgment dated 18th May, 1984 (Annexure P. 2). The petitioner, it is further stated, incurred an expense of Rs. 19,000 in the arbitration proceedings and is entitled to recover it from the respondent.

(4) The case of the petitioner further is that it served a notice under sections 433 and 434 of the Act dated 11th September, 1980 (Annexure P. 3) to pay the amount of Rs. 21,67,208.15 but in spite of that the amount was not paid. Consequently, it was prayed that the respondent-company be ordered to be wound up.

(5) The petition has been contested by the respondent on the grounds that as the petitioner did not execute the judgment of the Delhi High Court, therefore the petition is not maintainable; that the petitioner did not amend the earlier petition but filed absolutely a new petition; that the respondent intends to file an appeal against the judgment of the High Court; that the petitioner was liable to pay stamp fee of Rs. 260, but it did not do so and that the petition

was required to be filed within a period of three weeks but it was not filed within the said period.

(6) The first question for determination is whether without executing the judgment of the Delhi High Court, the present petition is maintainable. There is no dispute about the salient facts of the case. The petitioner served a notice dated 11th September, 1980 on the respondent to pay the amount. After the service of the notice the matter was referred to the arbitrator who passed an award in favour of the petitioner which was made the rule of the Court by the Delhi High Court on 18th May, 1984. However, no proceedings for execution have been taken by the petitioner so far.

(7) With this background it will be appropriate to notice the relevant provisions of the Act. Section 433 provides that a company may be wound up by the court if it is unable to pay its debts. The expression "when the company is unable to pay its debts" has been dealt with in section 434 which reads as follows :

"434. (1) A company shall be deemed to be unable to pay its debts.—

- (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (b) if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, 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.

* * * *

Sarabhai Machinery v. M/s Haryana Detergents Ltd.
(R. N. Mittal, J.)

It is evident from the section that a company is deemed to be unable to pay its debts if any of the condition in clauses (a) to (c) is satisfied. The case of the petitioner squarely falls in clause (a) of subsection (1) of section 434 as it has served a demand notice on the company. A contention has been raised by Mr. Talwar that the petitioner has obtained a decree of the amount after service of the notice and, therefore, the present case is not covered by clause (a) but is covered by clause (b). He argues, the petitioner cannot take benefit of clause (b) as it did not execute the judgment of the Delhi High Court. I am not impressed with this submission. It is well settled that clause (a) is a general clause and applies to all sorts of debts including a judgment debt. It is true that in the case of a judgment debt, the creditor can take benefit of clause (b). But that does not mean that he cannot take benefit of clause (a) as both the clauses are not exclusive of each other. Similarly if a creditor after serving notice on the company, obtains a decree against it, he can still take benefit of clause (a) as after the decree neither the character of the creditor nor that of the debt is changed. In the above view I am fortified by the following observations of a Division Bench of Madras High Court in *Seethai Mills Ltd. vs. N. Perumalsamy and another*. (1):

“A creditor, who has instituted a suit and obtained a decree against the company, will still be a creditor of the company to whom money is due by the company. It may be that the original debt had merged in the decree and the person who was originally a creditor had become a decree-holder afterwards, but that does not in any way destroy his character as a creditor or the character of the money due to him from the company as a debt. As a matter of fact, section 434(1) (a) does not even use the word ‘debt’ and it merely states to whom the company is indebted in a sum exceeding five hundred rupees then due. Consequently, all that is necessary to be satisfied under section 434(1) (a) is that there must be a creditor and to that creditor the company must be indebted in a sum exceeding Rs. 500 then due and that creditor must have served a notice on the company and the company had not complied with the demand within three weeks from the date of the service of the notice. Even a judgment debtor

(1) (1980) 50 Company cases 422.

in respect of a money decree can be said to be indebted to the decree-holder, who would be a creditor. Consequently, in our opinion, there is no mutual exclusion between section 434(1) (a) and 434(1) (b) of the Act and there is a region common to both, which may be said to overlap. Hence we are of the opinion that even a decree-holder in respect of a money decree can institute proceedings under section 434(1) (a) if the other requirements of that provision are satisfied."

Consequently the petitioner, without executing the judgment of the Delhi High Court, can claim the benefit of clause (a) as he had served the requisite notice under the said clause.

(8) The second question for determination is, whether the petitioner while amending the petition has changed it in toto and if so, with what effect. Admittedly the petitioner was entitled to amend the petition in view of the order of this Court dated 13th December, 1984. After the amendment the petitioner had to plead the facts of his case and omit the facts relating to the original petitioner. In the circumstances it is natural that the petition appears to be a new petition. But it could not be helped. It has not been brought to my notice which of the facts included now are unnecessary and how the respondent has been prejudiced by pleading those facts. The objection appears to be too technical. Consequently I do not find any merit in it.

