

(1999) 08 P&H CK 0093
In the Punjab And Haryana At Chandigarh
Case No : Company Petition No. 330 of 1998

Oswal Spinning and Weaving Mills Ltd.	APPELLANT
Vs	
Kansal Fibres Ltd. and others	RESPONDENT

Date of Decision : 10-08-1999

Acts Referred:

Companies Act, 1956 — Section 433, 434, 439

Citation : (1999) 08 P&H CK 0093

Hon'ble Judges : V.S. Aggarwal, J

Bench : Single Bench

Judgement

V.S. Aggarwal, J.—Petitioner M/s. Oswal Spinning and Weaving Mills Ltd. is a public limited company. It had one alloy steel unit with three numbers of induction furnaces. The petitioner company was approached by respondent M/s. Kansal Alloys, Proprietor, Kansal Fibre Limited, to sell the complete alloy steel unit comprising of two acres of land and building situated thereupon alongwith one induction furnace of three metric ton and two induction furnaces of one metric ton each as well as all accessories, etc., situated at Ludhiana. The sale consideration was settled at Rs. 1.35 crores only. An agreement to that effect had been entered into between the parties on 14.2.1996. The respondent company paid the entire sale consideration except Rs. 15 lakhs. The said amount was agreed to be paid on actual transfer of power connection with contract demand and load in its favour. Accordingly, the alloy steel unit was transferred to respondent company which started operating the plant. It was agreed that till the connection is transferred in favour of the respondent company, it shall continue to use electricity from the combined power connection of the petitioner company and would pay the electricity consumption charges on monthly basis. The said system continued and the petitioner company used to send the detailed calculation for making payment. Upto September, 1998, payments were made except Rs. 3,60,809 which was due to the petitioner company. However, the bill for the energy consumed in the month of October, 1998, was received from the Punjab State Electricity Board. On receipt of the bill, petitioner company after

getting the acknowledgement raised a debit note for making payment of Rs. 20,36,224. The consumption of the details were provided to the respondent company. No payment was made by the respondent company. The petitioner company became liable to pay surcharge at the rate of 10% on the unpaid amount. Even bill for November, 1998, was received. It was for Rs. 21,21,965 and the share of the respondent company comes to Rs. 12,82,221. Even the same had not been paid. In this process, a sum of Rs. 40,71,838 were due from the respondent company. A notice had been served for payment of the debt. No reply was received. Hence, an application had been filed for winding up of the respondent company under the provisions of section 439 read with sections 433 and 434 of the Companies Act, 1956 (for short "the Act").

2. The respondents contested the petition. As per respondents, the claim of the petitioner company is false and the amount claimed is not due. The defence offered was that consideration money was paid because of the attraction of electricity connection which was in existence at the premises, i.e., LS-49 bearing 3070 K.W. after the same had been reduced by 1400 K.W. by the petitioner company. The respondent company had further incurred an expenditure of about Rs. 50 lakhs approximately to make the unit functional. It was agreed by the petitioner company that the electricity connection shall be transferred in the name of the respondent company and all expenditure which was to be incurred for the said purpose was to be incurred by the petitioner company. The said electricity connection has never been transferred. To the contrary, the said electricity connection alongwith LS-49 was got merged into LS-5. The respondent company even made a request that the electricity connection be shifted to its premises. The electricity connection has not been segregated. In this process, the petitioner company misled the respondent company and on that basis, took Rs. 120 lakhs from the respondent company.

3. It was not disputed that it had been agreed that a sub-meter shall be installed at the premises of the petitioner company and that whatever electricity would be consumed by the petitioner company, the consumption would be deducted from the total bill of the connection. The electricity was to be shared in the ratio of 17:13. The petitioner company had been taking advantage of the general consumption of the electricity to the extent of 1700 K.W. During the period when the petitioner company was not utilising 1370 K.W. of electricity, the petitioner company had taken the advantage and Rs. 52,45,513.90 had been paid by the respondent company for and on behalf of the petitioner company for which adjustment has also been claimed.

4. On 30.3.1999, this court directed that a senior officer from the Punjab State Electricity Board, Ludhiana, of the large consumer section well conversant with the facts of the case should be present to clarify the extent and concept of minimum charges. On 8.4.1999 an Assistant Engineer of the Punjab State Electricity Board was present who was not able to answer the questions put to him. So a Senior Executive Engineer (Operation) was called and the case was

adjourned. It appears that the Electricity Board employees were not able to answer the question and, therefore, even When the matter was relisted, no such request was made. The parties in this process were heard.

