
(1998) 10 PAT CK 0022
In the Patna High Court
Case No : Company Petition No. 7 of 1995

BOC India Limited

APPELLANT

Vs

Zinc Products and Company Pvt. Ltd.

RESPONDENT

Date of Decision : 09-10-1998

Acts Referred:

Companies Act, 1956 — Section 433, 434(1)

Citation : (2001) 103 CompCas 759

Hon'ble Judges : S.N. Jha, J

Bench : Single Bench

Advocate : Subhro Sanyal, for the Appellant; R.A. Singh and K.P. Dubey, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Jha, J.—This is a petition for winding up of Zinc Products and Company Pvt. Ltd. (hereinafter referred to as "the respondent company") under Sections 433 (e) and (f) read with Sections 434 and 439 of the Companies Act, 1956. The said company was incorporated with the object of carrying on the business of manufacture and trade of distilled zinc dust and other allied products of zinc metal. The petitioner, BOC India Limited (formerly known as IOL Ltd.) is also a company incorporated under the Companies Act having its factory premises at Asansol and Jamshedpur "where it carries on the business of manufacture and supply of various industrial and medical gases to its consumers. The petitioner-company supplied industrial gases to the respondent-company from its Asansol and Jamshedpur factories and provided certain other facilities incidental to the supply between 1988 and 1991. According to the petitioner, the respondent-company owes a sum of Rs. 5,48,978.16 to it on account of supply of gases. The respondent-company in fact issued five cheques, one on September 12, 1991 and four on March 30, 1992. for a total sum of Rs. 3,03,686.59. The cheques however, on presentation to the bank, were returned for insufficiency of funds. It is said that correspondence ensued between the parties and the respondent-

company agreed to liquidate the dues by issuing fresh cheques but the same was never done. Despite several rounds of correspondence and personal approaches the amount remained outstanding. In the circumstances, a notice as required u/s 434(1)(a) of the Companies Act was sent on February 3, 1995, and finally on May 1, 1995, the present company petition was filed.

2. The respondent-company has filed a counter-affidavit in which it has denied the claim of the petitioner. According to it, the petitioner used to supply compressed nitrogen gas to it since its very inception from its Patna Depot. Keeping in view the off-take of the compressed nitrogen, the petitioner approached it with an offer to supply nitrogen gas in liquid form at a price of Rs. 690 per 100 cu.m. inclusive of excise duty but exclusive of sales tax, and delivery charge at the rate of Rs. 150 per 100 cu.m. It offered to make supply for a period of five years at the same price subject to escalation only on account of power tariff and wholesale price index. Other terms and conditions were as incorporated in the letter dated July 6, 1988. The respondent-company accepted the offer with some modification vide its letter dated October 29, 1988. As per its counter-offer, it agreed to buy liquid nitrogen gas at the rate of Rs. 690 per 100 cu.m. for a period of three years with an option of extension for a further period of two years. The petitioner agreed to the said terms and communicated its acceptance by letter dated January 5, 1989. These three letters dated July 6, 1988, October 29, 1988, and January 5, 1989, copies whereof have been marked annexures A, B and C to the counter-affidavit, admittedly formed the basis of the contract between the parties.

3. The petitioner-company installed and completed the pipeline work in the factory premises of the respondent-company and supplied the first load of the liquid nitrogen on April 28, 1989. According to the respondent-company, the supply of liquid nitrogen was erratic from the very beginning which resulted in business losses to the respondent. It is said that by letter dated June 1, 1990, the respondent-company informed the petitioner-company that during the previous one year, out of 36 loads of liquid nitrogen only 15 loads had been supplied. Disputes also arose between the parties on account of the fact that as against the agreed price of Rs. 690 per 100 cu.m, the petitioner, allegedly, unilaterally increased the price of liquid nitrogen to Rs. 1,500 per 100 cu.m. in August, 1990, which was again increased to Rs. 3,310 per 100 cu.m. in September, 1991. From the correspondence between the parties brought on record of this case it appears that the relationship between them become quite strained so much so that they gave notice to each other to remove the pipeline (VIST) installed in the factory premises of the respondent-company.

4. The sheet anchor of the case of the petitioner is the dishonoured cheques issued by the respondent-company on September 12, 1991, and March 30, 1992, mentioned above. According to the petitioner, refusal to pay the amount despite several opportunities in that regard amounts to neglect (to pay) and inability to pay on the part of the respondent-company, within the meaning of Section

433(e) read with Section 434(1)(a) of the Companies Act and, therefore, the company is liable to be wound up. The respondent-company has denied the claim of the petitioner in this regard. According to it, the cheques had been issued as advance for future supply at a time when the factory was closed and efforts were being made to revive the company.

5. Section 433(e) of the Companies Act provides that a company may be wound up by the court if "the company is unable to pay its debts". Section 434(1)(a) of the Act provides that a company shall be deemed to be unable to pay its debts if a creditor, by assigning 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.

6. It may be mentioned at this stage that although as indicated above at the outset, the winding up of the company is sought under both Clause (e) and (f) of Section 433 of the Act, precious little has been said to make out a case of winding up on the "just and equitable" ground under Clause (f). In other words, although in the cause title Clause (f) also has been mentioned, in substance, winding up is sought only on the ground of "inability to pay" under Clause (e) of Section 433.

