Bombay High Court
In Re: Yashodan Chit Fund Pvt. Ltd. ... vs Yashodan Chit Fund Pvt. Ltd. on 25 January, 1979
Equivalent citations: 1980 50 CompCas 356 Bom
Author: R Aggarwal
Bench: R Aggarwal
JUDGMENT R.L. Aggarwal, J.

1. This is a creditor's petition for winding up. It comes up for admission and arises this way.

2. The petitioners are the tenants of certain premises in Navsari Chambers, 3rd floor, Dr. Dadabhoy Nowroji Road, Fort, Bombay-400 001. By a leave and licence agreement dated 8th May, 1972, they granted permission to the respondent-company, Yashodan Chit Fund Pvt. Ltd., to use and occupy certain area out of the said premises for a fixed period of three years from 31st May, 1972, to 30th May, 1975, on a monthly compensation of Rs. 1,000 and Rs. 400 per month as commission for services through the petitioners and their watchmen and peons. On the execution of the leave and licence agreement, the petitioners received from the respondent company a sum of Rs. 50,400 being the compensation up to 30th May, 1975, at the rate of Rs. 1,000 and Rs. 400 per month. It seems that as and from 1st June, 1975, the respondent-company did not pay the compensation of Rs. 1,000 or Rs. 400 per month or any part thereof. On or about 29th May, 1975, the respondent-company filed Declaratory Suit No. 2334 of 1975 against the petitioners and their landlords, Messrs. Tata Sons Pvt. Ltd., in the Court of Small Causes at Bombay. By this suit, the respondent company has sought a declaration that they are the tenants in respect of the said premises in their occupation and claimed other reliefs like a perpetual induction against the petitioners. The petitioners have filed their written statement and the said suit is pending. On 10th June, 1975, the respondent-company filed standard rent application in the said court being Application No. RAN/673/SR of 1975 against the petitioners and their landlords, Tata Sons Pvt. Ltd., for fixation of standard rent at the rate of Rs. 115 per month exclusive of permitted increases or such other sum as that court may determine. This application is also pending.

3. The petitioners by their advocate's letter dated 4th May, 1978, addressed to the company, inter alia, called upon the company to pay the arrears of compensation of Rs. 49,000 for the period from 1st June, 1975, to 30th April, 1978. By another letter of the same date, the petitioner's advocate gave a statutory notice under s. 434 of the Companies Act, 1956, in respect of the said arrears of Rs. 49,000. The respondent-company in reply denied liability for Rs. 49,000 and referred to the declaratory suit and the standard rent application pending in the Court of Small Causes at Bombay.

4. Mr. Chagla, learned counsel appearing for the petitioners, contended that the contractual liability of the respondent-company to compensation at the rate of Rs. 1,400 per month is clearly borne out by the leave and licence agreement. By making an application for fixation of standard rent, the liability to pay the contractual rent does not come to an end. The respondent-company has not applied for fixation of interim standard rent nor any interim standard rent has been fixed by the court. In these circumstances, according to the petitioners, they are entitled to recover from the respondent-company compensation at the rate of Rs. 1,400 per month from 1st June, 1975. Mr. Chagla also pointed out that the respondent-company is a trespasser and, under the agreement, the

petitioners are entitled to compensation at the rate of Rs. 75 per day. He emphasized that in spite of the statutory notice under s. 434 of the Companies Act, 1956, the respondent-company has neglected to pay the sum of Rs. 49,000 as demanded or to secure the same to the satisfaction of the petitioners and, therefore, the respondent-company is deemed to be unable to pay its debts. Once this position is established, the petitioners are entitled to a winding up order ex debito justitiae. In support of this contention, Mr. Chagla relied upon the following passage from In the matter of Advent Corporation Pvt. Ltd. [1969] 39 Comp Cas 463 (Bom) (per Headnote) :

"If a company fails to comply with a notice under section 434(1)(a) for payment of a debt the court has no discretion to refuse to make a winding up order. Section 434(1)(a) does not merely lay down a presumption which can be rebutted but uses the word "shall" and enacts a deeming provision which comes into play once the company neglects to pay the sum demanded. The creditor is them entitled to a winding-up order ex debito justitiae. In such case the commercial insolvency of the company need not be established. The fact that the creditor has the alternative means of filing a suit to recover the debt is irrelevant."

