

(1998) 03 P&H CK 0162
In the Punjab And Haryana At Chandigarh
Case No : C.P. No. 63 of 1997

Madhur Food Refrigeration

APPELLANT

Vs

Roadmaster Foods Ltd.

RESPONDENT

Date of Decision : 26-03-1998

Acts Referred:

Companies Act, 1956 — Section 433, 434, 439

Citation : (2000) 101 CompCas 329 : (1998) 119 PLR 369 : (1998) 3 RCR(Civil) 178

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Kamal Sehgal, for the Appellant; Bahadur Singh, for the Respondent

Judgement

Swatanter Kumar J.—This petition under sections 433, 434 and 439 of the Companies Act, 1956, filed by Madhur Food Refrigeration, a partnership concern with the prayer to order the winding up of Roadmaster Foods Limited hereinafter referred to as the respondent-company. The claim of the petitioner is that the respondent-company had approached the petitioner for supply of chilled milk to its factory at 18 KM Stone, Ghaziabad, Hapur Road, Ghaziabad. The milk supplies in pursuance of the said demand were effected from September, 1995, during the period 1995-96. The petitioner was raising bills for the supplies effected from time to time and as on April 4, 1996, the debit balance of Rs. 20,65,930 was confirmed by the respondent-company in furtherance of which various demands were made by cheque. Some of them were dishonoured. Fresh cheques were issued in lieu thereof which were encashed even as late as on January 29, 1995. The last cheque which was for Rs. 95,000 was encashed. It is further averred that the accounts were again reconciled on February 4, 1997 and payment due to the extent of Rs. 2,01,373.70 was found due and payable. This statement of account was confirmed. The petitioner claimed interest and served the notice u/s 434 of the Companies Act on February 13, 1977, which was duly served upon the respondent-company to clear the said liability within a period of 21 days from the date of the receipt of the notice. Having failed to recover the amount, the

present petition for winding up of the company has been filed.

2. Upon notice, the respondent appeared in this court and filed a detailed reply. The case of the respondent is that there were short supplies effected by the petitioner and suddenly they stopped the supplies after December 10, 1996, as a result of which losses have been suffered in terms of the agreement between the parties by the respondent-company. They claimed to have issued a debit note on January 31, 1997. They admitted that a sum of Rs. 30,527 is due and payable to the petitioner from the respondent-company which they are willing to pay. From the above narrated facts it is clear that the parties are not at dispute with regard to the basic fact. It is admitted that supplies were made and also that substantial payments were made. The dispute is only with regard to the supplies remaining unpaid the defence for which is issuance of debit note on account of losses leaving admittedly a credit balance to the petitioner to the extent of Rs. 30,527. It must be noticed at the very outset that even a sum of Rs. 30,527 was not tendered or paid to the petitioner-company in spite of notice u/s 434 of the Companies Act. The only dispute which has to be gone into at this stage is whether the dispute or the stand taken by the respondent-company is bona fide and is apparently supported by record which would take the present case outside the jurisdiction exercisable by the company court while entertaining the petition for winding up. It has been specifically averred in the petition and the notice u/s 434 of the Companies Act, served upon the respondent-company that the debit balance which was confirmed between the parties through Bhupinder Rastogi accountant of the respondent was Rs. 20,69,930. It is further averred that various payments were made thereafter towards this admitted liability. Some of the cheques were returned unpaid and the respondent-company had issued several cheques in lieu thereof. The last cheque was issued on January 29, 1997, for sum of Rs. 95,000 drawn on State Bank of India, New Delhi, which was encashed on presentation. At this stage it will be pertinent to note a specific contention of the petitioner-company which was first made in the notice served upon the respondent-company u/s 434 of the Companies Act and thereafter in the petition relating to confirmation of the amount by a person not less than the Deputy General Manager Finance of the respondent-company on February 4, 1997. In paragraph 7 of the petition, the petitioner has stated as under :

"That thereafter the petitioner made several visits/representations to the respondent-company for release of the payment of the dues, but the respondent failed to pay the same S. P. Goel, Deputy General Manager (Finance) of the respondent-company came to the petitioner-factory on February 4, 1997, when the matter was discussed and accounts were shown to him. He verified and tallied the same with respondent-company's account and after verification a sum of Rs. 2,01,373.70 was found to be due and payable by the respondent. The said Goel signed the statement of account as acknowledgement of this being due amount. A copy of this statement of account bearing signatures of S. P. Goel is annexed herewith as annexure P-3."

