

(2004) 06 MAD CK 0019

In the Madras High Court

Case No : Company Petition No. 563 of 2000 and Company Application No. 2464 of 2000

Aventis Cropscience India Ltd.

APPELLANT

Vs

Nilgiris Fertilizers Ltd.

RESPONDENT

Date of Decision : 15-06-2004

Acts Referred:

Companies Act, 1956 — Section 433, 433(1)

Citation : (2006) 1 BC 539 : (2005) 125 CompCas 139 : (2004) 55 SCL 411

Hon'ble Judges : A. Kulasekaran, J

Bench : Single Bench

Advocate : Devi, for the Appellant; R. Venkataraman, for the Respondent

Final Decision : Dismissed

Judgement

A. Kulasekaran, J.—The petitioner M/s. Aventis Cropscience India Limited, formerly known as AgrEvo India Limited is a public limited

company has filed the present petition for winding up of the respondent company under Sections 433(e) & (f) read with Sections 434(1)(a) and

439(1)(b) of the Companies Act, 1956 and for appointment of Official Liquidator as Liquidator.

2. The respondent is a private limited company with authorised share capital of Rs. 1,25,000 nominal value being Rs. 10 preferential shares of Rs.

1,25,000 of Rs. 10 each. The total issued, subscribed and paid up capital is Rs. 25,00,000.

3. It is the case of the petitioner that the respondent was appointed as stockists to deal with agro-chemical products manufactured by the petitioner

company in and around Coimbatore District. It is stated that the petitioner company has supplied goods during 31-8-1998 to 22-12-1998 to the

respondent company amounting to Rs. 14,87,457.37. The respondent stated to have acknowledged the materials supplied by the petitioner and

also admitted their liability by letters dated 24-8-1998, 8-9-1999, 30-11-1999, a fax message dated 31-12-1999 and letter dated 14-1-2000.

The petitioner also sent a statutory legal notice dated 18-2-2000 which was also duly served on the respondent, but the respondent company has

not chosen to give any reply. The present petition has been filed seeking order for winding up as the respondent is unable to pay its debts.

4. It is the case of the respondent company that originally, the respondent was appointed as Distributor of Hoechst India Limited for plant

protection products to operate in Coimbatore District and part of Nilgiris District. Subsequently, the said Division was taken over by Hoechst

Schering AgrEvo India Limited. Later, the petitioner company was named as AgrEvo Limited and it has once again changed its name as Aventis

Cropscience India Limited as described in the petition. It is stated by the respondent that the petitioner company, with its different name has been

supplying the products, however, it is not correct to say that the respondent has failed to make payment towards value of the bills for the period

from 31-8-1998 to 22-12-1998 to the tune of Rs. 14,87,457.37. It is also the case of the respondent that the petitioner has suppressed the fact

that a payment of Rs. 25 lakhs was made by the respondent company by way of cheque in April 1999 towards balance of Rs. 16,24,566.16 as

on 31-3-1999. Thereafter, no transaction between the petitioner and the respondent, but the petitioner company has unilaterally and unauthoriscdly

appropriated substantial portion of the amount towards the alleged due of partnership firm of the petitioner concern, which is totally a different

entity. The respondent further stated that they have asked receipt for the entire sum of Rs. 25 lakhs for which there was no reply by the petitioner.

After adjusting the amount of Rs. 16,24,566.16, the respondent would have a credit of Rs. 8,75,433.84, which amount is retained for future

supply of goods, but the petitioner company has not effected supply, which resulted in heavy loss and damages to the respondent company. It is

also stated by the respondent that they are not liable to pay any amount or interest as claimed by the petitioner; on the other band, the petitioner

company owe a sum of Rs. 8,75,433.84 to the respondent company.

5. The point for consideration in this petition is :

(i) Whether the respondent company is unable to pay its debts or not ?

(ii) Whether the respondent company is liable to be ordered to be wound up or not ?

