(2009) 05 P&H CK 0190

In the Punjab And Haryana At Chandigarh

Brothers Gas Agency — APPELLANT

Vs

Hemkunt Gases P. Ltd. — RESPONDENT

Date of Decision : 28-05-2009

Acts Referred:
Companies Act, 1956 — Section 433(c), 434

Citation : (2010) 156 CompCas 17

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

K. Kannan, J.—The petition has been filed u/s 433(c) and (e) read with Sections 434 and 439 of the Companies Act, 1956, for winding up of the respondent-company on the ground that the company has been unable to pay the admitted debt due to the petitioner and even otherwise it shall only be just and equitable to wind up the company for having suspended its work for more than one year. The claim is made on the basis that the respondent-company had appointed the petitioner as a dealer for the distribution of liquified petroleum gas (LPG) to customers who had been given connections for domestic use, produced by the respondent-company.

2. The terms of appointment of the dealership included, inter alia, the job of canvassing for connections with customers and the delivery of equipment against the security to be deposited by the consumers. Against each new gas connection, the consumer was required to deposit a sum of Rs. 1,800 (Rs. 1,000 as security for cylinder and regulator and Rs. 800 as security for rentals) in favour of the respondent-company, which was received by the dealer and passed on to the company. On surrender of the connection, the company was required to refund the amount to the consumer through the dealer as the collections were themselves made only through the dealer. As per the averments in the petition, the petitioner had collected the security deposit against 510 connections and passed on the same to the respondent-company from time to time through

demand drafts drawn in the name of the company as also in cash. The petition sets out all the details of the various connections that were made between the periods from October 4, 1994 to March 16, 1996, relating to the final net connection and the amounts collected towards the cylinder, regulator and the rental charges totalling a sum of Rs. 9,30,795. The document appointing the petitioner-company as a dealer and the details of the supply and the security deposits remitted by the petitioner to the respondent-company are evidenced through annexures P1 and P3 to P27, respectively. The balance-sheet evidencing rental and service charges are evidenced through annexure P28.

3. There was running account for the petitioner with the respondent and as on March 31, 1996, there was a debit balance of Rs. 1,83,144 due and recoverable from the respondent-company against the re-fill of gas cylinders of the value of Rs. 1,11,949. Thus, a balance of Rs. 71,195 remained due and payable by the respondent-company to the petitioner as against the supply of gas cylinders. The total amount due from the respondent under all heads totalled Rs. 9,30,750. In addition to that, the respondent had already received a sum of Rs. 60,000 as security in pursuance of dealership agreement dated October 27, 1994. The respondent-company discontinued the supply some time in the year 1996 and while normally no interest would be claimable against the security deposits, the petitioner states that he was making such claim at 18 per cent, in view of the fact that the respondent unjustly discontinued the supply and ruined the petitioner''s business. Making a claim together with interest calculated from March 31, 1996 to May 31, 1997, the petitioner makes total claim of Rs. 13,00,307.

4. A notice dated December 30, 1996 (annexure P31) making a demand on the respondent, was issued to which the respondent replied through a communication dated January 13, 1997. The respondent by the reply denied that the petitioner was ever appointed as a dealer and that the petitioner had been appointed as a dealer only of Asian Gas. The petitioner would stoutly deny the defence taken by the respondent and would state that Asian Gas was merely a brand name for the gas produced by the respondent-company M/s. Hemkunt Gases P. Ltd. A rejoinder was issued by the petitioner setting forth the alleged duplicity of the respondent in denying the privity of contract between the petitioner and the respondent. The petitioner applies for winding up stating that the failure of the respondent to pay the amount due to the petitioner created a statutory presumption against the respondent for its inability to pay and that further the respondent-company having completely ceased its operation and discontinued the supply service was also liable to be wound up on just and equitable reasons.

5. It may be noticed even at the outset that the petitioner M/s. Brothers Gas Agency has been represented through Shri Madan Lai as a sole proprietor. The defence which has been set up by the respondent through its written statement states in the preliminary objection that the agreement which was entered with M/

s. Brothers Gas Agency was represented only through Ramesh Chand Soni as representing the agency but the petition has been filed by another person. According to the respondent, Madan Lai was an utter stranger to the contract and he was not competent to maintain the petition. It was specifically mentioned even in the dealership agreement (annexure P2) that the business shall not be transferred and assigned without the written consent of the respondent and hence the contract itself has become unenforceable. The respondent would state that it had no knowledge that Ramesh Chand Soni had ceased to have any interest in M/s. Brothers Gas Agency and the respondent-company had never had dealings with the knowledge that they were dealing with the present representative of the petitioner agency.