3. An identical averment was made in paragraph 4 of the notice annexure P-5 to the main petition. The respondent-company did not specifically dispute these averments in the notice and opted to give a very vague and indefinite reply. Reply to para. 7 of the petition in the written statement filed on behalf of the respondent-company reads as under :

"That contents of para. No. 7 are denied being incorrect. As mentioned in the preliminary objections, the petitioner had been getting the details of supply of milk only in good faith from the respondent on the plea that the account of short supply shall be settled towards the end of the year and in fact had a mala fide intention but the respondent had been giving and signing the statement of account in good faith in respect of total current supply only and the said statements have been used now against the respondent intentionally."

4. It is clear from the above reply that the statement of accounts of April, 1996, as well as dated February 4, 1997, annexures P-1 and P-3 annexed to the petition were signed by the responsible officer and even payments in furtherance of such statement of accounts were made by the respondent-company. What was the occasion to give the statement of account in good faith when an officer of the rank of Deputy General Manager, Finance goes to the office of the petitioner to confirm the accounts. It is expected that he would have acted with due diligence and care and some sense of responsibility. It is very difficult to believe at this juncture that the confirmation by Rastogi and Goel was merely in good faith and has to be overlooked for all purposes and intents. The reply given by the respondent-company to the notice does not spell out any definable stand which can be termed either bona fide or a just cause for declining to pay the amount which at one point of time or the other was admitted by the respondent-company.

5. The whole plea taken by the respondent-company is that in terms of the agreement subsisting between the parties breach was attributable to the petitioner as a result of which the respondent-company was entitled to issue debit note. The stand of short supply and abrupt stoppage of supply by the petitioner can be treated to be a breach prima facie constituting a valid and proper defence for the respondent-company would depend only on the terms and conditions of the alleged agreement. This is strange that in spite of this specific stand the copy of the alleged agreement has not seen the light of the day so far. The alleged agreement or terms and conditions thereof have neither been pleaded in the written statement nor any document has been annexed thereto which could throw some light in this regard. The agreement at least prima facie would be the best evidence. The party which has pleaded the agreement and alleges execution of such agreement ought to have produced the agreement in the court. Failure on the part of the respondent-company to produce any agreement or even a document analogous to an agreement would obviously result in drawing an adverse inference against the respondent-company at least at this stage. The court would have to presume that no such agreement existed. Furthermore in the replication filed it has been stated that upon payment of the

amount by way of cheque in January, 1997, even if the respondent-company had any claim in regard to the alleged short supply it had waived the same by its conduct or otherwise. The confirmation of the statement of account on February 4, 1997 showing the credit balance of Rs. 2,01,377.70 wipes out the alleged grievance in their entirety. In fact the said document is an unequivocal admission on the part of the respondent-company. In the absence of an agreement it is the conduct of the respondent-company which would be a material factor in determining the controversy in issue. The aforesaid pleadings seen in the light of the documents produced on record clearly show that the defence raised by the respondent-company is neither bona fide nor genuine. Furthermore the admitted liability was also not cleared by the respondent-company in spite of the notice. This shows that the conduct of the respondent basically lacks bona fides. To avoid the action for winding up a company, the company must not only have a bona fide dispute to the claim raised against the company but such a defence must have a substance and likelihood of its being accepted by the courts at least prima facie at this initial stage. These well enunciated principles have been reiterated by the Hon'ble Supreme Court of India from time to time and were expressed in the following words in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., :

"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."

6. A Division Bench of this court in the case of Straw Board Manufacturing Co. Ltd. v. Mahalakshmi Sugar Mills Co. Ltd. [1991] 71 Comp Cas 544 following the above principles also indicated that where the claim of the petitioner/guarantor is bona fide it would be an additional consideration for entertainment of such a petition.

7. In other words a sham or a dispute which is raised for the sake of raising a dispute cannot constitute a bona fide or substantial defence. The defence which is raised in good faith and is of substance would have to be prima facie supported by specific averments of disputes and not by a mere imaginative denial of debt. The expression debt has been given a wider meaning and would obviously include a claim by a creditor based on documents. This would become even art admitted debt once documents showing such admissions are placed on record. Inability on the part of the company to pay such debt and its avoidance would normally fall within the mischief of the provisions of sections 433 and 434 of the Companies Act.

8. In view of the aforesaid discussion and settled position of law I am of the considered opinion that the respondent-company has failed to pay its admitted liability and in fact has intentionally avoided even to clear its liability. Consequently I direct that this petition for winding up be admitted. Notice of admission be published in the Tribune, Jansatta, and Official Gazette of the State

of Punjab in accordance with the rules. The respondent shall be given at least 14 days notice before the next date of hearing.

9. List the case for further proceedings and directions on May 8, 1998.