
(1999) 04 PAT CK 0047

In the Patna High Court

Case No : Company Petition No. 4 of 1992

Ferro Alloys Corporation Ltd.

APPELLANT

Vs

Rajhans Steel Ltd.

RESPONDENT

Date of Decision : 01-04-1999

Acts Referred:

Companies Act, 1956 — Section 433, 434, 520

Citation : (2000) 99 CompCas 426

Hon'ble Judges : G.S. Chaube, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G.S. Chaube, J.—This company-petition under Sections 433(e), 434(1)(a) and 439(1)(b) of the Companies Act, 1956 ("the Act") has been presented for winding up of Rajhans Steel Ltd., a public limited company incorporated under the Act, having its registered office at Joraphatak Road in the district and town of Dhanbad and factory or worksite at Mihijam in the district of Santhal Parganas of this State, which has been arrayed in this petition as opposite party No. 1 and shall hereinafter be referred to as such. The petitioner is Ferro Alloys Corporation Ltd. a company incorporated under the said Act having its registered office at Sriram Bhawan Tumsar in Maharashtra and regional office at Everest House, Jawaharlal Nehru Road in Calcutta, and shall be referred to hereinafter as the petitioner-company.

2. The case of the petitioner-company is that pursuant to two separate orders, one dated March 22, 1984, and another dated April 6, 1984, placed with it by opposite party No. 1 for supplying ferro manganese and ferro silicon, the petitioner-company, which carries on business of manufacturing, selling and/or otherwise dealing in ferro manganese, ferro silicon and other ferro alloys, had supplied to the former at its worksite at Mihijam 12.090 M. T. ferro manganese and 8 M. T. ferro silicon on March 27, 1984, April 11, 1984 and April 17, 1984. While 7.020 M. T. ferro manganese and 5 M. T. ferro silicon had been supplied on

March 27, 1984, at the rate of Rs. 5,700 and Rs. 11,350 per M. T. respectively as per the agreement/supply order dated March 22, 1984, the remaining supplies of ferro manganese and ferro silicon on April 11, 1984 and April 17, 1984, were made at the rate of Rs. 7,050 and Rs. 12,750 per M. T. respectively as per the letter of agreement/supply order dated April 6, 1984. In terms of the agreements/supply orders including those respective packing charges, freight and payment of excise duty and Central sales tax, etc., the petitioner-company submitted to opposite party No. 1 six bills ; three for ferro manganese and the remaining three for ferro silicon for a total sum of Rs. 1,87,503.27 against the supplies made by it and received and consumed by opposite party No. 1 without any objection or demur. It is not necessary to refer to all the terms of supply except the one that opposite party No. 1 was to pay interest at the rate of 20 per cent. per annum for the overdue period if the bills were not paid within 30 days of the despatch of the materials.

3. It is the further case of the petitioner-company that against the said bills, opposite party No. 1 made payment to it to the extent of Rs. 80,885.28 on different dates and a sum of Rs. 1,06,617.99 on account of the price of the materials supplied remained, and is still, unpaid in spite of repeated demands. The petitioner-company sent letter dated December 19, 1986, to opposite party No. 1 through its advocate demanding payment from the latter of a sum of Rs. 1,95,805.03 which included Rs. 77,081.95 by way of interest and Rs. 12,105.09 on account of additional Central sales tax, besides the unpaid price of the materials supplied. When opposite party No. 1 did not make any payment even in spite of the statutory notice, the petitioner-company filed a suit for realisation of the same in the Calcutta High Court in its ordinary original civil jurisdiction, being Suit No. 1073 of 1987. While the said suit was still pending in the Calcutta High Court, the petitioner-company came to learn that besides that, the Board for Industrial and Financial Reconstruction (BIFR) has directed liquidation of opposite party No. 1, in Company Petition No. 1 of 1985R filed by one Eastern Oxygen Acetylene Ltd., for winding up of opposite party No. 1, this court had passed order on September 12, 1988, appointing the official liquidator for taking possession of the latter's property. Hence, this company petition for winding up of opposite party No. 1 was filed by the petitioner-company on September 29, 1992, because the latter is not in a position to pay its outstanding dues.