6. Having regard to the fact that the petition had been filed in the year 1997, the respondent would also state that the liability to return the security deposit itself arose only after the completion of five years from the date of the agreement which was due for expiry only on October 26, 1999. The claim of interest was also against the terms of the agreement under Clause 3(ii) in that the security amounts themselves were not to be treated as belonging to the petitioner but they belonged to the individual consumers and hence, the petitioner was not entitled to treat itself as a creditor for the amounts alleged to be due by the respondent towards the security amounts collected from the customers. The respondent takes up other preliminary objections relating to the mode of service for notice and the manner of setting out the verification as constituting a bar against the petitioner for securing any relief.

7. In the written statement, it is contended that none of the consumers has ever approached the respondent-company for return of the security deposit except one person by name Bhagwan Dass. It is denied that the security amounts against 510 connections have been taken by the respondent. According to the respondent, the sole distributor for the State of Himachal Pradesh was M/s. Himalaya Gas Services and the petitioner itself had not been appointed at any time. Denying that the rental and service charges were received from the petitioner, the respondent would state that they had received only from the distributor duly appointed by the respondent and the documents annexures P3 to P27 were the products of forgery and fabrication by the petitioner. The amounts received by the respondent-company were all received from the dealer and not from the M/s. Brothers Gas Agency or the petitioner.

8. The petitioner has filed reply denying the averments contained in the written statement and particularly with reference to the averment that the petitioner was a stranger to the contract. The petitioner would state that M/s. Brothers Gas Agency was a partnership brought out on May 18,1994 and the same was registered with the Sub-Registrar, Bangana and the partnership was dissolved in the month of November, 1994 when Shri Ramesh Chand Soni executed a deed of retirement and notified the same to Shri Madan Lai. Accordingly, Ramesh Chand Soni had retired from the partnership on November 30, 1994 and all the

accounts relating to the partnership stood finalised on that date. In evidence of the partnership agreement and the subsequent retirement of Shri Ramesh Chand Soni, the petitioner would file the respective documents which are exhibited as annexures P39 and P40. At the first instance therefore M/s. Brother Gas Agency was a partnership but subsequently it came to be a proprietary concern of Madan Lai with effect from November 30, 1994. All the remittance which the petitioner had made to the respondent as security deposits made by the customers had been done only by Shri Madan Lai and this fact was also known to the respondent-company and particularly the fact that M/s. Brothers Gas Agency was being owned and controlled only by Shri Madan Lai. The petitioner would also join issue on the right of enforcement of the claim even prior to five years by pointing out that the respondent had completely closed down its operations even before the completion of five years period and the contract had come to an end making available to the petitioner a right to recover the money which had been paid through the petitioner. Although it was the customers'' money, the petitioner-company had rendered itself liable to the customers for having received the money on their behalf and making itself personally liable for payment to the customers. The correctness of the documents on which the petitioner sought enforcement were reiterated as true and the claim to interest was also justified in view of the demand made by the petitioner and the failure of the respondent to comply with the same.

9. Pending final consideration of the matter before the court, this Court had appointed a Local Commissioner to visit M/s. Brothers Gas Agency for the purpose of noting down the number of cylinders offered by the petitioner-company to the respondent and note down the number of cylinders that were rejected by the respondent-company and the local Commissioner had noted that there were 289 gas cylinders which bore the stamp of "Asian Gas". All the gas cylinders were offered to Shri Inderjit Singh, director of the respondent-company, for acceptance as per the orders of the court dated September 18, 1998. Though Shri Inderjit Singh admitted that the cylinders bearing the markings belonged to them, he refused acceptance on the ground that the same were never supplied to the petitioner-company and that the supplies had been made only to Himalaya Gas Agency. The denial was also on the ground that it was not possible for the respondent to accept them without tallying the serial number which has been inscribed in the cylinder with the record maintained by the respondent-company which was not available to him at the point of time. Serial numbers were however noted in the report in annexure Al. Similarly, 256 gas regulators out of which 47 bore the stamp of "Asian Gas" and 209 that bore the stamp of "Hemkunt Gas", were not being surrendered in view of the fact that the security deposited was not refunded.

