
(2004) 10 AP CK 0104

In the Andhra Pradesh High Court

Case No : Company Petition No. 181 of 2004

National Research Development Corporation

APPELLANT

Vs

Electro Flux (P) Ltd.

RESPONDENT

Date of Decision : 27-10-2004

Acts Referred:

Companies Act, 1956 — Section 433, 434

Citation : (2005) 2 ALD 531 : (2005) 1 ALT 683 : (2005) 4 BC 535 : (2005) 127 CompCas 23 : (2005) 6 CompLJ 370 : (2006) 66 SCL 429

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : A. Sanjay Kishore and D. Madhava Rao, for the Appellant; M. Anil Kumar, for Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Ramana, J.—This Company Petition, under Sections 433(e) and 434 of the Companies Act, 1956 (for short "the Companies Act") is filed by M/s. National Research Development Corporation, praying to pass an order of winding up against the respondent, namely M/s. Electro Flux (P) Ltd., and to appoint the Official Liquidator attached to this Court, as Provisional Liquidator to take custody of its assets.

2. The petitioner, which is a Government of India enterprise, is a leading research organization in the country. The petitioner states that the respondent approached them for "know how" to manufacture submerged Arc Welding Flux, and to grant them permission to use the invention with an assurance that they would pay premium and royalty. Accordingly, an agreement was entered into by the petitioner with the respondent on 1-3-1984, whereunder the respondent agreed to pay royalty of Rs. 15,000/- and licence fee for a period of ten years and 2.5% of the proceeds on net ex-factory sale price.

3. The petitioner further states that as per the agreement, they developed "know

how" for the manufacture of submerged Arc Welding Flux as required by the respondent, and the respondent having utilized and enjoyed the "know how" for their commercial purposes and having made profits, did not pay the royalty as agreed and committed default, and utilized the entire sale proceeds to their advantage.

4. Due to non-payment of royalty by the respondent, disputes arose between the petitioner and the respondent, which in terms of the arbitration clause in the agreement, were referred to a sole Arbitrator. Before the Arbitrator, the disputes referred by the petitioner were contested by the respondent. Ultimately, the Arbitrator passed an award on 23-3-1994, for Rs. 2,40,912/-, which subsequently, was made the rule of the Court, and as such, the respondent was due and liable to pay a sum of Rs. 2,40,912/- to the petitioner under the award.

5. Calling upon the respondent to pay the amount of Rs. 2,40,912/- awarded by the Arbitrator under the award, the petitioner got issued legal notice dated 8-5-2002, which the respondent having received, failed to pay the amount, and therefore, the petitioner filed the present Company Petition for winding up of the respondent contending that as the respondent is unable to pay the amount awarded by the Arbitrator under, it should be deemed that it has become commercially insolvent, and is therefore, liable to be wound up.

6. Heard the learned counsel for the petitioner. The learned counsel for petitioner submitted that as required by the respondent, the petitioner provided "know how" for manufacture of submerged Arc Welding Flux to the respondent, and though in terms of the agreement entered into for providing the "know how", the respondent agreed to pay royalty on the sale of the products, the respondent did not pay any royalty. Therefore, in terms of the arbitration clause in the agreement, the matter was referred to arbitration, and the sole Arbitrator, passed an award for Rs. 2,40,912/-, which ultimately was made rule of the Court. Thereafter, though the petitioner got issued legal notice dated 8-5-2002 calling upon the respondent to pay the amount under the award, the respondent having received the notice, failed to pay the amount, which amounts to not satisfying the award, which became the rule of the Court, and therefore, the respondent should be deemed to have become commercially insolvent, and an order for its winding up is required to be passed.

7. The only question that arises for consideration is whether a Company Petition, filed under Sections 433(e) and 434 of the Companies Act, for winding up of a company, for non-payment of the amount awarded by the Arbitrator under an award, which subsequently became the rule of the Court, is maintainable, on the ground that it has become commercially insolvent?

8. The answer to this question, in my considered view, should be in the negative. To answer the question elaborately, a reference to the provisions of Sections 433(e) and 434 of the Companies Act, under which the Company Petition came to be filed, would be appropriate. Section 433 of the Companies Act, which deals

with the circumstances in which company may be wound up by Court reads thus:

433. Circumstances in which company may be wound up by Court: 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.

9. Section 434 of the Companies Act deals with when a company can be deemed to be unable to pay its debts. The said Section reads thus:

434. Company when deemed unable to pay its debts: - (1) A Company shall be deemed to be unable to pay its debts -

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

(b) If execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) If it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether, a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under, the hand of the creditor if it is signed by any agent or legal adviser duly authorized on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm.

10. The petitioner claims that they have an award passed by the Arbitrator for a sum of Rs. 2,40,912/- in their favour, which subsequently became the rule of the Court. Upon the award becoming the rule of the Court, the award passed by the

Arbitrator is treated as a decree, as if it has been passed by the Court. The relief to be granted under Sections 433(e) and 434 of the Companies Act, there cannot be any doubt, is discretionary, and is to be exercised by the Company Court only when it is proved that the company is unable to pay its debts to its creditors on account of the fact that it has become commercially insolvent. It is not the case of the petitioner that in spite of initiation of execution proceedings, the respondent failed to satisfy the award either in whole or in part, and therefore, it should be deemed to have become commercially insolvent. The petitioner, admittedly, did not avail the execution proceedings, which is an effective alternative remedy available to them under Order XXI of the Code of Civil Procedure, 1908, for recovering the money under the award. Merely because the respondent has not paid the amount under the award in spite of receipt of demand notices, it cannot be said that the company has become commercially insolvent, warranting exercise of discretionary power by this Court. Inasmuch as the petitioner has an effective alternative remedy, and has approached this Court under Sections 433(e) and 434 of the Companies Act, without availing the said effective alternative remedy, and in the absence of any proof placed by the petitioner about the non-satisfaction of the award passed by the Arbitrator, which subsequently became a decree of the Court, by executing it before a competent Court having jurisdiction, no order of winding can be passed presuming that the company has become commercially insolvent. Be that as it may, since the petitioner has an alternative remedy of executing the award in a competent civil Court having jurisdiction, it cannot be allowed to invoke the jurisdiction of the Company Court, for executing the award passed by the Arbitrator, which subsequently became a decree.

11. In the above view of the matter, the Company Petition is misconceived, and it is accordingly dismissed at the stage of admission. This order, however, shall not come in the way of the petitioner to execute the award against the respondent in a competent Court having jurisdiction.