(1989) 12 P&H CK 0017

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 82 of 1982

Maruti Ltd. (in Liquidation) and Another — APPELLANT

Vs

Parry and Co. Ltd. — RESPONDENT

Date of Decision : 18-12-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6
Companies Act, 1956 — Section 446

Citation : (1991) 70 CompCas 663 : (1990) 97 PLR 476

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : J.S. Narang, for the Appellant; Ravi Kapoor, for the Respondent

Final Decision : Dismissed

Judgement

G.R. Majithia, J.—Facts leading to the filing of this petition u/s 446 of the Companies Act, 1956 (for short, "the Act"), read with Rule 9 of the Companies (Court) Rules, 1959, briefly, are that petitioner No. 1 was ordered to be wound up by an order dated March 6, 1978, passed in Company Petition No. 126 of 1977, which was presented on May 16, 1977. Petitioner No. 1 was acquired by petitioner No. 2 by virtue of the Maruti Limited (Acquisition and Transfer of Undertakings) Act, 1980 (Act 64 of 1980) (hereinafter referred to as "the 1980 Act"), along with the right, title arid interest excepting the liabilities of the company ordered to be wound up. Petitioner No. 1 had business dealings with the respondent-company and it opened a running account of the respondent on June 23, 1972. Petitioner No. 1 and the respondent continued to have business transactions till January 14, 1976, on which date the credit-debit balance was struck and it was found that the respondent was liable to pay Rs. 10,168 to the petitioners. A notice of demand was sent to the respondent on March 30, 1978, calling upon it to pay the amount of Rs. 10,168.80 with interest at the rate of 12% per annum from the date the amount fell due, within 7 days of the receipt of the notice, failing which legal proceedings shall be initiated against it. The respondent company, in its reply to the notice sent, vide letter dated April 14, 1978, admitted that a sum of Rs. 10,000 was due to petitioner No. 1, but it claimed that since the declaration in Form C was not supplied by petitioner No. 1 as required under the Central Sales Tax Act, 1956, it was" entitled to deduct excess sales tax. The respondent company deducted an amount of Rs. 5,269.35 out of the amount due and remitted the balance amount of Rs. 4,730.65 through cheque to the petitioner-company. The petitioners had claimed a sum of Rs. 18,099 inclusive of interest in this petition.

2. The respondent, in its written statement, maintained that the alleged credit-debit balance struck on January 14, 1976. by the petitioner is factually incorrect. It was further pleaded that petitioner No. 1 had placed an order with the respondent for supply of 11 KV/0. 433 KV--1000 KVA Kir-loskar make transformers, vide Ref. No. C/672/4998, dated June 23, 1972. As per Clause 5 of the order, the purchaser had to pay 3% surcharge and to provide Form C to cover the sales. In the purchase order, Central sales tax registration number of petitioner No. 1 was quoted to show that petitioner No. 1 was a registered dealer under the Central Sales Tax Act and was entitled to make purchases at the concessional rate of tax. Petitioner No. 1 also made purchases in pursuance of its order dated June 23, 1972, vide Bill No. 33440032, dated September 10, 1974, for Rs. 61, 500 with tax liability of Rs. 5,150, and Bill No. 33300733, dated May 30, 1975, for Rs. 1,326.14 with tax liability of Rs. 119.35. As the purchaser, as per terms mentioned in the purchase order dated June 23, 1972, was supposed to send the declaration in Form C no tax was charged from it. The respondent waited for the declaration in Form C but the same were not supplied by petitioner No. 1. The respondent was left with no other alternative but to adjust the tax liability of Rs. 5,269.35 and send the balance amount of Rs. 4,730.65 to petitioner No. 1, vide letter dated April 14, 1978. The respondent maintained that, after the payment of this amount, nothing is due from it to the petitioners.

3. From the pleadings of the parties, the following issues were framed :

1. Is an amount of Rs. 10,168.80 as principal due from the respondent?

2. Is the petitioner-company entitled to recover an amount of Rs. 7,931 as interest at the rate of 12% per annum up to the date of riling of the petition ?

3. Are the petitioners entitled to future interest at the rate of 12% per annum ?

4. Is the claim of the petitioners barred by limitation ?

5. Is the petition not maintainable without obtaining sanction of this court ?

6. Relief.

4. Vide order dated March 30, 1984, issue No. 1 was recast and it reads as under :

"Whether the respondent-company was entitled to adjust the amount of Rs. 5,269.35 against sales tax which it had to pay because of non-issue of Form C by the petitioner-company to it ?"

