

Amalgamated Commercial Traders (P.) ... vs A.C.K. Krishnaswami And Anr. on 8 January, 1965

Equivalent citations: [1965]35COMPCAS456(SC)

Bench: P.B. Gajendragadkar, K.N. Wanchoo, S.M. Sikri

JUDGMENT

Sikri, J.

1. These two appeals by certificate are directed against the judgment of the High Court of Madras, directing the winding up of the appellant, the Amalgamated Commercial Traders Private Limited, hereinafter referred to as the appellant-company.
2. The appellant-company was incorporated as a private company limited by shares on January 29, 1948. It had an issued and subscribed capital of Rs. 1,00,000 divided into 1,000 fully paid shares of Rs. 100 each. The company had the sole selling agency of the Indian Sugar and Refineries Ltd., Hospet, and of the Salar Jung Mills Ltd. A.C.K. Krishnaswami and C. Hariprasad were the directors of the company till May 2, 1960.
3. On December 5, 1959, a notice was given regarding the calling of the eleventh annual general meeting of the company on Wednesday, December 30, 1959. In the circular annexed to the notice, it was stated that " your directors feel that they must advert to the fact that our principals, the Indian Sugar and Refineries Ltd. and the Salar Jung Sugar Mills Ltd., have unjustifiably and unaccountably withheld commission accruing to us as from 1st January, 1959, and have not remitted any part of it, in spite of repeated demands. We have, therefore, been put to inconvenience and have not been able to make our tax payments in time. The authorities have served on our principals notices for collection of our taxes from them." It was further added that " as on September 30, 1959, we compute that after making payment of taxes on our account to the Government, the balance payable to us by our principals will roughly amount to over Rs. 1,90,000. You will note that the disbursement of the proposed dividends to our shareholders will depend on our being able to collect outstandings from our principals."
4. On December 30, 1959, a dividend was declared and it was resolved " that a dividend of Rs. 100 per share (taxable) on the equity shares be paid to such shareholders as appear on the register of members as on date, payments to be effected when commission due from principals are realised." It appears that serious differences arose between the directors and the shareholders, and on February 23, 1960, a requisition was sent by some shareholders, including S.P. Parasrampuriah, to call a meeting to consider and pass a resolution, the substance of which was to constitute a committee consisting of three shareholders to look after the management of the company. The managing

director, A.C.K. Krishnaswami, sent a lengthy reply to the requisitionists on March 7, 1960, explaining the affairs of the company. However, the meeting asked for was called for April 9, 1960.

5. On March 22, 1960, A.C.K. Krishnaswami filed a petition under sections 397 and 398 of the Companies Act, 1956, inter alia, praying that the holding of the meeting called for April 9, 1960, be restrained. By order dated March 25, 1960, the High Court stayed the holding of the meeting. By a resolution dated April 12, 1960, S.P. Parasrampuriah was co-opted as a director of the company with effect from April 12, 1960. It appears that a compromise was arrived at between the parties to the petition under Sections 397 and 398, and 216 shares of the appellant-company, registered in the name of A.C.K. Krishnaswami and/or Factors Private Ltd. were sold at Rs. 800 per share to the party of Parasrampuriah. Parasrampuriah filed an affidavit withdrawing all allegations and so did Krishnaswami. The petition under Sections 397 and 398 of the Companies Act was withdrawn and it was accordingly dismissed on April 20, 1960, but this was not the end of the dispute between the parties.

