
(2012) 02 CAL CK 0020
In the Calcutta High Court
Case No : C.P. No. 135 of 2010

Chowringhee Prakashan Private Limited	APPELLANT
Vs	
Begwani Trade and Industries Private Limited	RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:

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

Citation : (2012) 02 CAL CK 0020

Hon'ble Judges : Ashoke Kumar Dasadhikari, J

Bench : Single Bench

Advocate : Rudradeb Choudhury and Mr. Deepnath Roychoudhury, for the Appellant; S.B. Mookherjee and Mr. S.R. Saha, for the Respondent

Judgement

Ashoke Kumar Dasadhikari, J.—This winding up application is coming up for admission. The petitioner has a letter of credit limit from its bankers and establishes of credit on behalf of its customers or otherwise arrange finance when the customer do not have means to make immediate payment for goods to be purchased by them. Petitioner also stores and handles newsprint for its customers. Being approached by the Company from time to time and being informed by the Company that they had directly placed orders on different mills and have purchased newsprint but did not have the fund to pay the basic price of such goods, taxes, transportation costs, etc., the petitioner agreed to procure the newsprint from such mills upon making all payments and to arrange storage of newsprint reels in its godown, insure the goods and to deliver the same to the Company. The petitioner agreed to perform this job on some terms and conditions for which an agreement was entered into. The terms and conditions of the agreement entered into by and between the Company and the petitioner reads as follows: -

Price

Inclusive Of Basic Price, Excise & Tax At Prevailing Rate, Cess Transportation From Mill To Destination 45 Days Interest, Storage Charges And

Our Service Charges.

Payment

By Cash Or Cheque In Our Favour Within 45 Days Of Dispatch Or Before Delivery Of Goods Which Ever Is Later. In Case Payment Is Delayed Payments Will Be First Adjusted With Overdue Interest And Overdue Service Charges Then With Original Bill Value.

Variation

10%[+/-] Variation In Quantity & Value Allowed.

Over Due Interest

At Bank Rate On All Outstanding From 45Th Day From The Date Of Dispatch Or From The Date Of Delivery.

Overdue Service Charges

1% Per Month (M.C.B.) On All Outstanding From 45Th Day From The Date Of Dispatch Or From The Date Of Delivery.

Due Date

Due Date Will Start After 45 (Forty Five) Day From The Date Of Dispatch.

Transportation

From Mill To Destination To Be Arranged By You/Us At Our Cost On Your Behalf. Local Transportation From Our Godown To Your Place To Be Arranged By You At Your Cost.

Storage

If Required Beyond 45 Days To Be Paid By You On Actuals Or @ Rs.65/- Pmt Per Month Which Ever Is

Higher From 45Th Day From The Date Of Arrival Of Goods.

Duties & Taxes

Cst 2% And Cess Included In The Above Price Against ?c? Crom And Vat Etc. Extra, If Any/Applicable.

Insurance

Included In The Price.

Other Charges

All Other Charges Or Taxes Other Than Mentioned Herein Whether Applicable Now Or Shall Be Applicable In Future Relating To This Consignment Shall, Be Borne, Paid And Discharged By You.

Documents & Papers

- A) You Will Send Us Your Latest And Valid R.N.I Certificate.
- B) You Will Give Waybills ? 3 (Three) Or As Required From Time To Time.
- C) You Will Sign All Necessary Papers, Agreements, Documents And Confirmations As May Be Essential And Required Either At Present Or In Future Related To This Contract And For Insurance Claim.
- D) You Will Issue Necessary Letters To Procure, Store And Handle New print On Your Behalf For Supply To You.

Legal

- A) All Loss & Damages Shall Be Borne By You & You Will Always Keep Up Indemnified Against Such Losses And/Or Damages If So Occurs Due To Your Non-Payment And/Or Act Otherwise.
- B) In Case You Fail To Lift Material Within 90 Days From The Date Of Arrival Against Payment Of All Cost We May Sale The Material Towards Realisation Of Our Dues And Is Any Variation In Realisation The Same Will Be To Your Account Be It Higher Or Lower And All Statutory Liabilities Will Be To Your Account.

Others

You May Establish/Provide Discountable Usance L/C If Required By You For Payment Of Our Dues. L/C Discounting Charges On Our Account.

Jurisdiction

All Disputes Subject To Kolkata High Court Jurisdiction Only.

2. Mr. Chowdhury learned Counsel appearing for the petitioner submitted that as per the agreed terms and conditions the petitioner took delivery of newsprint rolls from the mill upon payment of the bills and supplied the same to the Company.