5. Issue No. 4 was referred to a larger Bench by the learned company judge, vide order dated July 11, 1986, and the following question of law was referred for adjudication :

"Whether the relevant date to determine whether the petition u/s 446(2) of the Companies Act is barred or not would be the date on which the winding up order was passed or the date on which the petition under the said section was moved ?"

6. The Bench, vide order dated February 4, 1988, answered the question thus 316 Comp Cas 66) :

"In view of our above observations, we are of the considered view that the period of limitation for an application making a claim u/s 446(2) of the Act on behalf of the company, which is being wound up, shall commence from the date of the winding up order and the period from the date of commencement of the winding up of the company to the date the winding up order is made, both inclusive, and a period of one year immediately following the date of winding up shall be excluded in computing the period of three years provided by Article 137 of the limitation Act."

7. In view of the authoritative decision by the Bench, issue No. 4 is answered in favour of the petitioners and against the respondent.

8. Issues Nos. 1 and 2. --The parties are in unison that a sum of Rs. 10,000 was due from the respondent. The respondent claims that petitioner No. 1 did not furnish the declaration in Form C and as a result thereof, it had to pay excess sales tax amounting to Rs. 5,269.36 and after adjusting this amount out of the amount due, the balance amount of Rs. 4,730.65 was remitted to petitioner No. 1 by cheque, vide letter dated April 14, 1978. These facts have been succinctly pleaded in para 5 of the written statement, The petitioners filed a replication to the written statement. The averments made in para 5 of the written statement were not denied. It will be useful to refer to the averments made in para 5 of the written statement and to the corresponding paragraph of the replication :

Para 5 of the written statement :

That the contents of para 5 of the petition under reply are not correct and hence denied. The alleged debit-credit balance on January 14, 1976, and marked as annexure P. 1 is also factually wrong and its correctness is denied. The petitioners are put to strict proof. The exact position is that after a lot of negotiation, Maruti Limited placed an order with the respondent for supply of 11 KV/O. 433 KV--1000 KVA Kirloskar made transformers, vide Ref. Ntf. C/672/4998, dated 23rd June, 1972. The copy of the letter is attached as annexure R-I. As per the terms contained in Clause 5 of the order dated 23rd June, 1972, placed by Maruti Limited for the purchase of transformers the purchaser had to pay 3% surcharge and provide Form C to cover the sales. In the said order, Central sales tax registration number of Maruti Limited was quoted to show that Maruti Limited is a registered dealer under the Central Sales Tax" Act and was entitled to make purchases at the concessional rate of tax. That Maruti Limited, as mentioned in the petition, made so many purchases and they had always been sending Form C as per the terms of order R-1. That, subsequently, they made purchases in pursuance of order, R-l, vide Bill No. 3340032, dated September 10, 1974, for Rs. 51,500 with tax liability of Rs. 5,150 and Bill No. 33300733, dated May 30, 1975 for Rs. 1,326.14 with tax liability of Rs. 119.35 respectively. As the purchasers as per terms mentioned in the purchase order, annexura R-1, were supposed to send the declaration in Form C therefor, no tax was charged from them. The respondent waited for the declaration in Form C from Maruti Limited for quite some time and sent them reminders, verbal as well as in writing, but did not receive the same. Finally, when the respondents were not supplied with the required declaration in Form C, they were left with no alternative but to adjust the tax liability of Rs. 5,269.35 and send the balance amount of Rs. 4,730.65 to Maruti Limited, vide letter dated April 14, 1978, attached with the petition as annexure P. 5 and made a full and final settlement of accounts between the parties. This amount of Rs. 5,269.35 had to be paid against additional demand made by the concerned assessing authority with regard to the above-referred bills. The reminders for sending the declaration in Form C, correct statement of accounts between the parties and the assessment orders for the years 1974-75 and 1975-76 are at present not available with the respondent and will be placed on the record at a later stage. Under the circumstances, the respondent was justified in adjusting the said amount from the running account of Maruti Limited with the respondent."

