

(2011) 08 AP CK 0077

In the Andhra Pradesh High Court

Case No : Company Petition No. 184 of 2003

M/S. Surat Goods Transport Service

APPELLANT

Vs

M/s. Golkonda Engg. Enterprises Ltd.

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Carriers Act, 1865 — Section 8
Companies (Court) Rules, 1959 — Rule 10, 95
Companies Act, 1956 — Section 433, 434(1), 439(1)

Citation : (2011) 08 AP CK 0077

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sri Justice B. Seshasayana Reddy

1. By this; company petition under Sections 433(c), 434(1)(a) and 439(1)(b) of the Companies Act, 1956 read with Rule 95 of the Companies (Court) Rules, 1959, the Petitioner, M/s. Surat Goods Transport Service, a Partnership Firm registered under the Partnership Act (hereinafter referred to as "Petitioner"), seeks an order of winding up against the Respondent-M/s. Golkonda Engineering Enterprises Ltd., a public limited company having its registered office at Surya Towers, S.P. Road, Secunderabad (hereinafter referred to as "Respondent"). The Respondent company is one of the Group companies of. M/s. Surana group having functional and financial integrity.

2(a). The Petitioner is doing business of transportation of goods of the customers as per the orders placed by them from time to time. The Respondent deals in manufacture and sale of steel, strips, and cables etcetera. The Respondent engaged the Petitioner in transportation of its material/goods from one place to another. The Petitioner opened a running account in respect of transactions with the Respondent. As and when the Respondent availed the transport service of the Petitioner on credit, the Petitioner debited the freight charges to the account

of the company and credited its accounts as and when the Respondent made payments. During the course of business transactions, the Respondent company became due in a sum of Rs. 7,12,269/- towards freight charges to the Petitioner. The Respondent is also liable to pay interest at the rate of 21% p.a., on delayed payment as per Clause (2) of the bills raised by the Petitioner against the Respondent. Thereby, the Respondent became indebted to the Petitioner firm in a sum of Rs. 7,12,269/- towards principal amount and Rs. 2,99,152/- towards interest.

2(b) The Respondent company is one of the Group Companies of Surana. There is a functional and financial integrity between the Respondent company and M/s. Surana Strips Ltd. M/s. Surana Strips Ltd., on behalf of the Respondent, admitted the liability of the Respondent in a sum of Rs. 6,11,437/- and Rs. 1,00,832/- under letter dated 15.11.2001. Since the amount due was not paid in spite of repeated requests, the Petitioner got issued a legal notice dated 14.2.2003 to the Respondent as required under Sections 433(e) and 434(i)(a) & (2) of the Companies Act, 1956 (for brevity, "the Act") demanding an amount of Rs. 7,12,269/- together with interest at 21% p.a. As the acknowledgments were not received, the Petitioner got issued another legal notice dated 6.5.2003 to the Respondent, which was acknowledged under reply dated 29.5.2003. It is stated by the Petitioner that in the legal notice dated 6.5.2003, amount due and liable to be paid was wrongly mentioned as Rs. 5,01,533/- instead of Rs. 7,12,269/- and as such; a corrigendum was issued on 23.6.2003 correcting the amount due as Rs. 7,12,269/-. According to the Petitioner, the Respondent, having admitted its liability, did not pay the amount due. As on 30.9.2003, a sum of Rs. 10,11,421/- was found due and payable by the Respondent, thereby, the Respondent company became commercially insolvent warranting an order of its winding up.

