(2013) 01 GUJ CK 0061

In the Gujarat High Court

Case No : Company Petition No. 68 of 2009

Ferro Spain S.A. APPELLANT

Vs

Sogo Ceramic Private Limited RESPONDENT

Date of Decision : 23-01-2013

Acts Referred:
Companies Act, 1956 — Section 433, 434, 439

Citation : (2013) 01 GUJ CK 0061

Hon'ble Judges : R.M. Chhaya, J

Bench : Single Bench

Advocate : A.C. Gandhi, for the Petitioners No. 1, for the Appellant; Vimal M. Patel, Advocate for the Respondent(s) No. 1, for the Respondent

Final Decision : Allowed

Judgement

R.M. Chhaya, J.—The present petition has been preferred by the petitioner u/Ss. 433, 434 and 439 of the Companies Act (hereinafter referred to as the Act) for appropriate order of winding up of the respondent Company - Sogo Ceramic Private Limited. It is contended by the petitioner that in course of business, the petitioner Company supplied the goods by way of two invoices being nos. (i) 2006706805 dated 31.3.2006 for an amount of Euro 70,462/- and (ii) 2006714570 dated 5.7.2006 for an amount of Euro 62,366/-. It is the case of the petitioner that both the invoices have remained outstanding and despite various reminders the respondent Company did not make any payment towards the aforesaid dues. It is further contended that as per the balance sheet of the respondent Company as on 31.3.2009 the respondent Company has incurred a loss to the tune of Rs. 8 crores with carried forward the loss of Rs. 13 crores. It is, therefore, contended that the respondent Company has lost its financial substratum and not a viable Company and therefore the respondent Company is not in a position to pay to its Creditors. It further appears from the record of the petition that in-spite of several correspondence between the petitioner and respondent Company with a request to make the payment of outstanding invoices, no payment was made. Thereafter, a statutory notice dated 15.3.2008 was sent through Advocate of the petitioner M/s. TCM & Associates, New Delhi raising demand of the outstanding amount with interest. It is contended that even though the notice has been duly served upon the respondent Company, the respondent Company neither replied to the said notice nor paid the outstanding dues of Euro 70,462/- and Euro 62,366/- respectively.

2. Heard Mr. Anip Gandhi for Mr. A.C. Gandhi, learned Advocate for the petitioner and Mr. Vimal Patel, learned Advocate for the respondent Company. Mr. Gandhi for the petitioner has submitted that as averred in the petition, the respondent Company has totally neglected to pay the outstanding dues of the petitioner Company. Mr. Gandhi relying upon the financial status as recorded in balance sheet in 2009 has reiterated that the respondent Company has lost its financial substratum. Mr. Gandhi further submitted that after the notice was issued by this Court the respondent Company has tried to come out with a new case that the respondent has relied upon three fax messages dated 18.5.2006, 14.11.2006 and 4.1.2007. However, no such fax messages have been ever received by the petitioner Company. Mr. Gandhi submitted that such a defence has been raised for the first time in the Affidavit-in-Reply which is filed in the present petition. However, at no point of time any such objection has been raised. No proof is produced on record by the respondent Company to show that such communications were ever received by the petitioner Company. Mr. Gandhi therefore contended that it is nothing but an afterthought. Mr. Gandhi, learned Counsel for the petitioner submitted that the petition deserves to be allowed.

3. As against this Mr. Vimal Patel, learned Advocate for the respondent Company has contended that the goods supplied by the petitioner Company were of inferior quality and the petitioner Company was informed about the same by fax messages dated 18.5.2006, 14.11.2006 and 4.1.2007 respectively. He therefore submitted that the petition is misconceived and same deserves to be dismissed.

4. Before considering the submissions made by the learned Counsels for the parties, it may be noted that while admitting this petition, this Court (Coram: Mr. Justice M.R. Shah) had passed the following order:

1. The present Company Petition has been preferred by the petitioner under Sections 433, 434 and 439 of the Companies Act, 1956 for an appropriate order of winding up of respondent- Sogo Ceramic Private Ltd..

2. It is the case on behalf of the petitioner that they supplied the goods in question vide two different invoices, total amounting to Euro 1,32,828, which is still outstanding by the respondent-Company. It is the case on behalf of the petitioner that despite various reminders, the respondent-Company has failed to make payments of the aforesaid dues. It is the case on behalf of the petitioner that as such by e-mail dated 10/02/2007, one Shri Atul Gandhi on behalf of the respondent-Company agreed to release Euro 70,462 by next Thursday or Friday and they agreed to pay the balance amount in instalment. It is further submitted

that as per the balance sheet, as on 31/03/2009, the respondent-Company has incurred loss of Rs. 8 Crores with carried forward loss of approximately Rs. 13 Crores, and, therefore, it is submitted that the respondent-Company is not a viable Company and not in a position to pay to its creditors.