10. Subsequent to the filing of the written statement, the respondent-company sought to produce assessment orders for the years 1999-2000 with the Assistant Excise and Taxation Commissioner-cum-Assessing Authority to show that the business was being run and that it was not being closed. Annexure R4 was the

sales tax assessment for the year 2001-02 and annexure R5 was the assessment for the assessment year 2002-03. In reply to these documents, the petitioner sets out his objections stating that the petition was filed on May 10,1997 and without touching upon the status of the company on the date when the petition was filed, the filing of documents relating to subsequent years had no relevance.

11. On June 26, 2005, this Court recorded the rival contentions between the parties and reserving to the parties to file affidavits in support of the respective contentions, this Court directed the respondent to furnish a bank guarantee of Rs. 3 lakhs without prejudice to the contentions. Such bank guarantee was also furnished but it is not clear from the records, whether the bank guarantee, which was originally furnished by Canara Bank on behalf of the respondent-company was extended beyond the period of January 5, 2006 and an affidavit of Shri Charanjit Singh, managing director of the respondent-company was filed reiterating the contention that the business of the company was still being run and that they had no privity of contract with the petitioner. This was recorded by an order of the court dated September 8, 2005. On April 25, 2008, this Court again directed the petitioner to file an affidavit along with the records, if any, whether the payments referred to in paragraphs 5 and 9 were paid directly to the respondent-company and the mode of payment. Similar affidavit was also directed to be filed by the respondent-company stating whether payments had been received from the petitioner-company or the money was received from the distributor.

12. Pursuant to the directions of the court requiring the parties to furnish affidavit on the mode of payments of the security deposits and the persons from whom it was done, Madan Lai representing the petitioner filed an affidavit to the effect that since the transaction relates to the year 1997 and that the affidavit has been filed only in 2008, it was able to obtain certificates issued from Kangra Central Co-operative Bank Ltd., dated September 5,1997, showing that five drafts were purchased from the bank amounting to Rs. 3,13,000 drawn in favour of the respondent-company. Four demand drafts have been purchased by Madan Lai and one draft had been purchased by Ramesh Chand Soni, his brother, however representing M/s. Brothers Gas Agency. The Central Bank of India, Bangana branch had issued certificate dated September 1, 1997, showing that 10 demand drafts had been purchased in the name of the respondent-company by the petitioner through Shri Madan Lai to a tune of Rs. 4,20,000. The certificate was filed as annexure A2 along with Company Application No. 368 of 2008. To the affidavit along with Company Application No. 368 of 2008, the respondent also filed reply pointing out that payments evidenced at annexure A2 to the tune of Rs. 4,20,000 had been made only for LPG supply and not against the price of cylinders and such a fact was evidenced from the letter of M/s. Himalaya Gas Agency dated May 17, 1995. The respondent has also stated in the affidavit denying that the payments exhibited through annexure A2 had any connection with the security deposits. The respondent refers to a letter of M/s. Himalaya Gas Services (annexure XI) where the distributor has vouched for

receipt of demand draft to the tune of Rs. 6,83,500 and that the receipt of Rs. 60,000 against security deposits was still awaited. The respondent-company refers to its own letter to M/s. Himalaya Gas Services on January 9, 1996, exhibited through annexure X3 that the dealers like M/s. Brothers Gas Agency, Bangana coming within the area of M/s. Himalaya Gas Services were creating documents without any approval of the company. Strangely the respondent had also referred to the fact that the petitioner was entering into a dealership with Appenzell group (annexure X4) in violation of the terms of dealership stating that the petitioner taking a dealership with yet another company against the terms of the final engagement of the petitioner as a dealer. If the respondent had no connection at all with the petitioner, it is not understood as to how it could have complained of the petitioner making any violation of the terms of appointment as a dealer.

13. Several documents have been filed by the respondent-company referring to the assessment for the period subsequent to the year 1997 with the sales tax authorities as well as through the sales register filed along with the reply to Company Application No. 368 of 2008. It is not possible to find out prima facie that the company has ceased its operations. The direction for winding up on the just and sufficient grounds is not available and the case would require to be considered only on the averments whether the petitioner has prima facie proof of the indebtedness of the company to the petitioner and that the respondent has been unable to pay the debt in spite of the notice, there being no bona fide dispute about the debt themselves.

14 Several documents filed by the respective parties and the affidavits bring to fore the following facts:

The respondent-company as a manufacturer of LPG, had appointed several distributors and through the distributors had canvassed business by appointing dealers.