6. On May 5, 1960, one M. R. Banka wrote to the company claiming dividend on the 216 shares alleged to have been purchased by him and requested that no payment be made to the previous registered holders. On May 17, 1960, Hariprasad wrote to the company demanding the payment of Rs. 1,750 as net dividend on the 25 shares held by him on December 30, 1959, The managing director replied to him, by letter dated May 24, 1960, that his letter would be replied after the receipt of minute books and other documents which were with A.C.K. Krishnaswami. He further mentioned that there was another claimant also for the same dividend. Hariprasad seems to have felt indignant on the receipt of this reply and wrote on May 27, 1960, wanting to know who the other claimant of his dividend was and the basis of his claim. He further gave a statutory notice under Section 434 of the Companies Act to pay the dividend of Rs. 1,750 within the space of 21 days, and also the sum of Rs. 7,605.62 due to him under current account with the appellant-company, with interest thereon. He also threatened that otherwise he would take further steps under Section 439 of the Companies Act. On June 10, 1960, the company replied to this letter and reiterated that the company had not received some important documents including the minute books, from its previous directors and that his letter would be dealt with as soon as the books were received. On May 17, 1960, A.C.K. Krishnaswami made a similar demand for Rs. 11,620 in respect of 166 shares held by him on December 30, 1959. On the same date he demanded Rs. 6,300 in respect of 90 shares held by Factors Private Limited on December 30, 1959. On May 24, 1960, the managing director of the appellant-company replied to A.C.K. Krishnaswami demanding the return of minute books and other documents which were with him. By another letter addressed to A.C.K. Krishnaswami, Parasrampuriah claimed that the 216 shares were purchased by him with the right to receive any dividend due on them and that the price included the consideration for the amount of this dividend. A.C.K. Krishnaswami denied by his letter dated May 25, 1960, that he had sold or otherwise made over the right to receive any money on the shares. He claimed from the company that the dividend, as declared on December 30, 1959, be paid to him. By letter dated May 27, 1960, Krishnaswami returned a number of documents but kept back the minute books containing entries from February 23, 1948, to April 29, 1955, on the ground that he required it for his income-tax reference. The managing director complained to Krishnaswami against his withholding the minute books stating that these minute books were required for the company's management every now and

then and that these were required for examining certain complaints made against certain directors and also examining the claims of certain shareholders for dividend. On June 10, 1960, Parasrampuriah reiterated that he had bought the shares with all rights and liabilities attached to them, especially the dividend declared and not paid. He said that he had verified the position from Radheshyamji, who said that the price of Rs. 800 definitely included consideration for the dividend in question. On July 5, 1960, S.P. Parasrampuriah finally repudiated the claim on the ground that the " company was advised that the resolution dated December 30, 1959, does not constitute a proper and valid declaration of dividend and no liability to pay dividend arises thereunder." It appears that the company had taken legal advice in this matter and a circular was sent to all the shareholders on July 22, 1960, stating "that the company had been advised that the shareholders' resolution dated 30th December, 1959, to the effect that a dividend of Rs. 100.00 per share (taxable) on the equity shares be paid to the shareholders, payment to be effected when the commission due from the principals are realised, is not a declaration of dividend and/or does not constitute a proper and valid declaration of dividend and that no liability to pay any dividend arises thereunder. The company has acted on this advice and intimation thereof is given to you as a shareholder."

7. On July 26, 1960, Company Petition No. 42 of 1960 was filed in the High Court of Madras under Section 439 of the Companies Act by C. Hariprasad. After stating the facts relating to the incorporation of the company and the objects of the company, it was stated in the petition that the company was indebted to the petitioner in the sum of Rs. 1,750 being the net dividend amount payable on 25 equity shares and the petitioner applied to the company for payment of this debt by his notice of demand dated May 27, 1960, but the company had failed and neglected to pay the same or any part thereof. It was further alleged that the company was unable to pay its debts and the petitioner prayed that the appellant-company be wound up by the court under the provisions of the Companies Act. C.V. Ekambaram filed an affidavit supporting the petition. He alleged that the company had not paid Rs. 3,500 being the net dividend payable to -him on 50 shares held by him. He asserted that the company had failed to pay in spite of his demand. A.C.K. Krishnaswami also filed an affidavit supporting the petition. He alleged that Rs. 11,620 being the net dividend payable on 166 shares held by him had not been paid in spite of demand. On September 14, 1960, C. Hariprasad, acting as a duly constituted agent of Mrs. Godavaribat, also filed an affidavit stating that the company was indebted to the said Mrs. Godavaribai in a sum of Rs. 34,863, and the said sum had not been paid. In reply the company took the stand, among other things, that there was no debt due to the petitioner and the amounts claimed by him were in fact disputed by the company, and the company was not unable to pay its debts but was in a very sound financial condition. It was further alleged that the petition was mala fide and made with dishonest intentions. It was also alleged that the resolution dated December 30, 1959, was invalid, ineffective and not binding on the company. It was alleged further that the company had been making profits and declaring substantial dividends on its shares from year to year and that the present earnings of the company were over Rs. 3,00,000 per year. It was denied that the company was unable to pay its debts. It is not necessary to refer to various other affidavits and counter-affidavits filed in the court.