5. The above principle, though not absolute, has been a constant guideline for a company court in applying the provisions of s. 433(e) read with s. 434(1)(a) of the Companies Act, 1956. Ordinarily speaking, when a debt due by a company has been established and remains unsatisfied, it is to under the discretion the court to refuse to a creditor an order for winding up of the company. The combined effect of s. 433(e) and s. 434(1)(a) is that when the circumstance mentioned therein exist, the company shall be wound up. One of the circumstances mentioned in s. 434(1)(a) is the indebtedness of a company to its creditor. The court has, therefore, to consider the nature of the money owing to the creditor. Money owing is that which is legally recoverably and not a debt of honour. The debt must be a valid debt for which there is clear proof. The debt must be one which does not require to be investigated by adopting proceedings. The debt must be one which cannot be impeached or disputed. The debt must be free from doubt or controversy or argument or dispute. It is when a creditor establishes that the debt owed by the company is clear, valid in law, unimpeachable and indisputable, that a creditor will be entitled to a winding-up order ex debito justitiae; for, otherwise miscarriage would occur and gravest or grossest injustice would be done to the company. Therefore, if such a debt is established and not satisfied on demand for a period of three weeks, then the deeming fiction embodied in s. 434(1)(a) would be attracted and not otherwise. What is the position when the debt is disputed ? The first thing to be examined by the court is whether the dispute is genuine and bona fide and of some weight and substance or whether the dispute raised is for the sake of avoiding payment or kicking up a controversy on flimsy grounds or by way of a spoke in the wheel of a winding-up order which would follow ex debito justitiae. The courts have been of the firm opinion that a winding-up order will not be made on the basis of a debt which is bona fide disputed. The question whether a dispute regarding debt is bona fide or not depends upon the circumstances of each case.

6. Another circumstance referred to in s. 434(1)(a) is that the company "neglects" to pay the sum demanded. In order to understand the import and significance of the expression "neglect" in the context in which it is issued in s. 434(1)(a), I would straightway heed to the pronouncement of 1874 from Jessel, Master of the Rolls, in the following words : (See [1874] LR 19 Eq 444, 445) :

"It has been asserted on the part of the petitioner that there is a statutory right to a winding-up order given by the 80th section of the Companies Act, 1862, to any creditor who has given the statutory notice if non-payment has occurred by the company for a space of three weeks. Now, first of all, what does the statute say ? It says that whenever a creditor to whom a company is indebted in a sum exceeding Pounds 50 has served on the company in a certain ways a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum or to secure or compound for the same to the reasonable satisfaction of the creditor, then the company shall be deemed to be unable to pay its debts. It is very obvious, on reading that enactment, that the word 'neglected' is not necessarily equivalent to the word 'omitted'. Negligence is a term which is well-known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is bona fide disputed by the debtor, and the debtor alleges, for example, that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent values to pay, or as he himself considered a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute."

7. The Master of the Rolls refused to make an order of winding up in favour of the petitioner, Zuccani, who had charged the company Pounds 267 for furniture which he had supplied, but the directors considered this an excessive price and offered Pounds 155 and later, after having received the report of two values, Pounds 197. An action had been commenced in the Court of the Exchequer to resolve the dispute, but Zuccani, who had earlier served a statutory demand, presented a winding-up petition. The petition was dismissed with costs. (See In re London and Paris Banking Corporation [1874] LR 19 Eq 444).

8. Thus, where a bona fide dispute is raised, the deeming feature incorporated in s. 434(1)(a) loses its striking force and the principle of ex debito justitiae recedes and steps back from the promise held by it to a petitioning creditor.