4. Notice of the company-petition having been served on it, opposite party No. 1 appeared and filed a counter-affidavit by way of show cause. In the said counter affidavit without disputing the allegation of the petitioner-company specifically respecting supplies of materials to it and unpaid price therefor, opposite party No. 1 has questioned the competence of the petition on the ground that the claim of the petitioner-company is "highly disputed" and time-barred ; still awaiting adjudication by the Calcutta High Court in the suit filed respecting the same. It has been further stated in the counter affidavit of opposite party No. 1 that the undertaking was established in the most backward area of this State of Bihar to provide employment to the local people but due to some financial

constraints, presently it has become non-functioning. However, after having failed in getting a favourable response from the Board for Industrial and Financial Reconstruction, attempt is being made for its rehabilitation with the help of the State Bank of India and preliminary discussions with the officers of the said bank have already taken place. Therefore, it has been urged that the company petition for winding up of opposite party No. 1 be dismissed.

5. At a subsequent stage, State Bank of India (opposite party No. 2 and to be referred to hereinafter as the bank) and Bihar State Industrial Development Corporation (opposite party No. 3) having major share in the company were added as parties to the petition on intervention petitions having been filed. While opposite party No. 3 has not filed any show cause, one has been filed on behalf of the bank questioning the maintainability of the petition on the grounds that the claim/debt of the petitioner-company against opposite party No. 1 is barred by limitation and that the petitioner-company having already instituted a regular suit on the original side of the Calcutta High Court respecting the same debt and the suit still remaining pending, a parallel proceeding by way of winding up of opposite party No. 1, i.e., the present proceeding is not permissible. The bank has also stated in its show cause that it is a major and substantial creditor of opposite party No. 1 inasmuch as it has advanced to the latter loans to the extent of Rs. 1,10,56,154,56 as on January, 1996 on hypothecation of the entire stock and raw materials, etc., and creation of equitable mortgage by deposit of title deeds, etc. As a matter of fact, it has also instituted a suit against opposite party No. 1 for realisation of its dues and the same is presently pending before the Debt Recovery Tribunal at Patna, Therefore, it has been urged that opposite party No. 1 should not be sent to liquidation for realisation of the debt of the petitioner-company.

6. Therefore, it is necessary in the backdrop of the facts stated above to decide whether the present company petition for winding up of opposite party No. 1 is maintainable and can be granted. Section 439 contains provisions as to applications for winding up. Clause (b) of Sub-section (1) thereof provides that an application to the court for winding up of a company shall be by petition presented, subject to the provisions of this section, inter alia, by any creditor or creditors including any contingent or prospective creditor or creditors. Section 433 enumerates the circumstances in which a company may be wound up by the court. According to this section, a company may be wound up by the court, among other things, (e) if the company is unable to pay its debts. Section 434 states the circumstances under which a company shall be deemed unable to pay its debts. According to Sub-section (1) of Section 434, a company shall be deemed to be unable to pay its debts--"(a) if a creditor by assignment 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 ;

(b) if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

There is no dispute regarding the fact that the petitioner-company has supplied certain materials to the opposite party-company as far back as in 1984, and submitted bills therefore to the extent of Rs. 1,87,503.26 and after part payments made thereagainst, a sum of Rs, 1,06,617.99 remained still unpaid. When that amount was not paid within the stipulated period, a legal notice through an advocate was served on opposite party No. 1 demanding payment of Rs. 1,95,805.03 including interest and additional Central sales tax, etc., because of failure by opposite party No. 1 to furnish Form No. C. That letter was sent on December 19, 1986. Therefore, the unpaid sum of Rs. 1,95,805.03 becomes a debt within the meaning of Section 434(1)(a), read with Section 439(1)(e), and the petitioner-company , being the creditor was entitled to present the petition for winding-up in view of the provisions of Clause (b) of Sub-section (1) of Section 439.

7. However, the law is by now well-settled that where a debt is bona fide disputed and substantial questions are raised, a petition for winding up of a company on the allegation that the said company neglects or omits without reasonable cause to pay its debt, is not maintainable even if the debt is otherwise admitted. In the present case, the claim/debt of the petitioner-company on account of materials supplied by it is not denied by opposite party No. 1. There is only a vague statement in the counter-affidavit filed by opposite party No. 1 that it is highly disputed. In other words, opposite party No. 1 has not denied that it owed to the petitioner-company money on account of the supply of materials to it by the latter.