8. Veeraswami J. by his order dated December 20, 1961, dismissed the petition. He held that the sum of Rs. 7,605.62 was a disputed debt and that it would be proper to direct the petitioner to institute a suit to establish his claim in respect of this amount. Regarding the sum of Rs. 1,750, he

came to the conclusion that the declaration of dividend at the general meeting held on December 30, 1959, was valid. He further held that although the company had failed to pay dividend within 21 days of the service of demand, the company should not be directed to be wound up because the company did not pay this amount not because it was financially unable to pay but because evidently of the legal advice it received. He held that Section 434(1)(a) of the Companies Act enacted only a rule of presumption and no more. He came to the conclusion on the facts that this statutory presumption was replaced by the factual position that the company was solvent and able to pay at least the sum of Rs. 1,750. As far as the contention of the four creditors who supported the petition, he held that they could not enlarge the ground on which the petition for winding up was based. He, therefore, dismissed the petition as far as the prayer for winding up of the company on the ground of the alleged inability on the part of the company to pay its debts. To the extent the petition related to the sum of Rs. 7,605.62 it was permitted to be withdrawn but subject to the conditions mentioned in the judgment. It is not necessary to refer to these conditions because nothing turns on them.

9. Three appeals were filed before the High Court, O.S.A. No: 70 of 1962 by Factors Private Limited and A.C.K. Krishnaswami, O.S.A. No. 18 of 1962 by C. Hariprasad and O.S.A. No. 37 of 1962 by Mrs. Godavari Bai against the judgment of Veeraswami J. These three appeals were disposed of by a common judgment on November 19, 1963. The Division Bench accepted the appeals and directed the winding up of the company on the ground of its inability to pay its debts, but at the same time directed that the order be kept in abeyance for a period of three weeks in order to enable the company to pay up the dividends to the two creditors, namely, A.C.K. Krishnaswami and C. Hariprasad, for the year 1959. No order as to the payment to Mrs. Godavari Bai was made as she had not made a statutory demand. It was further directed that in default there would be winding up of the company and further proceedings would ensue. The Division Bench of the High Court arrived at the following findings :

- (1) That Veeraswami J. erred in holding that so long as the company is commercially solvent, it could not be wound up at the instance of one of its creditors although he was unable to get his dues paid in spite of demand having been made by him and such demand remained without being complied with for more than three weeks ;
- (2) That where the company disputes the claim, the court will see whether such a dispute is genuine or not or merely one to cover up its unwillingness or inability to pay and the court will have to decide whether the dispute rests on a substantial basis ;
- (3) That the petitioner and the supporting creditors could be regarded as creditors of the company so as to entitle any one of them to sustain a petition for winding up of the company ;
- (4) That Krishnaswami and Hariprasad were not estopped from claiming what is due to them in their individual capacity from the company;
- (5) That a debt was owing by the company to three creditors concerned in the present petition in respect of the dividends declared for the year 1959;

(6) That the declaration of dividend even before the actual receipt of assets was valid;

(7) That the resolution of the company dated December 30, 1959, did not contravene the provisions of Section 207 of the Companies Act; and (8) That the resolution dated December 30, 1959, in form and substance consisted of two parts, separable between themselves and that the invalidity of the second part that payment would be effected when the commission due from the principals was realised could not render the declaration of dividend itself void.