9. Let us now turn our minds to the case before us. The facts indicated at the outset show that under the leave and licence agreement, the respondent-company was to pay Rs. 1,000 per month for compensation for use and occupation and Rs. 400 per month for service charges. The respondent-company paid three years' compensation in advance. During the subsistence of the leave and licence agreement, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, was amended by Maharashtra Act, No. XVII of 1973. This amendment was brought about by the law makers as they felt that the principal Act was being increasingly avoided by giving out premises on licence and as such they decided to extend protection of statutory tenants to certain licensees. Secondly, the law-makers thought it expedient to legislate about the charges and/or compensation for licences on the basis that such charges shall not exceed the standard rent of the premises and permitted increases. The law-makers thus intended to protect the licensees against unreasonable eviction and against being charged excessive charges or compensation. The licence charges or compensation are brought down to the level of standard rent and permitted increases. It appears that taking benefit of this amendment which was made effective from 1st February, 1973, the

respondent-company wanted to consolidate its position as a tenant as well as levelize the contractual charges to that of standard rent of the premises. Without further engaging myself about the implications of the provision relating to fixation of standard rent in the case of licence charges or compensation, it is enough to read the clear terms of the relevant section as it stands in operation from 1st February, 1973 :

"Section 7. (1) Except where the rent is liable to periodical increment by virtue of an agreement entered into before the first day of September 1940, it shall not be lawful to claim or receive on account of rent for any premises any increase above the standard rent, unless the landlord was, before the coming into operation of this Act, entitled to recover such increase under the provisions of the Bombay Rent Restriction Act, 1939, or the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944, or is entitled to recover such increase under the provisions of this Act.

(2) (a) No person shall claim or receive on account of any licence fee or charge for any premises or any part thereof, anything in excess of the standard rent and permitted increases (or, as the case may be, a proportionate part thereto), for such premises if they had been let, and such additional sum as is reasonable consideration for any amenities or other services supplied with the premises.

(b) All the provisions of this Act in respect of the standard rent and permitted increases in relation to any premises let, or if let, to a tenant, shall mutates mutandis apply in respect of any licence fee or charge and permitted increases in relation to the premises given on licence; and accordingly, the licensee or licensor may apply to the court for the fixation of the licence fee or charge and permitted increases and the additional sum mentioned above."

10. Can it be seriously be seriously contended that the respondent-company who has made an application for fixation of standard rend and permitted increases in relation to the premises given on licence be said to be raising a false or untenable plea to avoid payment of contractual licence charges ? It could have been possible to argue on behalf of the petitioners that the respondent-company is not a "licensee" within the meaning of s. 5(4A) of the Bombay Rent Act. No move was made in this direction on behalf of the petitioners. Nothing was pointed out to show that the respondent-company was not entitled to avail of the machinery under the above section.

11. Again, sub-section (2)(a) of s. 7 debars a person even from claiming or receiving, much less recovering, on account of any licence fee or charge, anything in excess of the standard rent and permitted increases and additional sum any amenities or other services supplied with the premises, provided such sum is a reasonable consideration.

12. In these circumstances, it can be concluded unhesitatingly on the facts of this case that there exists a bona fide dispute between the parties which is under adjudication before a competent court. In this connection, the observations of Jessel, Master of the Rolls, quoted above, have a substantial bearing on the present case. If we pause and read them once again, the picture becomes clear and it cannot beheld that the sum of money demanded by the petitioners is undisputed and that the respondent-company has "neglected" to pay within the meaning of s. 434(1)(a). Therefore, no case is made out to declare that the respondent-company is deemed to be unable to pay its alleged debt.

13. Mr. Chagla also contended that the respondent-company has not applied to the Court of Small Causes at Bombay for fixation of interim rent and, therefore, it should continue to pay the contractual compensation. It appears the petitioners have not served any notice upon the respondent-company under s. 106 of the Transfer of Property Act nor filed any suit for recovery of possession on the ground of non-payment of rent/compensation. Therefore, the matters have not come to a head and the petitioners are content in contesting the proceedings adopted by the respondent-company. The non-fixation of interim rent is immaterial once a real and guanines dispute arises between the parties.

14. Mr. Chagla also contended that the respondent-company is profiteering by allowing a third party use of a part of the premises. Mr. Shah, learned counsel appearing on behalf of the respondent-company, urged that the petitioners are paying a rent of Rs. 201.50 to their landlords, Messrs. Tata Sons Pvt. Ltd., for the entire are of 1,913 sq. ft. and the petitioners have collected Rs. 50,400 for three years in advance at the rate of Rs. 1,400 per month for an area of 825 sq. ft. and want to recover the arrears at the same rate and, therefore, the petitioners are profiteering rather than the respondent-company. I think that this controversy is not of any significance in the context of the issue before me.

