(2008) 02 GUJ CK 0118

In the Gujarat High Court

Case No : Company Petition No. 180 of 2007

Nachmo Knitex Limited — APPELLANT

Vs

The Abhiyog Holdings Private Limited — RESPONDENT

Date of Decision : 21-02-2008

Acts Referred:
Companies Act, 1956 — Section 433, 434

Citation : (2008) 172 CompCas 512 : (2008) 3 CompLJ 398

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Swati Soparkar, for the Appellant; R.S. Sanjanwala, for Respondent 1, for the Respondent

Final Decision : Allowed

Judgement

K.A. Puj, J.—The petitioner has filed this petition u/s 433 and 434 of the Companies Act, 1956 for winding up of the respondent-Company.

2. This Court has issued Notice on 13th September, 2007. On service of Notice respondent- Company has filed its appearance through its advocate Mr.R.S.Sanjanwala. An Affidavit in reply was filed by the respondent-Company on 17/22nd October, 2007. Considering the said affidavit-in-reply, the Court has passed an order on 24th October, 2007 and observed that outstanding dues principally are not in dispute and Mr.Sanjanwala learned Counsel appearing for the respondent-Company further declared before the Court that the financial position of the Company is such that the assets are much lower than the liability. The Court, therefore, admitted the petition and order of advertisement was passed directing the petitioner to publish the advertisement in two newspapers namely, Indian Express and Sandesh both Ahmedabad editions and publication in the Government Gazette was dispensed with. The final hearing of the petition was fixed on 5th December, 2007. Pursuant to the order of admission and advertisement, publication of advertisement was made in the two newspapers as directed by this Court on 02.11.2007. An Affidavit of publication is filed on 19th

November, 2007. Relevant extracts of the advertisement published in the two newspapers are produced on record of the Court along with the affidavit of publication.

3. The petition was taken up for hearing on 12th December, 2007. The Court has directed the petitioner and respondent-Company to give the list of their Directors. The Court, further observed that the petitioner-Company has produced at Annexure-A the statement of ledger Annexure-A, for the period from 01.04.2007 to 14.08.2007. The opening balance shows that Rs. 12,78,87,547.57 are outstanding. The Court, therefore, directed the petitioner-Company to produce on record statement of ledger, right from the beginning so as to indicate how the figure of Rs. 12,78,87,547.57 was arrived at.

4. Purusant to the said order dated 12.12.2007, the petitioner has produced statement of ledger right from the beginning. Over and above this, a brief summary of the statement of account from 1998-1999 to 2007-2008 is filed before the Court. This statement indicates as to how the outstanding balance of Rs. 12,78,87,547.57 as on 31st March, 2006 is arrived at. This is further increased to Rs. 13,53,08,065.00 as on 31st March, 2007. On behalf of the petitioner, an additional affidavit is filed on 18th December, 2007 along with list of directors of the petitioner-Company Likewise on behalf of the respondent-Company, an affidavit is filed on 19th December, 2007 giving the list of directors as on 18th December, 2007.

5. The petition is taken up for hearing today. Heard Mr.S.N.Soparkar, learned senior Counsel appearing for the petitioner and Mr.R.S.Sanjanwala, learned advocate appearing for the respondent-Company.

6. It is the case of the petitioner that the petitioner had been carrying on the business for the last many years under the Agreement of Distributorship between the petitioner and Company. Under the terms of the said agreement, the petitioner had supplied knitted fabrics from time to time to the Company and a running account is maintained for the same in the books of the petitioner. All the transactions between both the parties are recorded in the same and all the payments made by the Company for the supplies are duly credited to its account. It is further stated that material supplied to the Company was found up to the satisfaction of the Company and the same was sold by the Company in the market. Several invoices / challans were raised for the supplies made during the last three financial years viz. 2005-06, 2006-07 as well as current financial year and against the said supplies made by the petitioner, the Company has also made several on account payments during this period. However, several invoices are still unpaid totaling to an amount of Rs. 13,53,08,065/- as outstanding dues as on 15th August, 2007.

7. As agreed between the parties, the payment for the said supply of materials was to be made within 90 days from the date of issuance of invoices. However, vide petitioner''s letter dated 8th January, 2007, the credit period was reduced to

30 days for the supplies with effect from 1st January, 2007. As per the understanding between the parties to make payment by the due dates, the Company is liable to pay 15% interest on the delayed payment. It is, therefore, the petitioner is entitled to interest at the rate of 15% per annum on the aforesaid outstanding dues for the delayed period which comes to Rs. 57.03,216/ as on 15.08.2007 with a further interest till the realization of the dues.

8. The petitioner has been continuously requesting the Company vide numerous letters to clear the huge outstanding amount. In spite of repeated requests and regular follow up through the representatives of the petitioner for the said outstanding dues, and in spite of the Company''s promises to do the same at an earliest, the Company has not been able to make the payments for the said outstanding dues. As a result, the petitioner has been compelled to bring an end to the said distributorship of the respondent-Company.

9. Since, in spite of the repeated reminders, the Company failed and/or neglected to make the payment, the petitioner was compelled to send through its advocate a Statutory Notice dated 17.07.2007 under Sections 433 and 434 of the Companies Act, 1956 calling upon the Company to pay to its advocate or to the petitioner the above mentioned principal sum together with running interest at the rate of 15% per annum. The same has been duly served upon the Respondent-Company at its registered office. In spite of the service of the said notice, the Company has not been in a position to clear the outstanding dues. The Company had replied to the said Statutory Notice vide letter dated 25th July, 2007. The petitioner submits that the Respondent-Company has not disputed its liability to pay but has expressed its inability to adhere to the repayment schedule in view of the default in payment by the end users. The inability of the respondent-Company to recover from its customers or end users is of no concern to the present petitioner. In fact, due to the huge outstanding from the said respondent-Company, the petitioner is presently facing serious financial crisis.

