

(2015) 10 CAL CK 0066
In the Calcutta High Court
Case No : C.P No. 86 of 2014

In the matter of : Concast Exim Ltd., Re: R.A.V. Dravya (P) Ltd.

Date of Decision : 16-10-2015

Acts Referred:

Companies Act, 1956 — Section 433, Section 434, Section 439

Citation : (2017) 200 CompCas 323

Hon'ble Judges : I.P. Mukerji, J.

Bench : Single Bench

Advocate : Mr. Abhrajit Mitra, Sr. Adv., Mr. Jishnu Chowdhury, Ms. Noelle Banerjee and Mr. Dipak Kr. Dey, Advocates, for the Company; Mr. Samit Talukdar, Sr. Adv. Mr. Jishnu Saha, Sr. Adv. Mr. Hashnuhana Chakraborty, Mr. Debjyoti Manna and Mr. Aniruddh Poddar, Advocates, for the Petitioner

Final Decision : Disposed Off

Judgement

I.P. Mukerji, J. - These are winding up applications U/S 433, 434 and 439 under the Companies Act, 1956. The transactions which are the subject matter of these applications are very similar. All the above applications can be disposed of by this common judgement and order. As far as the facts are concerned, I will narrate those of C.P.No.86 of 2014, In the matter of: Concast Exim Ltd, Re: R.A.V Dravya (P) Ltd.

2. This winding up application is founded on a sale transaction which took place between the parties between July, 2011 and August, 2011. In this period, according to the averments made in the petition, the petitioning creditor sold and delivered to the Company diverse quantities of iron and steel materials. Delivery would be at the godown of the petitioning creditor. The goods were accepted and consumed. Invoices of the value of Rs.6,18,91,744/-, were raised by the seller on the buyer. A table showing the details of all those invoices together with the copies of the invoices are annexed to the petition. Copies of the value added tax returns showing payment of this tax on the entire quantity of goods is also annexed to the petition.

3. A statutory notice dated 11th December, 2013, U/s 434 of the said Act, was

issued by the petitioning creditor to the Company, asking them to pay up the above invoice value together with interest @ 24% per annum, within three weeks from the date of the notice, failing which the petitioning creditor would be constrained to initiate winding proceedings against them.

4. It is an admitted fact that the Company neither paid what was demanded of them nor bothered to reply to the statutory notice.

5. On the failure of the Company to reply to the said statutory notice a presumption of insolvency arises by the operation of Section 434 (1)(a) of the said Act.

6. The claim in the winding up petition is for Rs. 10, 41, 13, 301.99 inclusive of interest.

7. In fact in paragraph 14(f) of the Affidavit in Opposition of the Company affirmed on 24th July, 2014 it admitted the transaction.

8. If one considers the nature and weight of evidence brought on record by the petitioning creditor, regarding the sale and delivery of these goods, one would immediately tend to form an opinion that the petitioning creditor is entitled to summary judgement.

9. Points in defence have been taken in the Affidavit in Opposition of the Company, as follows. It is a part of a group of eight Companies. The seven other Companies are Concast Ispat Ltd., Concast Bengal Industries Ltd., Dankuni Steel Ltd., Concast Steel and Power Ltd., Concast Vyapar Ltd., Sureka Exports Ltd. and Concast Global Ltd. These Companies are engaged in trading in iron and steel materials. One Sanjay Sureka controls these Companies. He is the Director of the respondent Company and of Concast Bengal Industries Ltd. He is also the Chairman of the group. All the members of the group are to be taken as one entity.

10. The petitioning creditor is also a member of a group of industries, the other Companies being Ram Swarup Vyapar Ltd. and Ram Swarup Industries Ltd. They are controlled by the Jhunjhunwala family. The group is known as the Ram Swarup Group of Companies and is to be taken as one entity.

11. From a table consisting three sheets of papers being Annexure-"I" at pages 529 to 541 of the Affidavit in Opposition, it is shown that Concast Bengal Industry Ltd. between 2nd January, 2009 and 9th March 2009 sold and delivered a total quantity of 12,273,656/- metric tonnes of iron of the value of Rs. 29,99,12,219/-, the gross value of which was Rs. 31,19,08,705/-. The corresponding invoices have also been annexed and marked as Annexure-"J". Value added tax (VAT) returns are also annexed to the Affidavit in Opposition to show that VAT had been disclosed on the above sale. Mrs. Banerjee, Learned Advocate assisting Mr. Mitra for the respondent Company submitted that the entire value added tax was paid by the company. The value added tax return was for the period from 1st January, 2009 to 31st March, 2009. The total value added

tax paid by the respondent was over Rs.10,00,000/- (Rupees Ten Lakhs), she said.

12. She also submitted that the price receivable by the petitioning creditor in respect of the said sale of goods by them to the Company between July 2011 and August 2011, was set off by the company against the price receivable by them for the sale made in 2009. This was shown by one confirmation of account dated 31st December, 2011, which is Annexure-"L" at page 561 of the Affidavit in Opposition. After balancing, a sum of Rs. 2,17,17,439/- was shown to be due and payable by the petitioning creditor to the company.

