(2007) 05 CAL CK 0047

In the Calcutta High Court

Case No : C.P. No. 77 of 2005

In Re: Siddharth Automobiles Ltd.

Date of Decision : 18-05-2007

Acts Referred:
Companies Act, 1956 — Section 433, 434, 439
Limitation Act, 1963 — Section 18

Citation : (2008) 82 SCL 277

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Ahin Chowdhury, Debangshu Basak, S.S. Bose and S. Roy, for the Appellant;S.B. Mukherjee, Sibaji Sen, S.N. Mukherjee and Kaushik Banerjee, for the Respondent

Judgement

Sanjib Banerjee, J.—The company disputes not so much the factum of indebtedness to the petitioner as the quantum thereof to resist admission of the creditor''s petition for having the company wound up. The company suggests that if accounts are required to be taken between the parties, that would have to be done in regular action and the winding up proceedings should await the result of such action.

2. The manufacturer seeks to realise the price of cars sold by it, on principal to principal basis, to its distributor and is met with the plea that till such time the company is given credit for commission due to it, the claim must wait. The company seeks commission but does not quantify it, possibly because upon quantification the entirety of the demand for commission can be subtracted from the petitioner''s claim and the remainder be found to be the admitted debt. The company raises the question of commission only to show that it had some form of counter-claim and urges that the citing of a counter-claim is enough to unsettle apparently settled accounts and resist a petition for winding up. Claims in rupees are resisted by counter claims in paisa and it is urged that till the exact excess of the rupees over the paisa is established, the petition cannot proceed to the next stage.

3. An old English judgment is referred to by the company to suggest that the purpose of the relevant provisions now found in Sections 433, 434 and 439 of the Companies Act is to wind up insolvent companies and to make them pay their debts so far as their assets would extend. Such provisions cannot be stretched, the company asserts, to take accounts between two solvent parties as in a regular civil suit.

4. The company relies on the principle established by Sir John Romilly, M.R., in Brighton Club & Norfolk Hotel Co. Ltd., In re 55 ER 873 which is summarised in the following lucid words:

Suppose the company said, ''We are now willing to pay the debt'', then this question would arise: What is the debt, what is really due to the Petitioner on the claim ? I must then take the accounts, and do the very thing which cannot be done except by bill, unless in cases where there is fraud and collusion, and I should thus take complicated and contested accounts, between solvent persons, under the powers of an Act of Parliament which meant to do nothing but to wind up insolvent companies and to make them pay their debts, so far as their assets would extend. Far from being insolvent, this company is carrying on a thriving business, which I am asked to stop, merely because there is a quarrel between the company and their contractor as to what is due to him.

5. That was the answer to a question found in the opening lines of the report in a matter where the frontiers of the relevant provisions, still in their infancy, were being tested:

This is a novel experiment, and if I acceded to the application, the consequence would be very serious to public companies. The meaning of the Act is this:- If a debt above ?50, which is not bona fide contested, be not paid or arranged within three weeks after demand, the Court may order the company to be wound up. It is not sufficient for a company to say, ''we dispute the debt'' they must show some reasonable ground for doing so. This is a bona fide contested debt, and, though more than ?50 appears to be due, I do not think that it is such a case as was intended by the Act.

6. The company uses the Brighton Club principle that has stood the test of time and a more recent authoritative pronouncement closer to home found in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, as its sheet anchor to ward off the creditor''s threat. The Supreme Court has recognised in Mediquip Systems (P.) Ltd. ''s case {supra) that the quantum of debt was of paramount importance as the company then would have a chance to weigh the option of offering security or altogether paying it off to arrest the progress of the winding up proceedings. The Supreme Court judgment, of course, did not consider the applicability of the test at the first of the two stages that the practice in this Court permits a creditor''s winding up petition to be resisted. But the lest would equally apply to the first stage where the parties now stand in these proceedings. In the practice followed by this Court, at the initial stage, a

prima facie view of quantum of indebtedness is taken and the progress of the petition to the second stage may be halted by the company taking up the option that is generally offered it of either securing the debt or paying it off so that the petition does not partake a representative character at the second stage. The company may as well feel hard done by the prima facie finding of the quantum of indebtedness at the preliminary stage and fight such finding at the subsequent stage where other creditors may jump in and such other creditors'' claims have also to be resisted or succumbed to.

