

(1993) 04 DEL CK 0005

In the Delhi High Court

Case No : Civil Petition No. 13 of 1987

Karam Chand Thapar and Brothers (Coal) Sales Ltd.

APPELLANT

Vs

Acme Paper Ltd.

RESPONDENT

Date of Decision : 23-04-1993

Acts Referred:

Citation : AIR 1994 Delhi 1 : (1996) 86 CompCas 636 : (1993) 51 DLT 439 : (1999) 27 DRJ 440 : (1993) RLR 522

Hon'ble Judges : J.K. Mehra, J

Bench : Single Bench

Advocate : I.S. Mathur, Rajesh Goel and Pinki Anand, for the Appellant;

Judgement

J.K. Mehra, J.

(1) This petition for winding up has been filed on the basis of the claims which the petitioner company has against the respondent company for the price of the goods sold and neither to it, the petitioner used to procure the sole against payment from the collieries on the permits issued in favor of the respondent company and supply that coal to the respondent. In the year 1983 the respondent company ran into thing financial difficulties and its factory was closed our the petitioner on the date of the closure of the factory had to recover from the Respondent a sum. of Rs. 1,94,487,70 whereon the petitioner had claimed interest @ 22% per annum which till 31st March 1986 came to Rs, 98,328.58p. Before the closure of the factory the petitioner approached the respondent for the payment of its use and as a consequence of certain telephonic discussions the respondent wrote to the petitioner on 2nd March 1984 reading as under:-

"THIS refers to our Today"s telephonic talk regarding payment of coal dues of about Rs.2.30 lacs. First of all, we are extremely sorry for the delay in payment caused due to some unavoidable circumstances at our end resulting in blockage of funds. However, we appreciate your co-operation all along and assure you that we would be able to make payment of your dues by the end of

March 84 or earlier if possible. Therefore, we request you to please bear with us for this period and oblige."

(2) Subsequent thereto the respondent again wrote to the petitioner on 22nd June, 1984, a copy of the said letter is annexure "D" to the petition offering to pay the outstanding amount of the petitioner amounting to Rs-2.21 lacs plus interest, by paying Rs.20,000.00 initially on 30th June, 1984 and thereafter Rs.25,000.00 every fortnight. But no payment was made. This letter was followed by a letter from the petitioner of 29th June 1985 where with copies of the ledger account for the years 1983-84 and 1984-85 up to 21st June 1985 were sent to the respondent. The petitioner further offered in view of the respondent's closed operation to take back the coal. This offer of return of coal was apparently accepted by the respondent vide its letter of July 2, 1985. When the petitioner attempted to remove the coal tie was not permitted to do so and this fact was duly communicated to the respondent vide petitioner's letter dated 11th July, 1985 wherein it is communicated that the Collector of Sehore did not allow lifting of the coal from the respondent's Mills Coal Yard. Thus the respondent neither paid for coal nor could return it to the petitioner. The petitioner again wrote on 30th July, 1985 calling upon the respondent to make the payment. This letter was duly acknowledged by the respondent vide its letter of 3rd August, 1985 wherein they once again expressed their helplessness and pointed out. "Once the mill Reopens and starts functioning, action will be taken to send you payment. Kindly bear with us till then Following this a notice u/s 434 of the Companies Act was sent by the petitioner respondent on 29th August, 1986. No payment was made in response to the said notice in fact the respondent took a complete summersault and for the first time the claim in the petition was disputed in the reply to the notice vide letter of respondent's lawyer dated 24th September, 1986.

(3) Having thus failed to recover its dues the petitioner filed the present petition for winding upon 16th February, 1987. After the winding up petition had been filed in this Court which has been pending for quite some time, I am told that the petitioner has also instituted a civil suit being Suit No. 1357/88 filed in May, 1988 with a view to save the claim getting time barred. The petition has been resisted mainly on two grounds, firstly, that making of the offer for the return of the goods and its acceptance by the respondent amounts to novation of the contract and that there is no liability to make payment for the goods thereafter; and secondly that the present petition is not maintainable because a civil suit has already been instituted for the recovery of the said amount.