13. Mr. Saha on reply denied that the Companies referred to in the Affidavit in Opposition of the company could be called group companies or that the transactions were made between the petitioning creditor and the companies which were said to comprise the group, on the understanding that they were being treated as one entity for the purposes of the transaction. Mr. Saha maintained that the transactions which were being referred to by the respondent company in their Affidavit in Opposition were between the petitioning creditor and Concast Bengal Industries Ltd. The transactions which were the subject matter of the winding up the petition were between petitioning creditor and Concast Exim Ltd. which was altogether a different entity from Concast Bengal Industries Ltd. The transaction which the petitioning creditor had with Concast Exim Ltd was separate from those between the petitioning creditor and other companies with Concast Bengal Industries Ltd. Both should not be clubbed together for the purpose setting up the defence in this winding up application.

14. The alleged transactions which according to learned Counsel for the petitioning creditor had with Concast Bengal Industries Ltd. were between January, 2009 and March, 2009. It was most astonishing that no proceedings were taken to realise the price of goods sold and delivered by Concast Bengal Industries Ltd. to the petitioning creditor Concast had to wait till the winding up petition was filed in 2014, and claim a set off in respect of transactions which took place between the petitioning creditor and Concast Exim Ltd, learned counsel submitted. Learned Counsel also argued that since Concast Exim Ltd. and Concast Bengal Industries Ltd. were different juristic entities the petitioning creditor could maintain this winding application for non-payment of the price of goods sold and delivered them to Concast Exim Ltd. irrespective of whether Concast Exim Ltd. have received payment for the goods allegedly goods sold and delivered by them to the petitioning creditor.

15. Furthermore, the adjustment the company was seeking was equitable set off. According to Mr. Saha the remedy of equitable set off lies when the transaction is the same. This relief cannot be availed of in respect of a transaction of 2009 on a claim made in a winding up petition in 2014 in respect of goods supplied by the petitioning creditor between July, 2011 and August, 2011.

16. In the company petition C.P. No. 89 of 2014, the transaction was between

Concast Global and the petitioning creditor. The invoice value was Rs. 6,06,56,729.12/-. The total claim made in paragraph 21 of the petition was Rs. 10,20,35,779.20/-. In C.P. No. 91 of 2014, the transaction was between Dankuni Steels Limited and the petitioning creditor. The invoice amount was Rs. 6,19,86,110.16/-. The total claim in paragraph 21 of the petition is Rs. 10,42,72,042.73/-.

17. In the winding up application C.P.No-88 of 2014, the sale was in similar circumstances by the petitioning creditor in favour of Concast Ispat Ltd. The total invoice value was Rs. 6,41,23,335.12/-. The total claim as claimed in paragraph 21 of the petition was Rs. 10,78,67,248.36/-, inclusive of interest.

18. It was stated in paragraph 23 of the Affidavit in Opposition that during the subject period the Ram Swarup Group had sold goods worth Rs. 29,01,91,266/- to the Concast Group, while the Concast group sold goods worth Rs. 31,19,08,705/- to the Ram Swarup Group. Therefore, the Concast Group was entitled to receive a sum of Rs.21717439/- from the Ram Swarup Group.

19. In my opinion, the cross transactions appear to be real. There is no evidence brought on record by the petitioning creditor to show that it ever made any payment for the goods supplied by Concast Bengal Industries Ltd. in 2009. Ordinarily if Concast Exim Ltd. is seen as a different entity than, Concast Bengal Industries Ltd., the petitioning creditor would have a separate cause of action against Concast Exim Ltd. In that event this winding up application would be maintainable. There is no record to show that Concast Bengal has taken out any action in respect of the said transaction against the petitioning creditor.

20. Whether the Concast companies are to be taken as group companies or a single entity for adjudging the liability of each of these companies towards the petitioning creditor is to be seen.

21. The provision in the Companies Act 1956, namely, Section 370 (1) (B) does not really answer the controversy. The said Section refers to the circumstances when two companies might be treated to be under the same management. Now, two Companies may be under the same management and yet be completely different business entities or it may be under the same management and be one company in all respects, because a single Shareholder or Director controls the affairs of each of these companies.

22. We are familiar with the expression "Lifting of the Corporate Veil". Sometimes it is necessary to pierce the exterior of the Company and examine what is inside or "lift the veil" and see who is the real person behind it. The Corporate veil is removed to identify the person who controls the company wearing the corporate cloak. This is necessary to find out who is the person behind the actions of the company, the fault of the company and also to locate the real seat of the company. Lifting the corporate veil is necessary to detect fraud and crime. The doctrine of lifting of the corporate veil is being increasingly used in modern times to scrutinize corporate action. This concept was beautifully

analysed by Mr. Justice S.C.Agrawal in *New Horizons Ltd. and Another v. Union Of India and Others* reported in (1995) 1 SCC 478, cited by Mr. Mitra for the Company. Mr. Justice Sanjib Banerjee in: *In the Goods of: Kamal Kumar Mitra deceased And In the Matter of: Taxation Services Syndicate Ltd., In re* reported in 2008(3) CHN 384 also cited by Mr. Mitra has remarked. "Courts are more prone now than ever before to disregard the veil and go straight at the controlling mind without stopping to question the propriety or necessity of piercing the veil."