15. The second ground for winding up taken up is that the respondent-company is wholly insolvent and Mr. Chagla described it as a "bubble" company. Counsel pointed out that the paid-up share capital of the company is Rs. 200 and in 1976, the carried forward losses were Rs. 2,58,949.85 and the sundry creditors of the company were to the extent of Rs. 9,52,739. Mr. Shah, learned counsel appearing for the respondent-company, pointed out that the debt of the sundry creditors is reduced to the extent of Rs. 3,50,000. He relied upon the balance-sheet as at 31st December, 1977. The balance-sheet shows that in the year ending 31st December, 1976, the company owed Rs. 8,76,372 to the sundry creditors and at the end of 31st December, 1977, a sum of Rs. 6,83,288.60 was payable to the sundry creditors. Its fixed and current assets were Rs. 4,22,535. The respondent-company is effectively carrying on business. There is no material to show that the respondent-company is unable to meet its outstanding liabilities of any of its admitted creditors. The ground of insolvency is to be proved by the petitioners as a fact. I am left with the impression that such a serious allegation is made without any basis and on the top of it to call it a "bubble" company is nothing short of a reckless allegation. As far as I can lay my hands on, it was first in the case of In re London and Country Coal Company [1867] LR 3 Eq 355 that the expression "bubble" came to be used, in arguments and not in judgment.

16. In the above case, the directors admitted their liability to pay the deposit money. About the bargain by the directors, the court observed (p. 360) :

"Instead of that it was a bargain to get something for themselves. Virtually, they say this : 'We agree to give you something, that you may pay it back to us - that you may "discharge an obligation incurred by you," whereby we will rob the public of so much money, and put it into our own pockets.' No other language will properly describe the transaction. It is a mere contrivance, under the guise of an agreement for the advantage of the company, to plunder the public to this extent. In that state of things, it is expedient alike for the public, the petitioner, and these gentlement

themselves, who have paid not the least regard to justice and propriety, that the company should be at once abolished."

17. The learned judge further said and concluded as follows :

"The next step is a curious transaction, showing how cautious the public should be in dealing with these companies. These gentlemen, not having any money of their own (for if they had any, I must assume, out of regard for their own characters, they would have paid these deposits), thought it would be the best thing to get somebody else to pay for them. They accordingly advertise for a secretary and a sub-secretary, and state that the secretary will be expected to pay Pounds 240 (which this petitioner has done), and the sub-secretary Pounds 50. I believe a small profit of Pounds 7-10s. has been made; but with this exception, all the expenses of the company have been paid out of the advances of the unfortunate secretary and sub-secretary.

Then I am asked to continue this wretched concern. I say, extinguished it must be; and although, perhaps, the parties might find a more beneficial mode of extinguishing it than through the medium f a winding-up order, a winding-up order I shall make."

18. The above case was one of the most extraordinary cases that had been brought before the court. There ar two more cases examined by me in connection with a company being a "bubble" company, but I do not propose to make any reference to them. These cases are (1) In re Haven Gold Mining Company [1882] 20 Ch D 151 (CA) and (2) In re Thomas Edward Brinsmead & Sons [1897] 1 Ch D 45 (affirmed on appeal - see [1897] 1 Ch D 406

19. I think to dub the respondent-company as a bubble company is totally unjustified and uncalled for. This ground was not even alleged in the petition and seems to have been taken in desperation.

20. To sum up, I have come to the conclusion that both the grounds taken under s. 433(e) read with s. 434(1)(a) and s. 433(f) are not well founded and the petition presented ostensibly for a winding-up order is really to exercise pressure and deserves to be refused admission. It is proper to clarify that any observation made in this petition is only a prima facie view in the context of the provisions relating to a winding-up of a company and it will not affect the spending proceedings between the parties.

21. The petition is, therefore, dismissed with costs.