3. It was submitted that the Company failed and neglected to make payment against the outstanding dues for which the petitioner also could not pay its banker and the banker of the petitioner had stopped operation of the petitioner's bank account which had become irregular on account of failure on the part of the Company to make payment of its contractual dues to the petitioner. He also submitted that a meeting was held between the director of the petitioner as well as the Managing Director of the Company when they requested the petitioner for a discount in view of its precarious financial condition. By a letter dated 20th October, 2009 the petitioner wrote to the Company that a sum of Rs.72,13,326/- was due and payable by the Company to the petitioner as on 30th September, 2009. By another letter dated 20th October, 2009 the petitioner agreed to give the Company a lumpsum discount of Rs.3,50,000/- provided the Company pay off all its dues by 30th November, 2009 in two installments. In reply to that the

Company by its letter dated 20th October, 2009 and 26th October, 2009 wrote to the petitioner that they have purportedly overcharged the Company for the newsprint supply and that other publications had purchased newsprint at lower rates, etc.

4. Mr. Choudhury, learned Counsel appearing for the petitioner submits that individual orders placed by the Company directly upon the mills concerned specially mentioning the price at which the Company had agreed to purchase the newsprint contracted for. The petitioner is not the newsprint seller or supplier but was only financing the purchases made by the Company. He submitted that having specifically contracted with different mills to purchase diverse quantities of newsprint at specific rates and having specifically contracted with the petitioner to finance the Company's purchases and having duly received and consumed the ordered newsprint, it is not open to the Company to allege that the Company had erroneously contracted to purchase newsprint at higher than market rates. It was submitted that a sum of Rs.73,31,174/- remained due and owing to the petitioner from the Company as on 30th November, 2009 in terms of the diverse contracts entered into by and between the petitioner and the Company. The offer of discount as offered by the petitioner conditional upon the Company paying of its entire dues in terms of thereof and no longer remained in force as the Company failed to comply such condition. It was submitted that the Company failed and neglected to make payment to petitioner's dues and a statutory notice u/s 434 of the Companies Act, 1956 demanding the aforesaid sum of Rs.73,31,174/-together with contractual interest and contractual overdue service charges calculated from 1st December, 2009 until the date of payment was claimed and the said notice was duly served upon and received by the Company as its registered office on 9th December, 2009. The Company duly replied to the said notice by the letter dated 22nd December, 2009 through its Advocate and in the reply it was wrongfully alleged that the petitioner had been acting as an intending agent of various newspaper mills and had purportedly charged higher rates for newsprint from the Company than the petitioner had charged other consumers of newsprint over the past several years.

5. It was submitted by Mr. Choudhury that the entire outstanding of the petitioner arises on account of the newsprint financed by the petitioner and no part whereof had been intended by the petitioner. It was submitted that the petitioner is entitled to and claims contractual overdue interest at the rate the petitioner have been charged its bankers, i.e. 15 per cent interest plus 2 per cent penal interest from the date of default until payment as well as overdue service charges at the rate of 1 per cent per month. It was submitted by Mr. Choudhury that the certificate issued by the Indian Overseas Bank, the banker of the petitioner, certifying the rate of interest charged has been disclosed by the petitioner in the petition. Thus, the petitioner claimed an outstanding on 30th November, 2009 calculated as per contract Rs.72,46,383/- and also contractual overdue interest and contractual overdue service charges calculated from 1st December, 2009 until 15th March, 2010 amounting to Rs.7,18,346/- and the

total unpaid amount comes to Rs.79,65,229.81 It was submitted that the statutory period of 21 days had elapsed since the service of the said statutory notice but the Company not paid the amount claimed thereunder or any portion thereof or to secure or compound for the same to the reasonable satisfaction of the petitioner.

6. In support of his contention he submitted that the Company is unable to pay its debt and on several occasion adjournments were taken for coming to amicable settlement but nothing fruitful resulted. It was submitted by Mr. Choudhury that even on the prayer of the learned Advocates of the Company several sittings were held and discussions took place and ultimately on 30th August, 2011 Mr. Supriya Ranjan Saha, counsel appearing for the Statesman submitted before the Court that his client is agreeable to settle the dispute paying an agreed amount of Rs.6,05,00,000/- against three claims made in three winding up applications. He also submitted that if the entire amount could be paid by the Company in that event there would be no question of paying any further interest by the Company. If payment is made by installments then they would pay interest. Mr. Choudhury learned Counsel representing the petitioning creditor took time for taking instruction from the petitioner. The matter was fixed thereafter on Monday. Ultimately the Company through their learned Senior Counsel Mr. S. B. Mookherjee submitted that the Company is agreeable to make payment as settled but they will make payment by easy installments and they will not pay any further interest on the unpaid amount during the period of making installment payments. It was submitted by Mr. Choudhury that his client is required to pay the interest as fixed by Indian Overseas Bank for the overdrawn amount and, therefore, the Company is to pay interest at the rate which is fixed by the Bank for the unpaid amount till the date of payment.