3. Notice to the Respondent came to be ordered on 01.12.2003. The Respondent entered appearance and filed counter.

4. It is stated in the counter that an amount of Rs. 1,50,000/- paid by the Petitioner was not credited to the account of the Respondent. The statement of account filed by the Petitioner is false and the Respondent is not liable to pay interest at the rate of 21% p.a., on delayed payments. The amount claimed by the Petitioner has been denied. The Respondent has not received the legal notice dated 14.2.2003 said to have been sent by the Petitioner demanding payment of Rs. 7,12,269/- together with interest at 21% p.a. The Respondent received the legal notice dated 6.5.2003 for which a suitable reply has been issued to the Petitioner. The Petitioner failed to deliver 70 boxes of jointing Kits under each of the two LR Nos. 028587 and 029588 dated 11.10.2001 to the consignee. The Petitioner withheld the material for want of payment of certain amounts alleged to have been due and payable. The Petitioner has also not delivered Plastic Insolated copper wire worth Rs. 8,00,000/- to the consignee, i.e., Paramount Cables situated at Delhi. The Respondent company has a counter claim against

the Petitioner to a tune of Rs. 14,19,404/- being the value of the material, i.e., 70 boxes of jointing kits. The Petitioner cannot be permitted to link the liability of one company of Surana Group to the liability of the Respondent company since each company has got separate entity, as per the provisions of the Act. The Respondent company being one of the Surana Group Companies is not denied. M/s. P.M-Telecom, one of M/s. Surana Group Companies, on 11.10.2001 booked consignment of jointing kits TSF-2 to be delivered to SDE, (SD), Ghatkopar, Mumbai through the Petitioner. In each lorry, 70 boxes containing jointing kits worth Rs. 6,75,192/- were transported. The Petitioner failed to deliver the consignment to the consignee. The Petitioner, vide its letter dated 13.11.2001, addressed to M/s. PM Telecom (Surana Group of Companies) stated that the consignment of 70 boxes of Jointing Kits booked under LR Nos. 028587 & 28588 have been retained in exercise of its right to recover the unpaid dues of all the companies stated therein. The Respondent requested the Petitioner to deliver the withheld material immediately, since the contract with the consignee-MTNL, Mumbai was time bound and it's non-delivery within time, the contract may be cancelled. The Respondent assured the Petitioner with regard to payment of freight charges and requested for release of the consignment. The Petitioner demanded down payment of Rs. 10,00,000/- and balance in four cheques along with interest. Since the Respondent expressed its inability to pay the same at lump sum, the Petitioner did not release the said consignment resulting in loss of the contract with SDE (SD), Ghatkopar, Mumbai. Till date, the consignments have not been delivered causing loss of Rs. 14,19,404/- to the Respondent being the cost of the material. The Petitioner also complained to the Transport Association against the Respondent and its" group companies claiming freight charges of Rs. 16,76,867/-. The Association had not settled the issue in view of the counter claim of the Respondent. The Respondent sent one more consignment of Plastic Insolated copper wire contained in three drums to be delivered to Paramount Communications situated at New Delhi under Central Excise Challan Nos. 498, 499 & 500 dated 31.12.2000 and 01.01.2001. The Petitioner delivered the consignment neither to the consignee nor returned to the Respondent. The value of the said consignment is approximately about Rs. 6,00,000/-. The Petitioner is liable to pay the value of the consignment sent to MTNL, Mumbai and the value of the material sent to Paramount Cables, New Delhi, both worth of Rs. 20,19,404/- together with interest as per Section 8 of the Carriers Act. The Petitioner having kept lull for about two years, issued another legal notice dated 6.5.2003 claiming Rs. 5,01,533/- towards freight charges. The Respondent company got issued a reply notice dated 29.5.2003. If the alleged arrears of freight charges from the net value of material withheld by the Petitioner is adjusted, the Respondent has to get a sum of Rs. 8,91,736/- with interest apart from damages for loss of material. The Respondent raised a bona fide and honest dispute even before the Petitioner issued the statutory legal notice. Hence, the dispute with regard to the liability towards the Petitioner is bona fide, in which case the petition is liable to be dismissed.

5. On hearing the counsel appearing for the parties, the company petition came to be admitted by an order dated 14.6.2005. The Respondent assailed the order of admission of the company petition by filing O.S.A. No. 45 of 2005. The said OSA came to be dismissed on 6.3.2006, confirming the order of admission of the company petition for winding up of the Respondent company.