(9) The third question that requires determination is that if the respondent intends to file an appeal against the judgment of the Delhi High Court whether the petitioner is not entitled to file an application for winding up. It is well settled that if a decree is passed against a person, it is binding on him till it is set aside. Therefore, it cannot be held that because the respondent wants to file an appeal against the judgment of the Delhi High Court, no amount is due from it and, therefore, the petitioner is not entitled to file an application for winding up.

(10) The fourth question that arises for decision is, whether the petitioner is liable to pay fresh court-fee on the amended petition. The learned counsel for the respondent has not drawn my attention to any provision of law under which a substituted party in a petition under sections 433, 434 and 439 is liable to pay fresh court-fee on the amended petition. Moreover, rule 102 of the Rules provides that the amended petition shall be treated as the petition for

Sarabhai Machinery v. M/s Haryana Detergents Ltd.
(R. N. Mittal, J.)

the winding up of the company and shall be deemed to have been presented on the date on which the original petition was presented. After taking into consideration all the circumstances, I am of the view that the petitioner is not liable to pay fresh court-fee on the amended petition.

(11) The fifth question that requires determination is that if the amended petition was not filed within a period of three weeks as ordered but six days thereafter, whether it is liable to be dismissed on this ground. Section 148 of the Code of Civil Procedure empowers a Court to enlarge the period, if the period fixed by the Court for doing an act has expired. It is also well settled that laws of procedure are hand-maid of justice and meant to advance it. Therefore, I am not inclined to dismiss the petition on this technical ground and enlarge the period for filing the petition under the said section by six days.

(12) Before parting with the judgment I may notice another contention of Mr. Talwar. He has urged that the respondent is a solvent company but has faced a setback due to the collapse of the joint sector projects under which it was set up. It is taking steps to revive and commence production and for that purpose it is leasing out the factory premises to M/s Hindustan Lever Ltd., so that adequate funds be generated and debts of the company be liquidated. He submits that in this situation it will not be advisable to order winding up of the company. I do not find any merit in this submission as well. The petition was filed as far back as 1982. During this period the respondent had been delaying the proceedings on one ground or the other. The machinery was installed by the petitioner as far back as 1975. A period of more than 10 years has elapsed but the payment has not been made by the respondent. During the pendency of the petition the respondent also filed a scheme. The Court passed an order to convene the meeting of the unsecured creditors in order to obtain their approval, but for the reasons best known, the respondent did not deposit the requisite expenses and, therefore, the meeting for the said purpose could not be convened. Thus it is evident that this contention has been raised by Mr. Talwar for the purpose of delaying the payment of the petitioner. Consequently I reject the same.

(13) For the aforesaid reasons, I order that the Company be wound up. The order be advertised within a period of 30 days by

the petitioner in the English and Hindi Tribunes and Haryana Government Gazette. The Official Liquidator is directed to take charge of the Company.

N.K.S.

Before R. N. Mittal, J.

NATHI,—Appellant.

versus

GHANSI,—Respondent.

Civil Revision No. 1512 of 1977

April 12, 1985.

Stamp Act (II of 1899)—Sections 35 and 36—Suit for recovery of money on the basis of pronote—Pronote exhibited with an objection regarding its admissibility—Objection left open to be decided at the time of arguments—Section 36—Whether debars courts from deciding objection at a later stage—Meaning of the word ‘admission’ in Section 36—Explained.

Held, that section 35 of the Stamp Act, 1899 provides that no instruments chargeable with duty shall be admitted in evidence for any purpose unless such instrument is duly stamped. Section 36 says that where an instrument has been admitted in evidence such admission shall not be called in question at any stage of the same suit on the ground that it had not been duly stamped. The admission contemplated therein should be the result of determining the question of admissibility of the document judicially. If the document is admitted subject to the objection to be decided at the time of arguments, it cannot be said that the provisions of section 36 are attracted and the court is debarred from deciding the point later on. However, if no objection about admissibility on the ground of insufficiency of stamps or proper cancellation of stamps is raised at the stage of evidence and the document is exhibited, it is not open to any of the parties to raise the objection later on. As such the court is competent to go into the question of admissibility of a document even at a later stage. (Paras 7 and 8)

Petition under Section 115 C.P.C. for revision from the order of the Court of Shri Shiv Dass Tyagi, District Judge, Gurgaon, dated the 15th day of June, 1977 affirming that of Shri C. R. Goel, HCS, Sub-Judge 1st Class, Palwal, dated the 13th day of August, 1976