7. Mr. Choudhury submitted that there is no bona fide defense on the part of the Company specially when the basic price was fixed by the Company when they placed order for supply of newsprint before the mill. The petitioner has no roll to play there. The petitioner is to pay the price as agreed with other taxes and/or cess and also for carrying the goods from the mill to godown and thereafter supply the same to the Company and there is no scope to increase the basic charges and/or rates as alleged by the Company. He also submitted that the terms and conditions of the contract is clear and specific and the price quoted in that agreement is the agreed price and the company did never raised any objection to the same. Mr. Choudhury submitted there is no scope for making any overcharge and this plea was an after thought and not at all a bona fide one.

8. He submitted that the Company is unable to pay its debts and, therefore, the order of winding up should be passed in favour of the petitioner.

9. It was submitted by Mr. Choudhury that after service of the statutory notice by the petitioner, the Company filed a civil suit before this High Court which is defective and no attempt was made to remove the defects to the said suit even after the present winding up proceedings were instituted. He submitted that the

winding up notice issued on 9th December, 2009 and the suit was failed by the Company on 8th January, 2010, presented on 10th February, 2010 and defects were removed on 24th March, 2010 thereafter the summons were issued. It was submitted by Mr. Choudhury that baseless allegations made in the suit which are identical to the defense raised by the Company in this proceedings. He submitted that the dispute sought to be raised by the Company is completely sham and moonshine. He submitted that the payments have not been made by the Company, but in the suit filed by them they claimed a decree for Rs.1,42,57,132.50P. allegedly on account of the overcharged amount from the Company. He submitted that payment has not been made so there is no question of claiming any amount against making any overcharge upon the Company. It was submitted that the financing of the newsprint purchased by the Company was admittedly by opening letters of credit and bank finance. The Company has specifically contracted to make payment of contractual overdue interest at the rate the petitioner has been charged by its bankers that 15 per cent interest plus 2 per cent penal interest, from the date of default until payment as well as overdue service charges at the rate of 1 per cent per month.

10. He submitted that the Company have never denied the contract entered into between the parties nor pointed out any defect therein. It was submitted that in the event an opportunity to make payment is given to the Company, the Company should be directed to pay the aforesaid amount of Rs.79,65,229.81 together with penal interest calculated thereon from 16th March, 2010 at the rate not less than 20 per cent per annum. It was submitted that the petitioner will be required to pay its bankers at the rate of 17 per cent per annum compounded monthly. It was submitted that if the Company is directed to pay at any lesser rate the same would result the petitioning creditor not being able to pay its bankers resulting the mortgage immovable properties being sold under securitisation Act. Mr. Choudhury in support of his contentions relied on the following judgments: -

1. Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., ,
2. 1962 2 W.L.R. 38,
3. 58 Comp Cas 417 (Mukand Iron And Steel Works Ltd. Vs. Karnataka Steel And Wire Products Ltd. & Others),
4. 62 Company Cases 239 (State Bank of India Vs. Hegde And Golay Ltd.),
5. 48 Comp Cas 604 (All India General Transport Corporation Ltd. Vs. Raj Kumar Mittal),
6. 41 Comp Cas 174 (Of Lynx Ltd. Vs. Simon Carves India Ltd.).

11. Mr. S. B. Mookherjee learned Senior Counsel, appearing on behalf of the Company submitted that the petitioner financed the purchase of newsprint on behalf of the Company by establishing letters of credit on behalf of the said Company to pay taxes, to pay transportation charges, etc. It was submitted by

Mr. Mookherjee that statutory notice dated December 09, 2009 was served by the petitioner's Advocate. By another letter dated October 20, 2009 a meeting of the parties had been recorded and the petitioner conditionally offered a discount of Rs.34,50,000/- on its claim. The Company by its Advocate's letter dated December 22, 2009 disputed the petitioner's claim and asked for the petitioner to withdraw the notice. It was submitted that the Company had denied the claim of the petitioner and contended by its letter dated 26th October, 2009 that the petitioner had overcharged the Company and requested the petitioner to recast the accounts and the said letter superseded all prior balance confirmation that may have been given by the Company. It was also submitted that the Company also filed a suit in this Hon'ble Court being C.S. No.6 of 2010 in which the Company claimed against the petitioner herein a sum of Rs.1,42,57,132.50P.. The writ of summons has been duly served on the petitioner and the time to file the written statement had also expired and the suit is liable to be heard as an undefended suit.