6. Proof of publication has been filed on 29.8.2005. On behalf of the Petitioner, affidavit in lieu of chief examination of PW.1-Bajarang Singh Takur has been filed and 13 documents were exhibited as Exs.P-1 to P-13. On behalf of the Respondent, one witness was examined as RW.1 and ten documents were exhibited as Exs.R.1 to Rule 10 apart from marking two documents as Exs.X-1 and X-2.

7. PW.1 is the Regional Manager of the Petitioner firm. Ex.P-1 is the Power of Attorney given to PW.1 authorizing him to file the proceedings on behalf of the Petitioner firm. Ex.P-2 is the copy of the registered partnership deed dated 18.6.1996. Exs.P-3 and P-4 are the certificates issued by the Registrar of Firms. Ex.P-5 is the certificate of registration of the Respondent company issued by the Registrar of Companies under the provisions of the Act. Ex.P-6 is the statement of account dated 30th September 2003 maintained by the Petitioner relating to the transactions with Respondent company. Ex.P-7 is the letter addressed to the Petitioner by M/s. Surat Strips Limited, one of the companies in Surana Group admitting the liability to a tune of Rs. 7,12,269/- while pleading that the financial position of their company is not sound. Exs.P-8 to P-12 are the notices and reply notices exchanged between the parties. Ex.P-13 is the bunch of bills numbering 31 referred to in the statement of account, which has been exhibited as Ex.P-6. RW.1 is G.P. Surana, and he is the Managing Director of the Respondent company. Ex.R-1 is the delivery challan-cum-invoice No. 004 issued to the Petitioner by M/s. P.M. Telecom. Ex.R-2 is the consignment copy bearing No. 28587 issued by the Petitioner to M/s. P.M. Telecom. Ex.R-3 is the delivery challan-cum-invoice No. 005 issued by the Petitioner firm to M/s. P.M. Telecom. Ex.R-4 is the consignment copy bearing No. 28588 issued by the Petitioner to M/s. P.M. Telecom. Ex.R-5 is the letter dated 13.10.2001 issued by the Petitioner to M/s. P.M. Telecom. Ex.R-6 is the legal notice dated 7.11.2001 issued on behalf of the Petitioner firm. Ex.R-7 is the legal notice dated 6.5.2003 issued by M. Radha Krishna Murthy to the Respondent. Ex.R-8 is the reply to the legal notice dated 28.5.2003 issued by the Respondent to the Petitioner. Ex.X-1 is the letter dated 1.8.2001 addressed to the Petitioner by the Respondent enclosing the statement detailing the cheques given to the Petitioner. Ex.X-2 is the acknowledgment dated 3.4.2001 signed by the Respondent.

8. Heard Learned Counsel appearing for the Petitioner and Learned Counsel appearing for the Respondent.

9. Learned Counsel appearing for the Petitioner submits that the Respondent company having availed the transport service of the Petitioner firm failed to pay the transport charges. The Respondent admitted the liability to a sum of Rs.

7,12,269/- under letter dated 15.11.2011, which has been exhibited as Ex.P-7. The Respondent having admitted the liability neglected to pay the same, which constitutes inability of the Respondent to pay undisputed amount, in which case the Respondent company is liable to be wound up. Learned Counsel laid much emphasis on Ex.P-7 addressed by the G.M (Operation) of Surana Steel Limited. The letter is styled as "Debt confirmation letter". The liability of the Respondent company to the Petitioner firm has been stated in the said debt confirmation letter. Since much emphasis has been laid by the Learned Counsel, I deem it appropriate to refer the text of the letter, which reads as hereunder:

To

Surat Goods Transport Service Viraj Impex House, 47, P.D. Mello Road, Mumbai 400 009.

Dear Sir,

Sub: Debt confirmation

This has reference to your letter dated 23rd October, 2001 regarding your dues in our various group companies.

The present financial position of the company is not sound we are not able to get financial assistance from our financial institutions, hence we could not be able to settle freight bills of various transporters. We confirm below the outstanding dues as on date of our various companies.