6. It is not in dispute that the respondent company has issued cheque for Rs. 25,00,000 on 27-3-1999 in favour of the petitioner company. It is

also not in dispute that on 31-3-1999 a sum of Rs, 16,24,566.16 was due and payable by the respondent company to the petitioner company,

which is evident from the letter dated 30-4-1999 issued by the petitioner company. It is also not in dispute that the said cheque for Rs. 25,00,000

was encashed by the petitioner company. According to the respondent, a surplus amount of Rs. 8,75,433.84 was paid by them for future supplies.

It is stated by the petitioner that the said cheque for Rs. 25,00,000 was adjusted towards the due amount payable by the respondent company to

the Partnership firm namely Yenefel Agro Corporation, which is a sister concern of the petitioner company. According to the respondent, such

adjustment is unauthorised and unilateral.

7. Under sub-sections (e) and (f) of Section 433 of the Companies Act, a company may be wound up by the Court, if the company is unable to

pay its debts, and if the Court is of the opinion that it is just and equitable that the Company should be wound up. The Section does not confer any

person a right to seek an order that a company shall be wound up. It confers powers on the Court to pass an order of winding up in appropriate

cases.

8. A debt is a sum of money which is payable or will be payable in future by a person of a present obligation. A debt must be a determined or a

definite sum of money payable immediately at a future date. Any debt payable to a sister concern cannot be termed as a debt payable to the

petitioner company.

9. It is not in dispute that the respondent has sent a letter dated 15-5-1999 calling upon the petitioner company to credit the entire sum of Rs.

25,00,000 in their account and also pointed out that a sum of Rs. 13,66,195 was adjusted to the account of Yenefel Agro Corporation. Indeed,

the respondent company has returned the receipt issued by the said Yenefel Agro Corporation for the said sum of Rs. 13,66,195.

10. It is argued on behalf of the petitioner that the statutory notice issued by the petitioner calling upon the respondent was not replied. It is also

further argued that several letters were issued calling upon the respondent to pay the due amount payable to the petitioner company, for which a

reply was given by the respondent praying time for settlement. The said two points were raised to say that the respondent has not disputed the

liability, while so, it should have been construed as that the respondent is unable to pay its debts.

11. Until the respondent is unable to pay its debts payable to the petitioner company, it is not open to the petitioner to seek the remedy u/s 433(e)

and (f) of the Act. It is the duty of the petitioner to establish its unimpeachable claim. Section 433(1)(a) confers a jurisdiction to direct winding up

only in cases where the creditors' right to receive the amount claimed is clear and unimpeachable and the Company is unable to demonstrate prima

facie that it has a bona fide and legally sustainable defence to such a claim. Unless the debt alleged to be due is clear and free from doubt, it cannot

reasonably be said that there is negligence, failure or inability to pay the debt and, therefore, the discretionary order of winding up, which order if

made would result in sounding the death-knell of the company, should not be made. Followed *Elmeh India v. Hi-sound Carder P. Ltd.* [1995] 83

Comp. Cas. 135 Hence, the argument of the counsel for the petitioner that statutory notice was not replied and several letters addressed by the

respondent seeking extension of time not sufficient to seek the remedy of winding up.

12. It is argued by the counsel for the petitioner that this Court, while ordering publication found that prima facie case has been made out by the

petitioner that the respondent is unable to pay its admitted liability, which was not appealed, hence the said finding reached a finality. The said

argument is not sustainable. The finding, if any means that the case that has proceeded upon sufficient proof to that stage only for the purpose of

ordering publication and still it is open to this Court, while finally disposing of the Company petition to look into whether a debt really exist as

claimed by the petitioner and that if the demand made is not met by the respondent company. The facts mentioned supra namely the excess

payment and other aspects were not brought to the notice of this Court at the time of ordering publication. In this case, the payment was made by

the respondent in excess than what is demanded or entitled to.

13. Hence, the Company petition for winding up is dismissed. No costs. Consequently, connected Company Application is closed.