3. The petition is opposed by Shri Vimal Patel, learned advocate appearing on behalf of the respondent-Company by submitting that as the goods were of inferior quality, payment was not made. It is submitted that vide communications dated 18/05/2006 and 14/11/2006, the petitioner-Company was informed with respect to the inferior quality of goods. It is submitted that the aforesaid communications were sent to the petitioner through Fax, and, therefore, it is submitted that when the goods were of inferior quality and when payment was not made, there is no reason to consider the present petition for winding up of the respondent-Company.

4. Shri Anip Gandhi, learned advocate appearing on behalf of the petitioner has submitted that as such the aforesaid two fax communications have not been received by the petitioner at all. It is further submitted that there is no proof produced on record by the respondent to show that the aforesaid communications, through fax, have been sent by the respondent-Company and received by the petitioner. It is further submitted that as such the aforesaid communications are nothing but an after thought, more particularly, when there was no reply filed by the respondent to the statutory notice, it is requested to admit the present petition.

5. Having heard the learned advocates appearing on behalf of the respective parties and considering the fact that the so called communications dated 18/05/2006 and 14/11/2006 addressed by the respondent-Company to the petitioner with respect to the alleged inferior quality of goods supplied by the petitioner, are reported to be not received by the petitioner and there is nothing is on record to confirm and/or prove that the aforesaid communications were sent by the respondent- Company and received by the petitioner and despite the service of statutory notice, admittedly the respondent- Company has not replied to the same, if at all there was any genuine objection with respect to the inferior quality of goods, communicated vide aforesaid communications, in that case, the respondent-Company would have immediately replied to the statutory notice, it appears that the aforesaid communications are nothing but an after thought as there is no reply to the statutory notice at all. Considering the balance sheet as on 31/03/2009, the respondent-Company has sustained/suffered loss to the extent of Rs. 8 Crores with carried forward loss of Rs. 13 Crores. Thus, it prima facie appears that the respondent-Company is a loss making Company and is not in a position to pay the debts to its creditors.

7. In view of the above, ADMIT.

8. Fixed for final hearing on 16/08/2010. Admission of the petition with the date of final hearing shall be published in two local newspapers i.e. ''Indian

Express'' (english daily), Ahmedabad edition and ''Phool Chab'' (gujarati daily), Rajkot edition. Publication in the government gazette is dispensed with.

5. It is further a matter of record that after the above order dated 21.6.2010 was passed admitting the present petition the same came to be advertised and published in two local newspapers i.e. ''Indian Express'' (English daily), Ahmedabad Edition and ''Phool Chab'' (Gujarati daily), Rajkot Edition. It may be noted that the petitioner Company has filed affidavit of service along with copies of advertisements. The defence has been put forward by the respondent Company to the effect that the petitioner Company was informed about the inferior quality of the goods supplied by the petitioner Company by three fax messages dated 18.5.2006, 14.11.2006 and 4.1.2007, however it is asserted by the petitioner Company that no such fax messages have been received and despite the opportunity being given, there is nothing on record to confirm and/or prove that the aforesaid communications were sent by the respondent Company and that the same were received by the petitioner Company. It is also worthwhile to note that even though the statutory notice was issued and same having been served upon the respondent Company, no reply was given and therefore the defence put forward by the respondent Company is nothing but an afterthought. On the contrary, it is on record that one Shri Atul Gandhi on behalf of the respondent Company by email dated 10.2.2007 agreed to release the payment. Even considering the balance sheet as on 31.3.2009, the same reveals that the respondent Company has suffered a loss to the tune of Rs. 8 crores with a carried forward loss of Rs. 13 crores. Thus, it appears that the respondent Company is a loss making Company and lost its financial substratum and the same also leads to only one conclusion that the Company is not in a position to pay debts to its Creditors. Considering the aforesaid facts and circumstances, it would be just and proper to direct that the respondent Company Sogo Ceramic Private Limited'' be wound up. Accordingly, the respondent Company Sogo Ceramic Private Limited'' is hereby ordered to be wound up. The Official Liquidator attached to this Court is hereby appointed as Official Liquidator of the respondent Company and the Official Liquidator is directed to take over possession of the entire assets of the respondent Company i.e. movable, immovable as well as Bank Account etc. The Official Liquidator is further directed to do the needful for winding up of the respondent Company as provided under the Act. The petition is allowed accordingly.

