
(2003) 06 KAR CK 0035
In the Karnataka High Court
Case No : O.S.A. No. 5 of 2003

Asea Brown Boveri Limited

APPELLANT

Vs

Boving Fouress Limited

RESPONDENT

Date of Decision : 27-06-2003

Acts Referred:

Companies Act, 1956 — Section 433, 433 (e), 433 (f)

Citation : (2004) 4 BC 405 : (2004) 120 CompCas 780 : (2003) ILR (Kar) 2814 : (2003) 6 KarLJ 1 : (2003) 3 KCCR 2242 : (2003) 47 SCL 554

Hon'ble Judges : N.K. Jain, C.J.; S. Abdul Nazeer, J

Bench : Division Bench

Advocate : S.S. Nagand, for Bhuvan and Co, for the Appellant;

Final Decision : Dismissed

Judgement

Jain, C.J.—This appeal is filed against the order of the learned single Judges dated 16.1.2003 passed in Company Petition No 111/2001 wherein the learned Single Judge has dismissed the petition reserving liberty to the petitioner therein to approach the competent Civil Court or to invoke the arbitration clause for recovery of the amount due

2. It is stated that the appellant is a company incorporated under the provisions of Companies Act, 1956 and is a manufacturer and dealer of electrical products, motors, switchgears, control panels, etc. The appellant company under various invoices raised from time to time, supplied the materials to the respondent company. The materials delivered by the appellant company were acknowledged by the respondent company and the total balance outstanding due on various invoices was Rs. 25, 09, 849-84. The respondent company though initially raised some dispute, issued a cheque of Rs 5,00,000.00 dated 31/12/2000 drawn on State Bank of India, Industrial Finance Branch, Bangalore. The same was dishonoured on 15/2/2001 with an endorsement of "insufficiency of funds" in the account of respondent. Meanwhile, the respondent threatened to encash the bank guarantees (performance guarantees) issued by the appellant to the

respondent as per letter dated 28/6/2001. It is also stated that the appellant filed O. S. No. 15867/2001 before the City Civil Court and obtained an order of temporary injunction restraining the respondent from encashing the bank guarantees. Thereafter a legal notice was issued on 20/02/2001 which was replied by the respondent on 23.2.2001 raising certain untenable grounds for non-payment in spite of the admission made by earlier letter dated 24/8/2000. The appellant filed a Company Petition No 111/2001 u/s 433(e) and (f) of the Companies Act, 1956. The learned Single Judge considering the objections dismissed the company petition as stated. Aggrieved the appellant company has filed this O.S.A

3. The learned Counsel for the appellant submits that the learned Single Judge has erred in not invoking Section 433 (e) and (f) of the Companies Act when admittedly the amount due was not paid by the respondent. He relied on a decision of the Supreme Court in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, , He also relied on a decision of this Court in the case of *Divya Export Enterprises Vs. Producin Private Ltd.*, , and also that of Calcutta High Court in the case of *DURGAPUR PROJECT LIMITED* 1983 (53) CC 320. The learned Counsel submits that the order of winding up should have been issued.

4. We have heard the learned Counsel for the appellant and perused the material placed on record and the case laws

5. Under the Companies Act a special jurisdiction has been created for winding up. If admitted debt is not paid after expiry of the statutory notice and company is unable to pay the debt, winding up order can be passed. In other words, if any admitted debt is due, the provision of Section 433 can be invoked but the debt should be bona fide and whether it is bona fide or not depends upon the circumstances of each case. Whether the dispute is raised to avoid payment of debt and not based on substantial ground cannot be considered. It is also sent that it is not the legislative intention that Company Court should be converted itself into an ordinary Civil Court and proceed to hold a trial at the instance of individual creditor

6. As per the facts culled out, the matter is arising out a contract between the parties and the cheque issued for a sum of Rs 5,00,000.00 towards payment for supply of goods has been dishonoured. In our view, merely on the basis of a commercial transaction, if cheque is dishonoured, it may not come within the purview of admitted due in view of the reply, nor it may raise a presumption of inability to pay the debt which is not enough in absence of satisfying the other condition of commercial insolvency. It is also to be sent that a company can have commercial transactions with many companies/firms/individuals and while dealing with payments with any of them, if a cheque is dishonoured, the same cannot be invoked as a subject matter of winding up, as otherwise also winding up, petition is not a legitimate means of seeking to enforce payment of the amount in the garb of debt. The learned Single Judge considered the fact situation and the aspect by a detailed order. The learned Single Judge has also

observed the decision of the Apex Court that winding up petition cannot be a device or pressurizing the company. The decisions relied on by the learned Counsel for the appellant have no application to the facts of the case. So far as the decision in Gordhandas's case (supra) is concerned, the learned Counsel relied on Paras 20 and 21 which read as under

"20. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. The Court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (See London and Paris Banking Corporation (1874) 19 Eq 444) Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed (See Re Brighton Club and Norfolk Hotel Co Ltd (1865) 35 Beav 204)

21. Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See Re A Company 94 SJ 369) Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the Court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re Tweeds Garages Ltd 1962 Ch 406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends"

wherein in that case the learned Single Judge refused to wind up the company, however asked the company to deposit the disputed amount and observed that in the mean while if the suit is not filed for recovery of the amount, the company would be able to withdraw the amount and if suit is filed the amount would stand credited to the suit. On appeal, the Division Bench upheld the order and found that the alleged claims of the appellants were very strongly and substantially denied and disputed. The Apex Court considering the facts of that case held that the appeal fails. Hence in the facts of the present case this case is not applicable. So also the decision in the case of Divya Export Enterprises (supra) and the decision of the Calcutta High Court in Durgapur Projects Ltd, (supra) are not helpful in the facts of the present case. Reference can be made to the decision of the Apex Court in AMALGAMATED COMMERCIAL TRADERS (P) LIMITED vs A.C. KRISHNA SWAMI (1965) CC 456(SC) wherein it was observed.

"It is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of debt which is bona fide disputed by the company. A petition presented ostensibly for winding up order but really to exercise pressure will be dismissed, and under certain circumstances may be stigmatized as a scandal or abuse of the Court"

and also to the decision of this Court in KAMADHENU ENTERPRISES vs VIVEK TEXTILE MILLS PRIVATE LIMITED 1982(1)KarLJ 296, wherein their Lordships have observed

"The Court u/s 433 Companies Act is not a Court essentially meant for settling money disputes between parties. The jurisdiction is to subserve the object of winding up the companies which have not paid their debts or which are unable to pay their debts. Therefore, the first prerequisite must be to establish prima facie a debt against the company. But when a claim or debt is disputed, the proper forum for that is a Civil Court"

In view of the above discussion and on consideration we find no error or illegality in the order passed by the learned Single Judge so as to call for any interference. Hence this appeal is dismissed. However, as per the direction of the learned Single Judge, the appellant is always free to approach the competent Civil Court or invoke the arbitration clause as the case may be in accordance with law