(1997) 10 SHI CK 0002

In the High Court Of Himachal Pradesh

Case No : Company Petition No. 1 of 1994

Essar Gujarat Ltd. (Steel Division) APPELLANT

Vs

United Ispat Udyog Pvt. Ltd. RESPONDENT

Date of Decision : 22-10-1997

Acts Referred:
Companies Act, 1956 — Section 433

Citation : (1999) 97 CompCas 842 : (1998) 1 ShimLC 402

Hon'ble Judges : P.K. Palli, J

Bench : Single Bench

Advocate : Deepak Gupta, for the Appellant; Sanjeev Walia, for the Respondent

Judgement

P.K. Palli, J.—This petition has been filed by the petitioner/creditor for winding up of the respondent-company under the provisions contained in Sections 433(e), 434 and 439 of the Companies Act, 1956.

2. The petitioner is a public limited company with its registered office at Surat (Gujarat) and is engaged in the production of iron and steel. The respondent-company placed orders for the supply of various products and the payment was to be made at the time of placing the order. It is averred that goods were supplied between June 25, 1991, and May 31, 1993, under various delivery challans and invoices. Details are given in the statement of account placed on record as annexure C. As per statement of account an amount of Rs. 74,94,262.37 is said to be due from the respondent to the petitioner. The respondent is said to have given various cheques from time to time in favour of the petitioner for the amount totalling to the out said above. The details are given in annexure D. The cheques are said to have been dishonoured by the bankers of the respondent as per annexure D placed on record.

3. Despite several letters written by the petitioner to issue demand drafts in lieu of dishonoured cheques, there was no improvement. The letters have been collectively placed on record as annexure E. According to the petitioner, the

issuance of the cheques by the respondent amounts to admission of its liability for the payments stated therein. The non-payment by the respondent amounts to its inability to pay its debt and reflects financial crisis. Interest is claimed at the rate of 24 per cent. per annum and is calculated at Rs. 24,42,660.69 from the date the said amount became due as on the filing of the petition.

4. Legal notice dated June 11, 1993, is said to have been served on the respondent. This notice along with acknowledgment due is annexed as annexure F. It is said that the company has become commercially insolvent and being unable to discharge its debts, it is just, equitable and necessary that it is wound up under the provisions of the above said Act.

5. In reply, the respondent has come up with the defence that the company suffered huge losses due to the substandard raw material supplied by the petitioner and there is a real dispute existing between them. It is said that the payment is not being made till the dispute is so settled and this petition is not maintainable and is incompetent for the realisation of the amount. It is said that it is wrong that the company is unable to pay its debts and should be wound up. It is also said that a lengthy and complicated litigation in various courts is already pending for the disputed demand in respect of supply of substandard material.

6. Mr. Deepak Gupta, learned counsel appearing for the petitioner, has brought to my notice the statement of account annexure C at page 27 of the record as well as other material showing the details of the cheques received, honoured as well as dishonoured. It is said that the petitioner is further entitled to interest at the rate of 24 per cent, per annum as agreed under the terms and conditions accepted by the respondent. Mr. Gupta further highlights that as per statement of account, the supplies continued to be made till the end of 1993, and debit and credit entries continued to be recorded till that date. It is also being said that some material got wet in transit, the same was inspected in the presence of the representatives of the respondent and a set off was given by the petitioner as calculated. Mr. Gupta has further laid stress on the fact that the respondent accepted the delivery of the goods, used them, sent the cheques which clearly amounts to the acknowledgment of the liability by the respondent and the dispute now being raised is not bona fide and the petition deserves to be admitted.

7. Mr. Sanjeev Walia, learned counsel representing the respondent, has brought to my notice the statement of account placed on record as annexure R-I and submits that in fact the cheques issued by the respondent were cancelled on account of defective supplies having been made. The respondent-company was put to huge losses and there was a debit balance of Rs. 3,29,184.86 to which the respondent is entitled to be reimbursed from the petitioner. Mr. Walia submits that from July, 1992, the supplies, besides being defective, were contaminated and mixed with water, moisture, mud, dust and other impurities and the matter was agitated and brought to the notice of the petitioner. To further highlight the

point, my attention has been brought to annexure R-2 which is the reply to the legal notice sent by the petitioner. Mr. Walia further contends that the cheques were issued in advance against booking of the orders against which no goods were supplied and were duly cancelled. The payment was stopped as the material sent was substandard.

8. Mr. Walia further contends that the respondent has never accepted its liability towards the petitioner and the correspondence annexure R-4 has been brought to my notice. It is said that the inspection was carried out in respect of the defective material and the inspection report is annexure R-5. The memorandum of understanding finally settled between the parties has been placed as annexure R-6 and a detailed settlement is annexure R-7 and annexure R-8.