7. The statutory notice of 18-12-2004 for a principal claim of Rs. 2,32,90,136.63 was met with a robust but pithy denial in the response of 17-1-2005. Advocate for the company referred to discussions between the parties and letters issued by the company on 5-3-2002, 18-3-2002 and 19-8-2002 and, "other letters". It was asserted that "it will be crystal clear that my client has also some dues from you which are due and outstanding". The statement of accounts on which the petitioner''s claim was founded, was disputed and it was suggested that the major portion of the claim was barred by limitation.

8. The petitioner has gone back a month before the first letter referred to by the company, as the starting point in support of its claim. The petitioner refers to its letter of 5-2-2002 and its assertion therein that as at 23-1 -2002, an amount of Rs. 3.03 crores remained due from the company - Rs. 2.67 crores in respect of vehicle sales and Rs. 36 lakhs on account of motor parts.

9. The petitioner has disclosed the three letters that find reference in the company''s response to the statutory notice and other contemporaneous correspondence. In the letter of 5-3-2002, the company referred to a meeting that took place in Chennai on 23-2-2002 and the petitioner having handed over a list of details of the outstanding amount and a list of returned cheques. The company proceeded to ultimately claim a sum of Rs. 37,37,517.92 against the petitioner''s admissible claim of Rs. 2,84,13,688.08 on the following terms:

We are enclosing a reconciliation Statement based on your outstanding list, which shows that we have to get Rs. 37,37,517.92 against your claim of Rs. 2,84,13,688.08.

From the enclosed reconciliation statement you will kindly note that several small amounts, totalling to Rs. 8,55,719.42 shown as due from us are not actually payable by us, since certain adjustments are pending at your end.

We have now every apprehension that similar smaller amounts from 1995 have been debited to, whereas the same should have been adjusted against legitimate claims.

Moreover, in our discussion with your Executives and other persons at Calcutta, it is found that different accounts are maintained at Ashok Leyland Ltd. Like Vehicle account, Spares account, ORC account, Bulk Incentive account, Deviation account, Discount account etc.

Since 1995, we have not received the Account statement of all the above accounts by which we can reconcile and ascertain the actual amount outstanding.

We would further like to mention here that since 1995 we have not received any of the Credit Notes from Ashok Leyland Ltd. by which we can know the earning of our dealership.

In view of above reconciliation enclosed herewith (which is prepared based on the outstanding list given by you during meeting at Chennai), it is found that we have to receive from Ashok Leyland a sum of Rs. 37,37,517.92.

10. Within a fortnight, a second letter followed from the company from which it is evident that the company acknowledged to be a nett debtor for a sum in excess of Rs. 60 lakhs. The company had offered to supply 15 vehicles to the petitioner of total value of Rs. 60 lakhs and proposed that if the petitioner forwarded the formal order therefor, supply would be effected by the company by adjusting Rs. 60 lakhs being the price of the vehicles against the sum due from the company to the petitioner. It does not appear that such transaction ultimately materialised but the petitioner relies on such letter to establish, lakh by laboured lakh, the indisputable amount due to it.

11. The petitioner next relies on its demands made in its letters of August 10 and August 12, 2002. In the first of the letters, the petitioner expressed anguish at the matter of payment not being taken forward by the company. In the second letter, the petitioner referred to the company''s proposal to clear dues of Rs. 2.84 crores and asserted that reconciliation of accounts had long been completed. Such second letter of 12-8-2002 needs to be noticed:

We refer to the meeting we had at Chennai on 23-2-2002 when a proposal to clear the overdues of Rs. 2.84 crores was discussed. The proposal envisaged sccuritisation of future receivables of Ravi Udyog Limited from mining operations, which would generate a cashflow of Rs. 35 lakhs per month for 9 to 12 months from L & T, Essel Mining and Ambuja Cements.

For this purpose you had agreed to organise meetings with L&T, Essel Mining and Ambuja Cements to crystallise the modalities. You had also agreed to pay to AL Rs. 60 lakhs before March 2002.

In this connection reference is invited to our fax dated 18-3-2002 urging you for committed action. In reply to our fax, you had promised Vide your letter dated 18-3-2002 to honour your commitment.

We understand from our RM (East) that the reconciliation of accounts has long been completed with your officials.

We are disappointed to note that despite repeated follow up from our side, you have not initiated any action either for clearance of overdues or for organising meetings with the cement companies as committed.