7. A petition for winding up on the ground of inability to pay the debt u/s 433(e) invariably involves the controversy as to whether for realisation of debt, the petitioner, seeking winding up, should not be relegated to the ordinary remedy of realisation of the debt through a civil suit. The courts have laid down various rules for resolving the controversy. Broadly stated, where the company, which is sought to be wound up, comes forward within a plausible defence and the dispute between the parties appears to be bona fide, it has been held, winding up is not the appropriate remedy. Merely because the company is found to be in debt to the creditor and the same is not discharged by it, it does not necessarily amount to inability to pay. There may be different circumstances or reasons for which the debt is not repaid. What is of essence is whether the ground or reason for which the payment is not made is bona fide or mere pretence. In *Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami* [1965] 35 Comp Cas 456, the Supreme Court, observed (page 463) :

"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)."

8. In *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.* [1972] 42 Comp Cas 125, the Supreme Court, observed (page 131) : "Two rules are well-settled. First, if the debt is bona fide disputed and the defence is 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, In re* ILR[1874] 19 444). 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 *Brighton Club and Norfolk Hotel Co. Ltd., In re* [1865] 35 Beav. 204)."

9. In its letter dated September 22, 1992, which the respondent-company wrote to the petitioner, copy marked annexure 2 to the reply-affidavit of the petitioner, the managing director of the company wrote to the area sales manager, Gases, IOL Ltd., Jamshedpur "so far as the returned cheques are concerned amounting to Rs. 3,03,686.59, it is an admitted dues and we are ready to pay the same by bank draft payable at Jamshedpur. "Earlier, on August 26, 1992, vide annexure 1 to the reply-affidavit the respondent-company had informed the petitioner-company at Asansol that "please send your authorised representative on October 9, 1992, to settle all the dues including returned cheques".

10. It is, therefore, obvious, that although the claim was sought to be denied by counsel for the respondent-company at the time of hearing of the case, the company admitted to owing sum of Rs. 3,03,686.59 for which six cheques had been issued on September 12, 1991, and March 30, 1992. The point for consideration is whether despite the said "admission" it is open to the respondent-company to take the plea of bona fide dispute.

11. As noted above, it is the definite case of the respondent-company that the supply made by the petitioner was not regular and according to the schedule as a result of which the business of the company ran into trouble. It is also its definite case that the supply was sought to be made at a price higher than the agreed price in violation of the terms of the agreement that the goods will be supplied at the same rate, i.e., Rs. 690 per 100 cu.m. for a period of three years, subject to escalation only on account of increased power tariff and wholesale price index. From the documents on record it appears that some counter-claim by the respondent-company was also outstanding although the value of the counter-claim was far less than the value of the claim with respect to which the cheques had already been issued.

12. According to me, even if the claim is admitted by the debtor, wholly or in

part, it may in good faith insist on settlement of outstanding dispute before the dues are finally paid notwithstanding the fact that the value of the counter-claim is less than the admitted claim. As stated above, what is of essence is whether the dispute sought to be raised by the debtor is bona fide or not. One of the tests to find out the bona fides of the dispute is whether the dispute is raised for the first time in the winding up proceeding or it was raised at the very first instance before presentation of the winding up petition. In the present case, it appears that the dispute cropped up in the year 1991 itself. In the letters written by the respondent-company referred to by counsel for the petitioner, the company mentioned about the settlement of the dispute. These letters cannot be read as an admission of the entire claim of the petitioner independent of the counter-claim of the respondent, i.e., settlement of the entire dispute. In the case of *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.*, [1972] 42 Comp Cas 125, the apex court, observed that (page 131):

"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."

13. Mr. R. A. Singh, learned counsel for the respondent-company, submitted that the claim of the petitioner has become time-barred by passage of time and this is one of the relevant considerations on which the winding up may be refused, for, winding up cannot be a camouflage for recovery of a time-barred debt. He also contended that regard being had to the fact that the petitioner is a non-secured creditor, even if the company is wound up, there is little chance of the petitioner getting anything out of the assets of the respondent-company when there are secured creditors like the Bihar State Financial Corporation having preferential claim over the rest, apart from the claim of the workmen, etc., u/s 529A of the Companies Act. In this connection he referred to the following" passage from *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt, Ltd.* [1972] 42 Comp Cas 125 (page 132) :

"It is also well-settled that a winding up order will not be made on a creditor"s petition if it would not benefit him or the company"s creditors generally, The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case. (See *P and J Macrae Limited, In re* [1961] 31 Comp Cas 424 (CA) ; 1 All ER 302 ; 1 WLR 229".

14. In the facts and circumstances of the case, I am inclined to accept the plea that the defence of the respondent is bona fide notwithstanding the fact that with respect to substantial amount of the petitioner"s claim it had issued cheques in token of acceptance of such claim. The insistence to have the entire dispute settled cannot be conclusively said to be in bad faith. The defence set up by the company to oppose the winding up, therefore, cannot be said to be a pretence or bogus to warrant its summary rejection.

15. In these premises I would dismiss this company petition.