12. Mr. Mookherjee submitted that the defense of the Company is mainly on three grounds viz. (a) the claim is bona fide disputed by the company, (b) the Company has not neglected to pay the sum claimed, (c) the winding up petition is an abuse of the process of this Court. Mr. Mookherjee submitted that no statutory presumption has been drawn in terms of Section 434(1)(a) of the Companies Act, 1956. He further submitted that even if there is a claim of the petitioner creditor exceeding Rs.500/- and such claim is admitted but there is ground of establishing that there is a bona fide dispute as to the substantial part of the debt on which the winding up petition is based and Company has not neglected to pay the same within the statutory period then the winding up petition may not be entertained. He also submitted in the instant case according to the Company it is matter of accounts to be taken and there is a dispute with regard to the claim or substantial part of the claim and a suit has been filed by the Company. Therefore, there is no neglect on the part of the Company to pay the amount even if the same is exceeding Rs.500/-. Mr. Mookherjee learned Senior Counsel relied on the following judgments in support of his submissions:

(a) The Company Vs. Sir. Rameshwar Singh , (b) In Re: Bharat Vegetable Products Ltd., (d) 66 Comp Cas 634, (e) 103 Company Cases 107, (f) 114 Company Cases 721, and 2005 Vol. 4 CHN 343, (g) AIR 77 SC 577, (h) 57 Company Cases 503. In these circumstances Mr. Mookherjee submitted that the winding up petition should be taken of the file and dismissed with costs. Although no Affidavit-in-Opposition was filed by the Company but the learned Counsel appearing for both parties adopted same argument as advanced in C.P. No. 78 of 2010.

13. The plea of overcharge raised by Mr. S. B. Mookherjee, learned Senior Counsel appearing for the Company is taken up first for consideration by this Court. I have already quoted the terms and conditions of the contract hereinbefore. The terms and conditions of the contract are very specific. It

appears that the Company itself placed the orders with the mills on an agreed price between them and the petitioner Company financed such purchase by paying the price inclusive of basic price, excise & tax at prevailing rate, cess, transportation from mill to destination 45 days interest, storage charges and service charges as per the agreed terms of contract note signed by both petitioner and the Company. In the instant case the petitioner have acted in terms of the agreement and paid the agreed price to the mill and delivered the goods to the Company.

14. It is evident from bare perusal of contract note that the agreed price per metric tonne mentioned therein not only includes basic value of the material charged by the mill but also includes tax at prevailing rates, transportation charges from the mill to Kolkata, 45 days interest, storage charges and agreed service charges and the said differential between the agreed amount stated in the contract and the basic ex-factory price charged by the mill represents the cost of the above. It is very important note that the price mentioned in the contract note was expressly granted by the Company, as would be evident from the document that it was confirmed by the Company's stamp and the signature on such contract. It also evident that the petitioner was not the newsprint seller but only a financier and the bank financing the purchases made by the Company and financing its other costs like transport, tax at prevailing rate, cess, 45 days interest, storage charges, etc. The plea of overcharging as mentioned by the Company in its Affidavit in Opposition alleging therein that the overcharged amount to the tune of Rs.3000/- to 4000/- per metric ton is also not correct because the amounts mentioned in the invoice of the paper mill was only ex-factory basic price of the newsprint and did not include the other items like transportation charges from mill to Kolkata, 45 days interest, storage charges agreed service charges, etc.

15. In terms of the said agreement the Company is obliged to pay the price and other charges to the petitioner. It appears from the agreement annexed to the petition that the price per metric ton was fixed by the Company is Rs.36,250/- and such price include excise and tax at the prevailing rate, cess, transportation from mill to destination, 45 days interest, storage charges and service charges. In case of payment is made after 45 days payments will by first adjusted with the overdue interest and over due service charges then with original bill value. The agreement clearly stipulates the overdue interest, overdue service charges, etc. Therefore, the demand is raised on that basis which is lawful and valid. It appears that some payments were received by the petitioner from the Company for which the Company was given credit. A mutual, open and current account was maintained by the petitioner in respect of his dealings and transactions with the Company. After adjustment of those payments an amount of Rs.72,46,383.26 was due and payable by the Company as on 30th September, 2009. Although, it was alleged that the petitioner wrongfully and/or illegally overcharged the Company for the newsprint supplied, there is nothing on record to show that the purported allegation of the Company is correct. On enquiry