23. We are told in the Affidavits in Opposition that Mr. Sanjay Surekha controls the Concast group of companies mentioned in that affidavit whereas the Jhunjhunwalas control the Ram Swarup Group of Companies. Whether each of the companies with the name Concast is so associated with Sanjay Surekha that he could be said to be the controlling mind of these companies can only be investigated on affidavit. It would also have to be seen whether Mr. Jhunjhunwala similarly controlled Companies described as the Ram Swarup Companies.

24. It has to be ascertained that the real arrangement was between Jhunjhunwala and Surekha. The goods would well be sold and bought by companies controlled by them. These companies would only be acting as a front. These facts can only be established on affidavit.

25. As of now, there is prima facie indication that Concast Exim Ltd. and Concast Bengal Ltd. were part of the same group and controlled by the same person. It also prima facie appears that the price payable on supply of goods to one company was adjusted against price payable by it for goods received by it from the other company.

26. Now, let us analyse the legal principles. A company is liable to be wound up if it is unable to pay its debts. Now, how does a Court adjudge that a company is unable to pay its debts.

27. A winding up application is made by affidavit, setting forth the claim of the petitioning creditor. Annexed to the petition are documents to substantiate the claim. The documents are photocopies. If so desired by the company the petitioning creditor has to give inspection of the original. The defence is also in the form of an affidavit with copy documents annexed. Similar inspection can be taken by the petitioning creditor.

28. The judgement of the Supreme Court in *M/s. Mechalec Engineers & Manufacturers v. M/s Basic Equipment Corporation* reported in AIR 1977 SC 577 is very relevant. What are the circumstances in which the Court trying a summary suit grants a decree or grants leave to defend or grants leave to defend subject to certain terms and conditions to the defendant are elucidated in this judgement. In fact, this judgement follows an ancient decision of this Court *Smt. Kiranmoyee Dasi v. Dr. J. Chatterjee* reported in (1945) 49 CWN 246. The principles are these:-

"8.(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence."

29. In *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries (P) Ltd.* reported in AIR 1971 SC 2600, the Supreme Court held that if the Company raises a defence in good faith or a defence which is likely to succeed or prima facie likely to succeed at the trial, in that event the winding up application would fail.

30. Sir George Jessel Master of the Rolls in *London and Paris Banking Corporation* reported in 19 Equity Cases 444 said that the Company should have reasonable ground for not paying the debt of the petitioning creditor, to avoid liquidation proceedings.

31. Ajoy Nath Ray, A.C.J, in *SRC Steel Pvt. Ltd. v. Bharat Industrial Corporation Ltd.* reported in 2005 (4) CHN 343 opined that in a winding up application the Court had to come to the conclusion that the claim of the petitioning creditor was indisputable. This determination had to be final and not prima facie, at both stages of winding up, the admission stage and the trial stage. At the admission stage it was final and conclusive as between the petitioning creditor and the Company but at the final hearing stage it was conclusive between the petitioning creditor, the company, the creditors and all other persons who joined the winding

up.

32. The standard of proof required by the petitioning creditor to prove his case in the winding up application is the same standard that is required to prove a plaintiff's case in a summary suit. (see SRC Steel Pvt. Ltd. v. Bharat Industrial Corporation Ltd. reported in 2005(4) CHN 343).

33. The company must be in a completely defenceless position. It would suffice if the company raised a triable issue, for relegation of the winding up application to a civil forum.

34. From the discussion of the facts above, it is absolutely clear that the company has been able to prima facie establish a strong case that the goods that the petitioning creditor shipped were in fact in lieu of payment for the goods shipped to them by Concast Bengal in 2009. Both the shipments have been proved by invoices, delivery, payment of VAT and so on. But there is no evidence of either party making payment of the price. There is also strong evidence produced by the company to show that each of the companies of the Concast Group was a part of one entity and carried on business as one entity. Shipment of goods by the petitioning creditor in 2011 was sufficient to extinguish its liability for the goods that it received in 2009.

35. The argument regarding equitable set off is premature, in my opinion. It has to be seen, upon scrutiny of the evidence at the trial whether the arrangement between the parties was such that the setting off took place at the time of the transaction or was it pleaded for the first time in the affidavits in opposition. That would determine whether the set off was legal or equitable and whether it could be claimed.

36. Having advanced a substantial defence there is no question of a winding up order being passed. The defence is so substantial that I am not even inclined to ask the company to provide security.

37. This winding up applications are disposed of, by refusing to admit the same and relegating the petitioning creditor to a civil remedy as available to it. The period during which these winding up applications have been pending in this Court may be excluded to compute limitation under Section 14 of the Limitation Act, 1963.

38. All findings and observations are to be taken as prima facie.

39. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.