Sr. No.

Amount (Rs.)

1.

Golkonda Engg Entp. Ltd.

6,11,437/-

1,00,832/-

2.

P.M. Telecom

14,600/-

3.

P.M. Strips Ltd.

14,705/-

4.

P.M. Strips Ltd.

1,20,585/-

5.

Kaveri India Ltd.

57,564/-

6.

Kaveri India Ltd.

42,524/-

7.

Surana Strips Ltd.

1,26,288/-

1,40,611/-

8.

Surana Strips Ltd.

22,500/-

9.

Surana Strips (Tube) Ltd.

3,01,415/-

92,762/-

10.

Surana Strips (Tube) Ltd.

5,600/-

16,51,423/-

Yours faithfully,

For SURANA STRIPS LTD. Sd/- M. RAVI SHANKAR GENERAL MANAGER
(Operations)

10. It is also contended by the Learned Counsel appearing for the Petitioner that RW-1-G.P. Surana admits of the liability of the Respondent to the Petitioner. What is disputed by the Respondent is only with regard to the quantum of amount. According to the Learned Counsel, transport of goods of the Respondent company through the transport provided by the Petitioner firm is not in dispute, in which case the Respondent company is bound to pay the freight charges. It is contended by the Learned Counsel that the Petitioner has not concealed any

material facts with regard to exercise of lien over the material entrusted for transport towards freight charges. The Petitioner informed the Respondent with regard to release of the consignment, on payment of the freight charges and despite repeated reminders to the Respondent, the Respondent did not choose to pay the freight charges and thereby, compelled the Petitioner firm to retain the consignment.

11. Learned Counsel appearing for the Respondent submits that the Petitioner, having accepted the transport of the goods for delivery to the consignee, failed to handover the goods to the consignee and thereby, committed breach of the contract and the Petitioner being a defaulting party cannot be permitted to contend that the goods came to be retained in exercising lien towards freight charges. He would also contend that the signatory to Ex.P-7 letter dated 15.11.2001 is not an authorized signatory on behalf of the Respondent company and therefore, the contents therein do not bind the Respondent company. In a way, the contention of the Respondent is that the Respondent never accepted the liability as projected in Ex.P-7 letter. He would also submit that the Respondent at the earliest point of time disputed the liability under reply notice dated 29.5.2003, copy of which has been exhibited as Ex.P-10. Since the very liability is in dispute, the question of neglecting to pay does not arise. In support of his submissions, reliance has been placed on the decisions of the Supreme Court in *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, *Ahmedabad Electricity Company Limited, Ahmedabad v. Sanghi Spinners (India) Ltd.* 2006 ALD 4 749

12. The Petitioner is engaged in the business of transport of goods of the customers, as per the orders placed by them from time to time. The Respondent belongs to Surana Group of Industries. There are about 10 companies belonging to Surana Group of Industries. All the companies transported their goods by engaging the transport service of the Petitioner firm. The Petitioner firm retained two consignments of 70 boxes of jointing kits under L.R. No. 28587 dated 11th October 2001 and 70 boxes of jointing kits booked under L.R. No. 02588 dated 11th October 2001 as a lien in exercise of its right to recover freight charges. The above-referred two consignments related to M/s. P.M. Telecom, which is one of the companies of Surana Group. Apart from the above-referred two consignments, the Petitioner firm also retained plastic isolated copper wire sent by the Respondent company for being delivered to Paramount cables, New Delhi.

13. Section 433 of the Companies Act says that a company may be wound up by the Court-

(a) if the company, has, by special resolution, resolved that the company be wound up by the Court;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year

(d) if the number of members is reduced, in the case of a public company, below seven and in the case of a private company, below two;

(e) if the company is unable to pay its debts;

(f) if the court is of opinion that it is just and equitable that the company should be wound up.

14. From the above, it follows that (1) There must be a debt; and (2) The company must be unable to pay the same. The Supreme Court in catena of decisions has held that an order u/s 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that inability being referred in the expression "unable to pay its debts" in Section 433 of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to utilize merely as a means for realization of debts due from the company.