10. In conclusion, as already stated, the Division Bench ordered that the company be directed to be wound up on the ground of its inability to pay its debts, subject to the direction that the order may be kept in abeyance.

11. Mr. G. Vasanta Pai, the learned counsel for the appellant, raised the following points before us :

(1) That Hariprasad is not a creditor within Sections 434 and 439 of the Companies Act and is not entitled to present a petition for winding up as a creditor;

(2) That non-payment of the dividend was due to the default of Hariprasad, when he was a director, and consequently he was disentitled from filing a petition under Section 439 ;

(3) That as the object of the petition was to make the appellant-company give up its pleas regarding the invalidity of the resolution dated December 30, 1959, the petition was an abuse of the process of court;

(4) That the High Court should have ascertained the wishes of the other creditors and contributories ;

(5) That Section 433, read with Section 434, gives a discretion to the court to wind up a company or not and the Division Bench should not have, on the facts of the case, ordered the winding up of the appellant-company ; and (6) that on the facts of the case it is clear that the debt was bona fide disputed by the appellant-company and that there were substantial questions about the invalidity of the resolution dated December 30, 1959, and the Division Bench should have dismissed the petition on this ground alone.

12. As there is substance in the last contention of Mr. Pai, it is not necessary to deal with the other contentions, Mr. Pai put his case thus, Section 207 of the Companies Act, at the relevant time, required a company to pay a dividend which had been declared within three months from the date of the declaration. It is obvious, he says, that a company cannot declare a dividend to be payable beyond three months. If it does that, the declaration would be a nullity. He further contends that such a resolution would not be severable. He then says that that is what has happened in this case. The resolution of December 30, 1959, declaring a dividend, made the payment of the dividend

contingent on the receipt of the commission from the Indian Sugar and Refineries Ltd. and the Salar Jung Sugar Mills. The commission was not received till May, 1960, i.e., more than three months from the date of the declaration. He urges that this was a bona fide dispute. The appellant-company had obtained legal advice to this effect and had no option but to act upon it. No shareholder was treated differently. If payment had been made to the petitioner after the statutory notice under Section 434 of the Companies Act, the appellant-company would have had to pay to all the shareholders in disregard of the legal advice. Non-payment of the dividend was not a cloak to hide the inability of the company to pay its debts for the company was a flourishing concern. Rs. 10,000 were deposited in court when Veeraswami J. directed it to deposit this sum as a condition for obtaining adjournment.

13. It is well-settled that "a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such, petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order." (Vide Buckley on the Companies Acts, 13th edition, page 451).

14. We are satisfied that the debt in respect of which notice was given under Section 434 was bona fide disputed by the appellant-company. The appellant-company had received legal advice and it had acted on it. On the facts it seems to us clear that the appellant-company did not dispute the debt in order to hide its inability to pay debts. Further we are satisfied that the question whether the declaration of dividend dated December 30, 1959, is valid or not raises a substantial question as to the interpretation of Section 207 of the Companies Act. Further, whether the declaration dated December 30, 1959, is severable or not is also a substantial question. We do not propose to decide whether the declaration of dividend was valid or not or whether it was severable or not, because in these proceedings we are only concerned with the question whether the debt was bona fide disputed by the company on substantial grounds. If the debt was bona fide disputed, as we hold it was, there cannot be "neglect to pay" within Section 434(1)(a) of the Companies Act. If there is no neglect, the deeming provision does not come into play and the ground of winding up, namely, that the company is unable to pay its debts is not substantiated.

15. In the result, the appeals are allowed and the judgment and order of the Division Bench set aside and the petition dismissed. But in the circumstances of the case there will be no order as to costs.