The interface with the ultimate customer who is the consumer of LPG gas cylinders was through the conduit of a distributor in any event.

The respondent''s business has been carried through dealers and the moneys were collected through the dealers. The face of the respondent to the customer was seen only through its dealer for it was the dealer who ultimately canvassed the business, collected the security deposits and remitted the amounts through the distributor channel by taking drafts in the name of the respondent-company.

The certificates issued by the Central Bank of India, Bangana, District Una (HP) and the Kangra Central Co-operative Bank Ltd., Dharamshala, District Kangra (HP) clearly show that the purchase of the drafts had been always made by the Brothers Gas Agency. The beneficiaries of the drafts were the respondent-company.

The attempt of the respondent-company however to show that the demand drafts were not security deposits but they were the price of the gas cylinders that were, alleged, to have been given by Himalaya Gas Agency, its distributor is futile for it is not the case of the respondent that the connections had been given to the customers even without obtaining security deposits for the cylinders and the regulators.

It is clear from the recital of the dealership agreement that the contract that the respondent had was with the petitioner agency only. The document (annexure P2) no doubt refers to the petitioner as represented by Ramesh Chand Soni, but the execution of such an agreement itself was not denied except that the petitioner has been represented through Ramesh Chand Soni and not shown to be represented through Madan Lai. It is brought out in evidence that Madan Lai and Ramesh Chand Soni who are brothers had a partnership arrangement and Ramesh Chand had withdrawn from the partnership leaving it to the hands of Madan Lai to look after the affairs of the petitioner firm and the internal arrangement as to who shall run the firm M/s. Brothers Gas Agency shall have no relevance for the respondent so long as it is seen that the respondent had received the moneys from the petitioner representing security deposit for 510 connections and also for the regulators.

15. A dealer when he collects money from the depositors and transmits it to the respondent-company, does so by receiving the money from the customers undertaking to repay the amount at the time of surrender of the connection. As far as a customer is concerned, the right of entitlement from its dealer arises by the deposit of the money to the dealer and the dealer may therefore become answerable to the claims of customers. By the fact that the respondent-company itself does not receive the money directly from the customers, it does not absolve the company of its liability and the customer will be entitled to sue and recover the money from the dealer who has received the money as well as the respondent-company whose products the customers were consuming. The security deposits were themselves only for such user of the company''s products. However, the personal liability of the dealer itself is in doubt for the dealer is but an agent of the company, and in an action that may be brought by the customer, both the dealer and the principal company may be made parties. The defence of the respondent that the money remitted in the name of the respondent-company belonged only to various individual customers will be a valid defence so long as the dealer himself is not damnified by any action taken by the customers for the return of the security deposits against the dealer or till the dealer himself has not paid the moneys to the customers, when obviously a right of indemnification will be certainly available for the dealer against the company, in the manner provided by Section 222 of the Indian Contract Act. The receipts of the amounts by the dealer remittances though clearly brought out by the certificate of banks, the dealer will have no right of action against the company, except when the amounts are shown to have been returned to the customers.

16. As stated above, the dealer is an agent for the company and not an agent for

the customers. An agent cannot personally enforce, nor will he be bound by contracts personally for the contract entered into on behalf of the principal. The personal liability or a right of enforcement personally by the agent shall arise only under the circumstances that Section 230 of the Indian Contract Act, 1872 provides. They are:

(1) Where the contract is made by an agent for the sale or purchase of goods for merchant resident abroad;

(2) Where the agent does not disclose the name of his principal; and

(3) Where the principal, though disclosed, cannot be sued.

17. An agent is entitled to sue on its own account and treat the liability as obtaining personally to him if it is shown that he has been damnified by the demands of the customers and the payments have been made by the dealer to the customers. If such payments have not been made to the customer, the mere fact that the amounts have been paid by the dealer to the company will not give a right of action for the dealer against the company. After all, the amounts paid to the respondent were not the amounts belonging to the petitioner. If there was an inability of the respondent to pay that inability must be shown to be existing in favour of the petitioner who could sue on his own account.

18. There is certainly a valid basis to dispute the claim of the petitioner. It is too well established that a resort to action for winding up is not a substitute remedy for recovering moneys. The commercial insolvency must be established on an undisputed liability and it is not possible to lay anchor to the petitioner''s claim on a strong legal basis. The petition is therefore dismissed leaving it open to resort to action for recovery of money alleged to be due to it through a regular civil suit. No costs.