10. It is further stated that the Company is commercially insolvent and is unable to discharge its debts in normal course of business. It is, therefore, not in the interest of the creditors of the Company to allow the Company to function. It would be, therefore, just, necessary and expedient for protecting interest of the Company that this Hon''ble Court be pleased to pass an order for winding up of the Company.

11. Mr.R.S.Sanjanwala, learned advocate appearing for the respondent-Company has submitted that the Company has already filed its affidavit in reply on 17th October, 2007. On the basis of the said affidavit-in-reply, he has submitted that Company engaged in the trading of knitted fabrics and has acted as Distributor of the petitioner for a period of 10 years starting from 1998. As per the arrangement between the petitioner and the Company, the petitioner used to supply knitted fabric to the Company as per the orders placed by the Company. The Company in turn used to sell the fabric to the end-users. By the very nature of things, the Company was required to provide credit period to the end- users

and accordingly, the petitioner also provided credit period to the Company. However, on receipt of the payments from the end-users, the Company used to regularly make payments to the petitioner. The arrangement continued successfully for a considerably long period. However, due to recession in the market and the financial problems being faced by the end-users, several payments from the end-users have got blocked and the Company is in the process of recovering the amounts from such end- users.

12. Mr.Sanjawala has further submitted in view of the delay in making the payment by the Company, the petitioner discontinued the Distributorship and stopped supplying the fabric to the Company. Consequently, the problems being faced by the Company got aggravated as the Company is no longer in a position to supply the fabric to the end- users. The payments by the end-users to the Company have consequently been jeopardized by the actions of the petitioner of discontinuing the Distributorship. The Company has time and again assured the petitioner that the amount due and payable shall be paid by the Company to the petitioner immediately on receipt of the said amounts from the end-users. The Company is in the process of recovering the amounts from the end-users and is making all possible efforts to recovering the said amounts and pay over to the petitioner. However, it is not possible for the Company to make immediate payments as is expected by the petitioner. In view of these facts, the Company says and submits that no case of liquidation is made out. The Company may be temporarily unable to make immediate payments but in view of the fact that various recoveries are pending and the Company is likely to recover the said amount, it cannot be said that the Company is unable to pay its debts. He has further submitted that the premature termination of the Distributorship has complicated the matter for the Company. If the Distributorship is restored and the petitioner commences supply of the material to the Company, so as to enable the Company to do further business either with the existing customers or with new customers, it would facilitate repayment of the amounts due. He has, therefore, submitted that the Company repeats and reiterates that it is not unable to pay its debts and as such, not required to be wound up in exercise of powers conferred by the Companies Act, 1956. He has therefore submitted that the petition is required to be dismissed.

13. Having heard the learned advocates appearing for the respective parties and having gone through the memo of petition along with documents attached therewith and affidavit-inreply filed by the Company, the Court is of the opinion that the Company has lost its financial substratum and it is unable to discharge its liabilities to the Creditors. It appears from the details of the statements of accounts that during the period from 1998-1999 to 2007-2008 every year there was a debit balance. In 1998-99 debit balance was to the tune of RS.18,550,318/-which reached to Rs. 227,856,607/- in 2002-2003 and Rs. 135,308,065/- in 2007-2008. Therefore, it appears to the Court that every year the Company has been incurring losses from the transactions entered into with the petitioner.

14. From the further affidavit tendered on behalf of the petitioner, it appears that there are no common Directors in the petitioner and respondent-Company as on 18th December, 2007. The Balance Sheet of the Company as on 31st March, 2007 clearly indicates that the Company posted loss after tax of Rs. 101.29 Lacs as compared to net profit of Rs. 1.81 Lacs in previous year. Since the list of Directors of the petitioner and respondent- Company was produced along with Affidavit-in-reply as on 18th December, 2007 the Court has asked the learned advocates appearing for both the parties to submit such list right from the year 1998 onwards so as to verify whether any common Directors are there or not. The Court has also asked the learned advocate of the respondent-Company to give details of Current Liabilities and Sundry Debtors as per the Audited Balance Sheet as on 31st March, 2007. The said details are furnished by the parties on the record of this petition.

15. Considering these details and looking to the financial position of the respondent- Company, the Court is of the view that the respondent-Company is not in a position to discharge its liabilities, the debt due and payable by the respondent-Company to the petitioner is mounting up from 1999 onwards. It is true that for 10 long years, the petitioner has allowed the respondent-Company to accumulate such debts and no legal proceedings have been taken in time. The present winding up petition was filed only in 2007 when the outstanding dues have reached to the tune of Rs. 13,53,08,065/-and moreover when the respondent-Company has failed to discharge its liabilities not only to the petitioner but also to the other creditors. The respondent-Company is liable to be wound up u/s 433(e) of the Companies Act, 1956 and accordingly, the respondent-Company is hereby wound up. The Official Liquidator attached to this Court is hereby appointed as the Liquidator of the Company. He is directed to take charge of the assets of the Company in liquidation after giving proper intimation to the Directors and Secured Creditors of the Company and file compliance report within 15 days from the date of taking possession of the assets of the Company in liquidation. He shall also intimate to the Ex-Directors of the Company to file the statement of affairs of the Company within the statutory period.

16. Subject to the aforesaid direction, this petition is accordingly allowed.