8. However, it has been asserted that the debt or claim for non-payment of which the present petition for winding-up has been filed, is barred by limitation. This is what opposite party No. 2, namely, the State Bank of India, has also asserted in its show-cause petition on affidavit. It is submitted on behalf of opposite parties Nos. 1 and 2 that being barred by limitation the debt cannot be realised by filing a winding up petition because the money ceases to be a debt which can be realised by the intervention of a court of law.

9. It is undisputed that supplies were made and bills submitted on March 27, 1984, April 11, 1984, and April 17, 1984. Under Article 14 of the Limitation Act, 1963, the period of limitation for instituting a suit for price of goods sold and delivered, where no fixed period of credit is agreed upon, is three years from the date of the delivery of the goods. Article 15 of the Limitation Act prescribes the

same period of limitation for instituting a suit for the price of the goods sold and delivered to be paid for after the expiry of a fixed period of credit, but the limitation starts running when the period of credit expires. The case of the petitioner-company is that a period of 30 days from the date of the billing had been fixed for making payment failing which the buyer, namely, opposite party No. 1 was liable to pay interest at the rate of 20 per cent. per annum. Therefore, taking into account the provision of Article 15, the unpaid price could have been realised by intervention of the court in a properly instituted suit by April 27, 1987, May 11, 1987, and May 17, 1987, respectively, the supplies made and bills on March 27, 1984, April 11, 1984, and April 17 1984, respectively. However, it has been contended by the petitioner-company, and not denied by opposite party No. 1 that the latter had made part payment against the said bills and the last such payment was made on July 17, 1985. Section 19 of the Limitation Act provides that where payment on account of debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. Thus, Section 19 provides a fresh period of limitation in case of part payment of a debt to be reckoned from the date of such payment. As the last of the part payments was made by opposite party No. 1 on July 17, 1985, well within the prescribed period of limitation from the dates of the bills, a fresh lease of life was given to the debt of the petitioner-company. If computed with effect from June 17, 1985, the period of three years prescribed under Article 15 expired on June 17, 1988. Any claim preferred beyond June 17, 1988, for realisation of the debt by way of filing suit or otherwise stood barred. The present company petition was filed on September 29, 1992, that is, more than four years after the debt had become time-barred.

10. It has been contended by learned counsel for opposite party No. 1 and the bank that since the debt or claim of the petitioner-company was barred when the present company petition was filed, it is not maintainable and the prayer for winding up of opposite party No. 1 is to be rejected.

11. In the case of *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, the apex court has held that if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The apex court has held that 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. In other words, if the company sought to be wound up is likely to succeed in its defence on the point of law, like limitation, the winding up thereof, cannot be ordered. In the case of *M/s. Poddar Projects Limited Vs. M/s. Krishna Metal Industries Private Limited*, , the debt of the petitioner-company for which winding up of the company had been sought, was found barred by limitation. The Andhra Pradesh High Court held that the plea of the respondent that the debt is barred by time

under Article 15 is a substantial defence and, accordingly, it cannot be said that the defence is not bona fide. Hence, it was held that (page 366)..... "the petitioner cannot seek the relief of winding up since there is a prima facie case in the plea of the respondent that the debt is barred by limitation".

12. Mr. Pawan Kumar, learned counsel appearing on behalf of the petitioner-company, however, contended that the claim of the said company is not barred by limitation because well before the expiry of the period of limitation computed with effect from June 17, 1985, the petitioner-company instituted a suit in the Calcutta High Court respecting the said debt. Therefore, the debt on the basis of which the winding up of opposite party No. 1 is sought, shall be deemed to subsist when the present petition was presented in this court in 1992. In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner-company against opposite party No. 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that court cannot enure for the benefit of the present winding up proceeding. The debt having become time-barred when this petition was presented in this court, the same could not be legally recoverable through this court by resorting to winding up proceedings because the same cannot legally be proved u/s 520 of the Act. It would have been altogether a different matter if the petitioner-company approached this court for winding up of opposite party No. 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in Clause (b) of Sub-section (1) of Section 454. Therefore, since the debt of the petitioner-company has become time-barred and cannot be legally proved in this court in course of the present proceedings, winding up of opposite party No. 1 cannot be ordered due to non-payment of the said debt.