Our MD is unhappy about the lack of progress in your various commitments and has taken a very serious note of the same. We need to meet urgently to take stock of the total position. We therefore propose to hold a meeting in Chennai on any day between 20th and 23rd of August 2002 and would request you to confirm the date. Please forward to us any proposal you would like to discuss during the meeting so that we can firm up the same.

12. The company responded on 19-8-2002 citing the same grounds as found earlier in its letter of 5-3-2002 and seeking to enlarge the scope of the disputes against the petitioner''s claim of Rs. 2.84 crores. The material part of such letter is as follows:

We are in receipt of above referred fax message showing an amount due of Rs. 2.84 crores as was mentioned earlier also.

We have already written to you and informed your regional office several times for the accounts statement, so that a proper reconciliation be made, but nothing concluding could be done.

We refer to our letter dated 5-3-2002 reply and reconciliation awaited.

We enclose herewith a piece of paper signed by your Regional Accountant (East) mentioning a credit of Rs. 56,22,239 yet to be given to us.

According to this said piece of paper duly signed by your Regional Accountant actual due is Rs. 2,27,91,499.

Earlier we have also written you that there was an amount of Rs. 8,55,719.42 shown as due from us against different small balances which were actually not payable and certain adjustments were pending at your end.

We have now every apprehension that similar small balances and credit notes for ORC and different incentive amounts from 1995 have not been properly disclosed to us.

We never received the accounts statement having proper details of supply made, payment received, ORC allowed, incentives credited to us since 1995.

13. The petitioner also refers to two further letters of the company. One of 12-12-2002 and another of 3-5-2003 to suggest that the company always accepted that it was a nett debtor to the petitioner and had cited its financial stringency to keep the petitioner at bay. In the second letter the company referred to the cash constraints that it faced and promised that it was "trying to arrange some part payment against our dues to the tune of around 20-25 lakhs to you within a period of 6-8 months." The following two paragraphs from the earlier letter have been particularly emphasised by the petitioner:

As a matter of fact, we are very much interested to clear the liabilities on us for which we would like to get the required fund financed by Ashok Leyland Finance Ltd., in favour of our associate Company Ravi Udyog Pvt. Ltd. with your support. We would request you to kindly advice ALFUIN suitably for entertaining our proposals.

Should you have the time, the undersigned would like to meet you to discuss the above related matters and future opportunities. In the meantime, we would once again request you to kindly advice your Regional Officer, Calcutta to intimate to us the exact amount payable after appropriating all the amounts payable to us on account of ORC, service/bills/warranty claims etc. and also the settlement of LGT Associates and Progressive Constructions Ltd. We feel that after proper appropriation of the above receivables our liabilities will automatically decrease substantially.

14. The petitioner has placed its final cryptic demand of 9-12-2004 before issuing its statutory notice. The amount claimed in such letter is the same as the one claimed in the statutory notice except that the digits in the units and tens columns were interchanged.

15. The company cites several authorities as to the binding principles in matters of such nature and suggests that in the absence of a firm figure of debt being arrived at, the claim was too nebulous for the petition to proceed to the next stage. The company relies on the classical authorities cited by most companies in resisting a creditor''s petition: Bharat Vegetable Products Ltd., In re 56 CWN 29; Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, ; Company v. Sir Rameswar Singh AIR 1920 Cal. 1004; Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, ; Ofu Lynx Ltd. Vs. Simon Carves India Ltd., .

16. On facts the company refers to its letter of 5-3-2002, complete with the statement appended to it that did not find place in the petition. The details in the accounts may not be relevant as the conclusion from such account is found in the body of the letter quoted above. The company refers to hire purchase agreements found at pages 62 to 66 of its affidavit, all of the year 2001 and advance in four trenches of Rs. 26 lakh, Rs. 60 lakh, Rs. 32 lakh and Rs. 14 lakh made to the company in March and April 2001. The company seeks to demonstrate that such matters need to be gone into and it calls for accounts being taken for a figure to be firmed up thereupon.

17. The principles laid down by the high authorities cited by the petitioner are not in dispute. A solvent company would not be sent into liquidation upon it not being told of the quantum of its debt so that it may exercise an option of payment. A bona fide dispute, whether on facts or in law. requiring any enquiry at which the view put forth by the company could finally be taken, is enough to stop the creditor''s claim proceeding in a winding up action. If there is any doubt, the nature of the proceedings demands that the company be the beneficiary of such doubt. Such are, broadly, the principles that companies rely on in proceedings of this kind. There are principles also that creditors invoke and which apply with equal force. A mere assertion of a dispute or the denial of a claim is not enough, the prima facie bona fides thereof need to be demonstrated.