15. Rules as regards the dismissal of winding up petition based on disputed claims are stated by the Supreme Court in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, The Supreme Court held that if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. The principles on which the Court acts are:

(i) that the defence of the company is in good faith and one of substance;

(ii) the defence is likely to succeed in point of law; and

(iii) the company adduces prima facie proof of the facts on which the defence depends.

For invoking the relevant provisions, i.e., Section 433(e) read with Section 434(1) (a) of the Act in relation to winding up of a company on the ground of its inability to pay its debt, what is necessary is that despite service of notice by the creditor, the company which indebted in a sum exceeding one lakh rupees then due, failed and/or neglected to pay the same within three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor. Failure of the company to pay the agreed interest or the statutory interest would come within the purview of the word "debt". Further Section 433(e) of the Companies Act does not state that the debt must be precisely a definite sum. It is not a requirement of law that the entire debt must be definite and certain.

16. RW-1 admits in chief-examination of the failure of the Respondent company in paying the freight charges to the Petitioner firm. For better appreciation, I may refer the relevant portion of the chief examination of RW.1 in his own words, and it reads thus:

I state that on 11.10.2001 M/s. P.M. Telecom, i.e., one of M/s. Surana Group of Companies booked consignment of jointing kits, TSF-2 to be consigned to MTNL, SDE, (SD), Ghatkopar, Mumbai through the Petitioner firm. In each lorry 70 boxes containing the jointing kits of value of Rs. 6,75,192/- were transported. While so, 140 boxes under invoices bearing No. 004 & 005 under the LRs No. 028557 and 28588 have not been delivered to the consignee. Immediately when enquired, Sri Pravin Rajendra Gupta, the partner of the Petitioner firm vide its Letter dated 13.11.2001 (under registered post) addressed to M/s. P.M. Telecom Limited stated that the consignment of 70 boxes of jointing kits booked under LRs. No. 028557 and 28588 have been stored (withheld) by them as LIEN in exercise of rights to recover the unpaid dues of all the companies stated therein. Upon receipt of the said letter, the Respondent has immediately faxed a letter dated 16.10.2001 requested the Petitioner to deliver the withheld material immediately, since the contract with the consignee MTNL, Mumbai was time bound and if not delivered within week days from its order, the contract may be cancelled. Further assured that the Respondent shall issue a cheque for Rs. 2,00,000/- of the current date and further five cheques for the balance amount upon settlement of accounts i.e., subject to delivery of the goods of P M Telecom to MTNL Bombay and goods of M/s. Golconda Engineering to Paramount communications, New Delhi. Instead of releasing the said material, the Petitioner demanded for down payment: of Rs. 10,00,000/- and balance in four cheques along with interest, which put loss of the contract to the Respondent company. The Jointing kits are used for telecom purpose and not a fast moving item in the market and with a shelf life of one year only from the date of manufacturing. Thus the Petitioner has high handedly withheld the entire consignment worth about Rs. 14,19,404/-. Till this date, the said consignments have not been delivered causing loss of Rs. 14,19,404/- to the Respondent being the cost of the material, interest loss @ 2% per month on the said money of the material under the said consignment, loss of business and huge damages

17. It is a matter of record that the Petitioner firm filed a suit against M/s. Kaveri Industries, one of the group companies of Surana Industries for recovery of the freight charges and obtained a decree. Mr. Ravi Shankar, General Manager, Operations, Surana Strips admitted the liability of the Respondent company to a tune of Rs. 6,11,437/- plus Rs. 1,00,832/- under Ex.P-7 letter dated 15.11.2001. of course, the Respondent disputed the authority of Mr. Ravi Shankar to admit the liability on its behalf. The Respondent company took the plea that Mr. Ravi Shankar earlier worked as Regional Manager in the Petitioner firm and he had no authorization on behalf of the Respondent company to admit the liability on its behalf towards the Petitioner firm. The Respondent company entrusted the consignment of plastic isolated copper wire to the Petitioner for being delivered to Paramount Communications situated at New Delhi on 31.12.2000 and 01.11.2001. The Petitioner has not delivered the material to the consignee. For the first time PW-1 came up with the theory in the cross-examination that the consignment which is required to be delivered to M/s. Paramount

Communications met with a fire accident in transit. For better appreciation, I may refer the statement of PW-1 in cross examination in his own words and it is thus:

We have not withheld the consignment sent to M/s. Paramount Communications as the consignment met with fire accident in transit.