Para 5 of the replication :

"That the contents of para 5 of the written statement are not admitted as they have been stated therein and in reply the contents of para 5 of the petition are reiterated. In any case, it is the admission of the respondents that the adjustment was admittedly made after the passing of the winding up order which is not permissible according to the provisions of the Companies Act, 1956. The respondents are entitled to file their claims in accordance with the provisions of the Companies Act, 1956, and, in any case, are not entitled to make the adjustments after the company had been ordered to be wound up as the winding up order commences from the date of filing of. the petition. Thus, no adjustment could be made after the petition had been filed and especially after the winding up order had been passed. The adjustment is, therefore, not admitted as the same has been claimed without any justification under law and facts of the case."

9. There was no denial that an order was placed by petitioner No. 1 on the respondent for supply of 11 KV/0. 433 KV--1000 KVA Kirloskar make transformers, vide Ref. No. C/672/4998 dated June 23, 1972, and that petitioner No. 1 was a registered dealer under the Central Sales Tax Act and was entitled to make purchases at a concessional rate of tax. The supply was made as per the purchase order but the declaration in Form C was not supplied by petitioner No.

1 to the respondent and thus towards the excess liability of sales tax, the respondent deducted Rs. 5,269.35 out of the amount due to petitioner No. 1. When a plea is not specifically denied in the replication, an inference can be drawn that the same was impliedly-admitted. A seller, in the absence of declaration in Form C, has to pay sales tax at a higher rate and for the excess payment, it is entitled to claim a set-off. Since petitioner No. 1 was a registered deafer under the Central Sales Tax Act at the time the purchase order was placed with the respondent, the respondent must have impliedly presumed that the petitioner would furnish declaration in Form C to enable the respondent to pay sales tax at a lower rate than what it will otherwise be liable to pay. The petitioners'' plea that the respondent cannot claim set-off in this petition and the remedy, if any, lay before the official liquidator, is not supported by law. The Supreme Court of India, after consulting the High Courts in exercise of powers conferred in Sub-sections (1) and (2) of Section 643 of the Act, framed rules cited as the Companies (Court) Rules, 1959 (for short, "the Rules"). Clause (4) of Rule 2 defines the term "Code" as meaning the Code of Civil Procedure. Rule 6 ibid provides that, save as otherwise provided by the Code or by these-Rules, the practice and procedure of the court and the provisions of the Code so far as applicable shall apply to all proceedings under the Act and these Rules. The proceedings under the Act will be regulated by the procedure prescribed under the Code save as otherwise expressly provided. Rule 6 of Order VIII of the CPC deals with the defendant''s claim to set off any demand in suit for an ascertained sum of money legally recoverable. In the absence of any contrary provision, the provisions of Rule 6 of Order 8 of the Code will be attracted. The defendant/ respondent is entitled to claim set off in a suit for recovery of an ascertained sum of money filed against it, provided both the parties fill the same character and the amount claimed by way of set-off does not exceed the pecuniary limits of the jurisdiction of the court and the suit is for a certain sum of money legally recoverable. The written statement containing particulars of the payment sought to be set off will have the effect of a cross-suit and the courkhas to pronounce its final judgment in respect both of the original claim and of the set-off. The respondent is entitled to claim set off of the excess sales tax paid by it and after accounting for the excess sales tax the respondent has remitted the balance amount of Rs. 4,730.65 to petitioner No. 1. The payment was received by petitioner No. 1 without any condition. Thus, there is no escape from the conclusion that the respondent was entitled to adjust the amount of excess sales tax of Rs. 5,269.35 which it had to pay because of non-issuance of Form C by petitioner No. 1. Issue. No. 1 is decided in favour of the respondent.

10. In view of my finding under issue No. 1, the petitioners are not entitled to claim any interest* as the claim for the same is not sustainable at law. Issue No. 2 is decided against the petitioner and in favour of the respondent.

11. Issue No. 3 : In view of my finding under issues Nos. 1 and 2, there is no escape from the conclusion* that the petitioners are not entitled to claim any future interest. This issue is decided against the petitioners.

12. Issue No. 5 : There is no impediment for the petitioners to maintain the present petition. The official liquidator has been appointed. The company has gone into liquidation. However, the present petition, at the instance of the official liquidator, is maintainable. Issue No. 5 is thus answered in favour of the petitioners and against the respondent.

13. In view of my finding under issue No. 1, this petition fails and is dismissed. However, the parties are left to bear their own costs.