13. The present winding up proceeding is not maintainable and, therefore, is impermissible on yet another ground. Admittedly, respecting the same debt or the subject-matter, the petitioner-company has instituted Suit No. 1073 of 1987," on the original side of the Calcutta High Court. By order dated February 16, 1999, when this petition was taken up for hearing, counsel for the opposite party-company had undertaken to inform this court about the outcome of the suit filed by the petitioner-company in the Calcutta High Court on the next date to which the hearing was adjourned. On the adjourned date, counsel for the opposite party having failed to furnish such information, learned counsel for the petitioner-company undertook to inform this court about the outcome of the suit filed in the Calcutta High Court on the next adjourned date. Therefore, the hearing was adjourned to March 16, 1999. On that date nobody appeared on behalf of the petitioner-company. In the absence of any information that the suit filed by the petitioner-company in the Calcutta High Court was disposed of and, if so, in what manner, one is left with no option but to assume that the suit is still pending there. Admittedly, during the pendency of the suit in the Calcutta High Court for recovery of the debt against opposite party No. 1, the present company-petition for winding up of opposite party No. 1 was filed. The settled law is that

parallel proceedings should not be allowed to continue because multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigations. (As per Ram Sumer Puri Mahant Vs. State of U.P. and Others, and Jai Singh Vs. Union of India and Others, . In the last mentioned case it has been held by the apex court that the appellants cannot pursue two parallel remedies in respect of the same matter at the same time.

14. Learned counsel for the petitioner-company has also drawn my attention to an order of the Board for Industrial and Financial Reconstruction in Rajhans Steel Ltd., In re (Case No. 164 of 1989) under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. A copy of the order is to be found at pages 22, 23, 24 and 25 of the brief. From the said order it appears that an attempt to revive and rehabilitate opposite party No. 1 having failed, a bench of the Board for Industrial and Financial Reconstruction observed that it was just and equitable that Rajhans Steels Ltd. should be wound up. Therefore, it has been urged that in view of the provisions of Section 20 of the Sick Industrial Companies (Special Provisions) Act, opposite party No. 1 is bound to be liquidated. When this fact was brought to my notice, there was an attempt to find out if any such order had been received in the Registry of this Bench. The Registry having informed that no such order had been ever received even though purporting to have been despatched on August 7, 1990, the Registrar-General of the High Court at Patna was directed, vide order dated February 16, 1999, to enquire into the matter and sent the record to this court immediately. A reply was received in response to the communication that no such record was shown to have been received in the Registry there. Consequently, on February 23, 1999, there was a fresh order directing the Registry at Patna to make a thorough search in the office and trace out the record of the Board for Industrial and Financial Reconstruction and transmit the same to this court at the earliest. The record shows that on the request of the Registry at Patna, the Registrar of the Board for Industrial and Financial Reconstruction has faxed a copy of the proceedings of the Board for Industrial and Financial Reconstruction dated February 12, 1990, April 5, 1990, and July 18, 1990, and the same is available at flag F of the brief. However, even though a Bench of the Board for Industrial and Financial Reconstruction has recommended winding up of opposite party No. 1, the said company (opposite party No. 1) cannot be ordered to be wound up at the instance of the petitioner-company. Moreover, in para. 25 of the company-petition itself it has been stated that against the order of the Board for Industrial and Financial Reconstruction two appeals are pending before the Appellate Authority for Industrial and Financial Reconstruction u/s 25 of the Sick Industrial Companies (Special Provisions) Act. It is not known what is the outcome of those appeals. For this reason also this court cannot act at present on the basis of the recommendation of the Board for Industrial and Financial Reconstruction.

15. For the reasons stated above, the company-petition presented by the petitioner-company for winding up of opposite party No. 1 fails and the same is

hereby dismissed. In the circumstances of the case, there is no order as to costs.

16. The Registry is directed to ascertain from the Board for Industrial and Financial Reconstruction and/or the Appellate Authority for Industrial and Financial Reconstruction whether any appeal had been preferred to the latter against the order of the Board for Industrial and Financial Reconstruction as stated in para. 25 of the company petition and, if so, whether those appeals are disposed of and, if so, with what result. If the appeal or appeals were preferred and disposed of upholding the recommendation of the Board for Industrial and Financial Reconstruction, the Registry shall register a case for winding up of opposite party No. 1 on the basis of the documents at flag F. It shall be open to the petitioner-company to prove its debt in course of the liquidation proceeding pursuant to the recommendation of the Board for Industrial and Financial Reconstruction, if it happens to obtain any decree respecting the same from the Calcutta High Court in the suit filed by it and the decree still remaining unsatisfied.