It is nowhere stated in the petition that the consignment is involved in fire accident while on transit. When once the goods are entrusted to the Petitioner for transportation, he is bound to take reasonable care till delivery is affected to the consignee. According to the Respondent, the worth of consignment entrusted to the Petitioner for being delivered to Paramount communications is Rs. 6 lakhs. There is a serious dispute as to whether the consignment entrusted to the Petitioner is involved in the fire accident while on transit. In the given facts and circumstances, the defence raised by the Respondent is a substantial one and not moonshine. It is the civil Court, which is proper forum to adjudicate the claim of the Petitioner firm as well as the counter claim of the Respondent company. Invocation of winding up proceedings, in the given facts and circumstances, is misconceived.

17. Accordingly, the Company Petition is dismissed.

:: APPENDIX of EVIDENCE::

:: WITNESSES EXAMINED ON BEHALF of THE Petitioner::

Pw-1

Bajarang Singh Takur

Regional Manager

EXHIBITS MARKED ON BEHALF of THE Petitioner

Ex.P-1

Dt. 14-10-2004

Power of Attorney

Ex.P-2

Dt. 18-06-1986

Partnership Deed

Ex.P-3

Dt. 10-3-2000

Certificate of Registration

Ex.P-4

Dt. 28.10.2002

Certificate of Registration

Ex.P-5

Dt. 12-03-1991

Registration certificate of the Respondent company

Ex.P-6

Dt. 30-09-2003

Statement of accounts

Ex.P-7

Dt. 15.11.2001

Letter dated 15.11.2001

Ex.P-8

Dt. 29.01.2003

Statutory notice

Ex.P-9

Dt. 06.5.2003

Statutory notice

Ex.P-10

Dt. 29.5.2003

Reply notice

Ex.P-11

Dt. 29.5.2003

Rejoinder notice

Ex.P-12

Dt. 23.6.2003

Notice

::Witnesses Examined On Behalf of The Petitioner::

Rw-1 :

G.P. Surana

Managing Director

Exhibits Marked On Behalf of The Respondent Company

Ex.R-1

Delivery challan-cum-Invoice No. 004 issued to the Petitioner firm by M/s. PM Telecom

Ex.R-2

Consignment copy bearing No. 28587 issued by the Petitioner firm company to M/s PM Telecom

Ex.R-3

Delivery challan-cum-Invoice No. 005 issued to the Petitioner firm by M/s. PM Telecom

Ex.R-4

Consignment copy bearing No. 28588 issued by the Petitioner firm company to M/s. PM Telecom

Ex.R-5

Letter dated 13.10.2001 issued by the Petitioner firm to PM Telecom

Ex.R-6

Legal Notice to PM Telecom dated 07.11.2001 issued by Sri G.V. Parmar, Advocate on behalf of the Petitioner firm company

Ex.R-7

Legal Notice dated 06-5-2003 issued by Sri M. Radha Krishna Murthy to the Respondent company company

Ex.R-8

Reply Legal notice dated 29.5.2003 issued by the Respondent company company to the Petitioner

Ex.R-9

Balance Sheet as on 31st March 2007 of M/s. Golkonda Engineering Enterprises Limited

Ex.R-10

Balance Sheet as on 31st March 2008 of M/s. Golkonda Engineering Enterprises Limited

Ex.X-1

Letter dated 1.8.2001 addressed to the Petitioner

Ex.X-2

Acknowledgment dated 3.4.2001 signed by the Respondent company.