Creditors'' winding up petitions have also been recognised to be an equitable mode of execution. The Company Court will not merely stay its hands upon a cloak of dispute being thrown over a claim by the company, it will peep within to ascertain whether the company merely amuses itself in denying a claim or whether there is some substance to the denial. These principles are too well-recognised for precedents to be brought in their support.

18. The company unequivocally offered to supply vehicles of value of Rs. 60 lakh to the petitioner in March, 2002 on its clear understanding that at least such sum was due to the company even in the wake of its barrage of petty claims. The company has not been able to demonstrate that any further sum fell due to it at any subsequent stage that could detract from its admitted indebtedness to the extent of Rs. 60 lakhs as at March, 2002. There is no dispute that the company can demonstrate, far less a bona fide dispute, as to such quantum of indebtedness.

19. The company''s murmurs as to the claim being barred by limitation come unstruck upon its reply of 17-1-2005 to the statutory notice. There is undeniable acknowledgement of the jural relationship of debtor and creditor that Section 18 of the Limitation Act, 1963 wants for a fresh count of three years to begin upon such acknowledgement.

20. The company''s letter of 19-8-2002 pins its extent of indebtedness down to Rs. 2,27,91,449. Even if the adjustment of Rs. 8,55,719.42 as claimed in such letter is deducted from such figure, a sum in the region of Rs. 2.19 crores appears to have been recognised by the company as being payable to the petitioner. But the rest of the letter has to be seen wherein the company claims further adjustments of indeterminate quantum. What is to be remembered is that the company''s counter-claim is on account of adjustments that a dealer seeks by way of commission, incentives and concession from the manufacturer. Surely, such further adjustments as sought by the company, vague as they are, may pull down the petitioner''s claim by a few lakhs but cannot wish away the crores. On any generous estimate in the company''s favour, the remaining lakhs in excess of Rs. 2 crores may be sliced off the petitioner''s claim. If the company had indicated definitive figures, the undeniable part of the petitioner''s claim could be more exactly arrived at. But it appears to be a part of the company''s strategy to make a vague assertion in the hope that the undetermined quantum of indebtedness would help it better to resist the petition.

21. The company partly succeeds for leaving its counter-claim vague. However strong an impression the Company Court may carry, summary proceedings do not permit a detailed investigation. But whatever benefit the company can obtain from the cloud of doubt, that it had raised, it would not be uncharitable to require it to secure, in cash with the Registrar, Original side, a sum of Rs. 1.5 crore in addition to the payment of Rs. 60 lakhs to avoid the petitioner from inviting other creditors of the company to join in and prey upon it.

22. The petition is admitted for the sum of Rs. 2.10 crores (Rs. 60 lakhs plus Rs. 1.5 crore) on account of principal together with interest at the rate of 8 per cent per annum on the principal sum of Rs. 60 lakhs from 18-3-2002 as by a letter of such date the petitioner unconditionally offered to supply vehicles of value of Rs. 60 lakhs and sought to adjust it against the sum due in its books to the petitioner.

23. If the company pays a sum of Rs. 60 lakhs, together with interest as aforesaid, to the petitioner within six weeks from date and furnishes cash security of Rs. 1.5 crore to the Registrar, Original side of this Court for the same being deposited in the highest interest-bearing deposit within eight weeks from date, the petition shall remain permanently stayed. In such event the balance claim of the petitioner, save to the extent of Rs. 60 lakhs and interest thereon, will stand relegated to a suit and the deposits in the name of the Registrar, Original Side will stand to the credit of the suit if such suit is instituted within four weeks from date of the security being furnished to the satisfaction of the Registrar. If either the sum of Rs. 60 lakhs with interest thereon is not paid to the company within six weeks from date or the security of Rs. 1.5 crore is not furnished within eight weeks from date, the petition will be advertised once in" The Telegraph" and once in "Jansatta". Publication in the Official Gazette will stand dispensed with. The advertisements should indicate that the matter would be returnable on the next available court day four weeks after the date of publication.

In the event, the petitioner fails to file the suit within time indicated, the company will be at liberty to seek discharge of the security.