(4) I have heard both counsel at length and find that the offer to take back the goods from the respondent was by way of a concession to the respondent which the respondent had accepted and even if it is assumed that it was a separate contract in substitution of the earlier one the same became incapable of performance/enforcement on account of the public authorities non-cooperation and inability of the respondent to return the goods. This position is impliedly

accepted by the respondent as when the fact was brought to its notice by the petitioner and in reply where to the respondent again requested the petitioner to bear with it and promised to pay once the factory starts functioning. Thus reverting to the earlier position. Therefore, I do not find any merit in this plea. In any event, no such plea was ever raised in reply to notice u/s 434 of the Companies Act. In fact this plea was for the first time taken in reply to the show cause notice only. The only plea and that too raised for the first time in reply to the notice, was that of abandonment of claim for money by the petitioner by virtue of his having made an offer to take back the goods without adverting to respondents assurances to pay even after its failure to return the goods. In other words the plea of the respondent appears to be that whether or not the goods can be returned, the respondent stood absolved of its liability to pay or return those goods. Such a situation cannot be accepted.

(5) The second plea raised in defense is that the petitioner has since filed a civil suit and the amount due to the petitioner is yet to be ascertained after proper trial of the suit and that the winding up petition cannot go on after the suit is instituted. Counsel for respondent has cited in support of this contention an authority of this Court in the case of *Traders Bank Limited v. Kwick Travel Pvt. Ltd.* reported as 1988 (2) C.L.J. 56. that case does not help the respondent. That was a case where the suit had been filed earlier and during the pendency of the suit the petition for winding up was filed by the petitioner. In fact the Court itself had acknowledged as correct the views expressed in the case of *Central Bank of India v. Sukhani Mining And Engineering Industries Pvt. Ltd. & Others* reported as 1987(47)Comp cas 1 wherein Patna High Court had come to the conclusion that the winding up petition which had already been filed would not be stayed merely because the creditor had filed a suit against the company. It was observed in that case as Under- There is no provision in the Act which ousts the jurisdiction of the Court in continuing and deciding the winding up proceeding in spite of the fact that there is a suit by creditor for the realisation of his debt. If the Legislature had intended that on account of the fact that a suit or proceeding has been filed in another Court, the court in seisin of the winding up application will stay the winding up proceeding on that ground alone, there would have been a provision to that effect in the Companies Act. However, there is no such provision because a winding up proceeding is not merely for the benefit of the petitioner but of all its shareholders, creditors or contributories, Therefore, merely because a creditor has filed a suit against the company the winding up proceedings cannot be stayed."

(6) The Learned Single Judge has placed reliance on the case of *Amainamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami & Another* reported as 1965(35) Comp Cas 456 where Hon"ble Supreme Court had held that:- "A petition presented ostensibly for a winding-up order; but really to exercise pressure will be dismissed, and under the circumstances, may be stigmatized as a scandalous abuse of the process of the Court. At one time, petitions founded on disputed debt were directed to stand over till the debt was established by

action if however, there was no reason to believe that the debt, if established would not be paid. the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order."

(7) In that judgment the Supreme Court clearly laid down that if the debt is not disputed on some substantial ground, the Court may decide it on the petition and pass order accordingly. That is the case here. The entire correspondence referred to above clearly shows that the amount payable to the petitioner was not once but repeatedly acknowledged as due and payable by the respondent and it was accompanied by promises to pay. I have already held in the case of Shri V. K. Jain v. M/s. Richa Laboratories (P) Limited in C.P. 159 of 1988 that if during the pendency of winding up proceedings a suit was filed by the creditor to avoid the institution of the suit getting barred by limitation the proceedings for winding up will not be invalidated. To the same effect was another judgment in the case of State Bank of India Vs. Hedde and Co Ltd reported as 1987 (62) Comp Cas 239.

(8) In the light of the above discussion, I hold that a prima facie case of the respondent's inability to pay its debt has been made out by the petitioner. Another factor which cannot be lost sight of while considering the petition for winding up proceedings is that the respondent company has not been doing any business ever since 1985. Its factory is lying closed and admittedly the officers of the respondent company have no access to the factory premises.

(9) In the light of the above discussion I admit the petition and order a citation to be published in daily "Statesman", "Jansatta" and "Delhi Gazette" for 27th September, 1993. It will be a further condition of this order that if the amount is paid by the respondent within nine weeks from today the citation will not be published.