5. u/s 433 of the Act, a company can be wound up by the court if it is unable to pay its debts or the court is of the opinion that it is just and equitable that the company should be wound up. The other grounds on which a company can be wound up are not relevant for the disposal of the present petition. What is impressed is that the respondent company has not been able to pay the debts and the amount as claimed.

6. It is well known that a winding up petition is an alternative in the case of a company. The normal procedure otherwise is to recover the amount in accordance with law. The machinery for winding up is not allowed to be used for realisation of the debts. This question has been considered by the Supreme Court in the case of Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, . The Supreme Court held that a winding up petition is not a legitimate means of seeking enforcement of a debt which is bona fide disputed. A petition presented ostensibly for a winding up order, but really to exercise pressure should be dismissed; otherwise the said provision can be misutilised. Same view was expressed by this court in the case of Ambala Bus Syndicate P. Ltd. Vs. Bala Financiers P. Ltd. (In Liquidation), . This court relied upon a well known decision of the Supreme Court in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . It was concluded that if there is a bona fide dispute and the defence is substantial, the court will not wind up the company. Same view prevailed with the Karnataka High Court in the case of Kamadenu Enterprises v. Vivek Textile Mills (P) Ltd. (1984) 55 Comp Cas 68 and in the case of T. Srinivasa v. Flemming (India) Apotheke Private Ltd. (1995) 5 Comp LJ 438 : (1990) 68 Comp Cas 506.

7. The position in the present case is that at the time when sale transaction took place, the parties even with respect to electricity had also made a settlement. The relevant part of that agreement reads as under :

"It has been agreed by the party of the 1st part (M/s. Oswal Spinning & Weaving Mills Ltd.) that it would get transfer of the power connection lying installed, in favour of the party of the 2nd part (Kansal Alloys Prop. M/s. Kansal Fibres Ltd.), at its own cost, and it shall complete all the formalities necessary for the transfer of the said electricity connection in favour of the 2nd party. Till the electric connection is actually transferred in favour of the 2nd part, it would be the responsibility of the 1st part to install a sub-meter, segregating furnaces load from total load of account No. LS-49. The party of the 2nd part is bound to make payment to the party of the 1st part equal of the consumption charges and any other charges such as meter rent, fuel consumption charges etc. as shown in the monthly electricity bill of account of LS-49 after deducting the reading shown in sub-meter installed therein. This payment will be made by the party of the 2nd part to the party of the 1st part atleast seven days before the last date of

payment of bill by demand draft. It is obligatory on the part of the party of 1st part to deposit the bill before due date. In case the power bill is not deposited within due date by the party of the 1st part after getting due share from the party of the 2nd part, the amount of the surcharge imposed by PSEB will be paid by the party of the 1st part only. In case the party of the 2nd part fails to give their due shares to the party of the 1st part, the surcharge amount will have to be paid by the party of the 2nd part in toto.

The party of the 2nd part shall adhere strictly to the restrictions imposed by the Punjab State Electricity Board on this electric connection No. LS-49, i.e., peak load hours restrictions. In case any of the restrictions are violated or the party of the 2nd part commits the breach of abridged conditions of supply including condition No. 33 it shall be responsible for all legal consequences, both civil as well as criminal. The party of the 2nd part shall not tamper with any seals of or electrical installation or misuse the electricity in any way. In case the party of the 2nd part commits the breach of abridged conditions of supply and commits theft of electricity, it shall be the responsibility of the party of the 2nd part. The party of the 2nd part shall be liable to compensate the Board on the part of the party of the 1st part in case the electric connection is disconnected on any account or theft or offence committed by the party of the second part. However, the party of the second part shall be entitled to use the load permissible to be used during the peak load hours restrictions, the party of the 1st part shall not share this load."

8. It is not in controversy that till date, the electric meter has not been transferred in the name of the respondent company. Instead, the electricity connection was merged into LS-5. Though the petitioner company has placed on the record the calculation as to how the amount is due, yet the same has been clarified. Annexure R-1 has been placed on the record as the calculation by the respondent company showing as to how, in fact, more amount is due to the respondent company and that what was actually paid by the petitioner company to the Punjab State Electricity Board was far less. It is thus a dispute pertaining to the calculation and thereupon an exact figure could be arrived at as to how much amount is due.

9. In addition to that, the respondent company claimed a set off of a particular amount. When such is the controversy coupled with the dispute that it is asserted that there was erratic supply of electricity by the petitioner company, it would be in the fitness of things that the matter is decided by an appropriate civil court.

10. In such like disputes, winding up is not necessary because the remedy provided u/s 434 of the Act is not a matter of right. The discretion, in the peculiar facts, thus cannot be exercised in favour of winding up of the respondent company.

11. For these reasons, the company petition is dismissed. It is clarified that

nothing said herein is any expression of opinion on the merits of the matter.