9. It is further being highlighted by Mr. Walia that there is a running account between the parties and the pleadings raise a bona fide dispute and the petitioner be directed to resort to the remedy of civil suit and cannot be granted any relief by way of the present petition.

10. After having heard the learned counsel for the parties at length and on careful examination of the material placed on record, I find that fresh orders continued to be made till October 1, 1992. Letter dated February 18, 1993, at page 102 of the record reveals that the respondent-company informed the petitioner that they had sent cheques for Rs. 40.95 lakhs and Rs. 27.30 lakhs hut goods against those cheques were not despatched. It is further said that the goods received during this period were against the previous orders for which payment had already been made by way of cheques. Request was made that cheques be returned as they have stopped payment on account of non-execution of the purchase order. It may also be noticed that during arguments Mr. Walia made a reference to certain documents which were not on record. It was stated that these documents have been filed in the Registry. After the conclusion of the arguments, these documents were permitted to be placed and have been examined by me.

11. It is not denied that the representatives of the respondent-company were present when the defective raw material was inspected. A credit of losses was given to the respondent. It may be noticed that the petitioner informed about the dishonouring of the cheques and demand drafts were requested in lieu of the dishonoured cheques. Letter dated October 1, 1992 (annexure E) written to the respondent states that the statement of account along with copy of cheques worth Rs. 88,04,000 returned unpaid by the respondent. The company was asked to check up the accounts and make payment immediately. This was followed by another letter dated November 20, 1992, where the respondent-company was told that as per stalement of account there were outstanding dues for Rs. 1,14,01,052. It was further said that the respondent had promised to pay Rs. 35 lakhs by October 10, 1992, but no payment had been made till date.

12. There is a letter dated October 1, 1992, in respect of the purchase order

placed by the respondent and 27 cheques were enclosed aggregating Rs. 27.30 lakhs. The inspection report annexure R-5 is at page 113 of the record. Defects were found, observations and recommendations were made and thereafter a discussion followed between the parties and minutes of the meeting are placed as annexure 6 at page 115 of the record. The issue of payment was discussed. It was pointed out that the wet material to the extent of 600 MT was despatched in spite of written protest by the representatives of the respondent. In respect of the undisputed amount, it was agreed that supplies would be made during the week next and the remaining undisputed amount would be paid as early as possible depending on market conditions.

13. There is another important piece of evidence in the shape of letter dated December 24, 1992, by the petitioner in respect of the financial losses incurred in respect of wet material. Total loss was worked out at Rs. 2.01 lakhs on account of moisture, Rs. 0.94 lakhs on account of fines and mud, Rs. 2 lakhs as additional maintenance cost, Rs. 16.24 lakhs for increased consumption of electricity, Rs. 32.48 lakhs on account of reduced output and Rs. 19.49 lakhs on account of reduced sales realization. A debit note was consequently sent to finally settle the accounts.

14. It is not disputed that the material, though it had gone wet and was contaminated, was used by the respondent-company for which the petitioner gave benefit of the amount suffered by the respondent after proper calculations. Total loss of Rs. 73,15,970 was found and debited to the account. The details are given in letter dated February 3, 1993, from pages 120 to 125 of the record.

15. Both the parties have cited a number of judgments in support of their respective pleas. This judgment need not be burdened with the case law cited at the Bar as it is well-settled that a winding up petition cannot be stressed to seek enforcement for the realisation of debt where there exists a bona fide dispute. The company court is required to judge whether the defence put up by the company is bona fide and is in good faith. It was further to be kept in view that the defence is one of substance and the defence taken is prima facie likely to succeed. Both learned counsel for the parties relied on the statement of account which they have appended to their pleadings. It may be noticed that fresh orders continued to be made till October 1, 1992. Till this date the respondent never made any grievance to the petitioner in respect of defective and substandard supplies. The respondent-company in its reply to the petition has raised a dispute which, on the face of it, can be said to be an afterthought.

16. The defence now being raised from the side of the respondent does not appear to be bona fide. It is not disputed that their representatives were present at the time of both the inspections and the losses suffered were credited. I am further not impressed with the arguments raised by learned counsel for the respondent that there is a running account between the parties and for that purpose the remedy of the petitioner is by way of civil suit.

17. It is a settled proposition that the company court while hearing a petition u/s 433(e) has a summary jurisdiction. It has no power to assess evidence. The respondent is, thus, unable to show that the contentions being raised by it have any sound basis.

18. From the discussion made above it follows that the respondent is unable to pay its debt and the petition deserves to be admitted. However, in the interest of justice, I deem it proper to direct the respondent to settle the claim of the petitioner. The principal amount is directed to be paid along with upto date interest on or before January 7, 1998, failing which the petition is ordered to be advertised in the Daily Tribune as well as in the Government Gazette of Himachal Pradesh. The case is ordered to be listed thereafter for further proceedings.