made by this Court the learned Senior Counsel appearing in support of the Company could not show any material and/or document on the basis of which the alleged plea of overcharging could be proved. Moreover the Company never questioned the contract nor the rates and/or the terms and conditions of the contract. The Company received the newsprint rolls as per terms and conditions of contract and utilised the same without any objection but took the pleas of overcharge when the demand for payment was made. Although, against the statutory notice the Company took this plea that the quoted rate was much higher than the prevailing market rate, but such plea is not tenable specially when the price rate is fixed by and between the Company and the mill. The function of the petitioner is to make payment and to get the supply and to deliver the same to the Company. In my view the alleged plea of overcharge or quoting higher rate is without any substance.

16. Now the next question is whether on the facts of this case any bona fide dispute has been raised by the Company. From Company's side nothing was shown that the petitioner have demanded any amount more than what was agreed as per the agreed terms and conditions as mentioned in the agreement as quoted hereinbefore. After careful consideration of the submission and the materials disclosed before this Court it can safely be concluded that there is no bona fide dispute as regards the dues of the petitioning creditor. In my view mere filing of a suit is not enough to say that there is bona fide dispute as regards the claim of the petitioner or it is an abuse of process of this Hon'ble Court either. It is pertinent to mention that the Company did not make payment and, therefore, there is no scope to claim any alleged overcharged amount by the Company. It is also not acceptable that the Company will make full payment and thereafter raise a claim for refund of the alleged overcharged amount. Moreover, the petitioner's claim is based on the agreed contractual terms and as such there cannot be bona fide dispute as regards the claim of the petitioner. Thus, there is no scope to hold that this petition is an abuse process of this Court in any manner.

17. Different judgments were cited by the learned Senior Counsel appearing for the Company in support of their defence. There is no dispute as regards the proposition of law settled therein but in the facts and circumstances of the present case the same are not applicable. There is no doubt that the Company failed and neglected to pay the dues of the Petitioner Company.

18. It is pertinent to mention that when the three winding up applications were heard by this Court, the learned Counsel appearing for the Company took several adjournments for settling the matter and the parties also discussed in between themselves and ultimately a suggestion was made by the learned Senior Counsel for the Company that his client is agreeable to pay an amount of Rs.6.05 crores in full and final settlement of the claim made by the petitioner in the three winding up applications. However, it was submitted by the learned Senior Counsel that the Company would pay the aforesaid amount by easy installments

but it was submitted that they are not agreeable to pay any future interest for the period during which the installments would be paid. The learned Counsel for the petitioner submitted by producing documents that the Bank is charging them 15 per cent interest plus 2 per cent penal interest, which the Company should pay, and for this reason the proposal of settlement failed.

19. From the facts of this case it can safely be concluded that there is no bona fide dispute about the amount receivable by the petitioning creditor. That the purported defense as taken in the instant case is totally misconceived, sham and illusory and also not bona fide. It prima face appears that a sum of Rs.79,65,229.81 remained due and payable by the Company to the petitioner as on 15th March, 2010.

20. The Company is indebted to pay the sum claimed by the petitioner and, therefore, I prima face hold that the petitioner is entitled to get a sum of Rs.79,65,229.81 as detailed hereinbefore and interest at the rate of 15 per cent plus 2 per cent penal interest from the date of default until payment as well as overdue service charges at the rate of 1 per cent per month. The interest which is charged by the banker that is 15 per cent plus 2 per cent penal interest is fixed by this Court.

21. Therefore, this winding up application is admitted. The winding up application is to be advertised once in Telegraph and once in Bartaman. The notice of the advertisement may be shortened at the discretion of the Advocate on Record of the petitioning creditor, but should contain the essential information. Publication in the official gazette is dispensed with such publication is to be made within a period of six weeks from the date of passing this order. Let this application appear as Company matter new after eight weeks.

22. However, the Company is granted an opportunity to pay the dues as aforesaid by five monthly equal installments. First of such installment is to be paid by 15th February, 2012 and thereafter on the same date of each succeeding month. In case the installments are paid regularly and the dues are cleared then the order of advertisement would remain stayed permanently. In case any one of the installments is not paid the petitioner is permitted to publish the notice as directed hereinabove.

23. I make it clear that the findings and observations made in this judgment and order is restricted to this proceedings only.

24. Let urgent Xerox certified copy of this judgment, if applied for, be given to the learned Advocates of the parties on usual undertaking.