(2011) 03 DEL CK 0553

In the Delhi High Court

Case No : CO. Petition 131 of 2008

Pankaj Aluminium Industries Pvt. Ltd. APPELLANT

Vs

Bharat Aluminium Company Ltd. RESPONDENT

Date of Decision : 23-03-2011

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

Citation : (2011) 166 CompCas 64 : (2011) 107 SCL 113

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Krishna Kumar and Kaustubh Shukla, for the Appellant; Rajiv Nayar and P.C. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—The present winding up petition has been filed under Sections 433(e) and 434 of the Companies Act, 1956 (for short "the Act").

2. The relevant facts of the present case are that both the Petitioner and Respondent are engaged in the business of manufacturing of aluminium products. During the course of their business dealings, the Petitioner had purchased from Respondent, aluminium products like ingots, wire rods and sheets/coils. For this purpose, Petitioner and Respondent had executed a number of Memorandums of Understanding. The first Memorandum of Understanding executed between the parties dated 1st April, 2003 is reproduced hereinbelow:

Ref MKT/MOU/

Dated 1st April, 2003

MEMORANDUM OF UNDERSTADING

MOU BETWEEN M/S. ANISH METALS PVT. LTD., & Group Companies and Bharat Aluminum Company Limited (BALCO) FOR SALE OF CG/EC GRADE ALUMINUM PROPERZI RODS.

M/S. Anish Metals Pvt. Ltd. & Group Companies agrees to purchase and Balco agrees to supply approx. 600 MT of CG/EC Road during the period 1.04.2003 to 30.06.2003 on company prices & terms.

1. Existing Price: Product Existing Basic Price Existing Trade Discount (Rs/T) (Rs/T) Alu. CG Road 90500.00 6000.00 Alu. EC Road 91000.00 6000.00

2. Excise Duty : @ 16% extra

3. CST : @ 2% against Form =C''

4. Export Tax : @ 0.10% on invoice value will be applicable.

5. Payment Terms : 100% payment in advance by way of Cheque/DD/LC prior to dispatch of material.

6. Monthly Quantity/Destination Discount: Will be applicable as per Balco''s policy. 7. Price Variation Clause : Prices, duties, taxes and all other discounts shall be charged as ruling on the date of dispatch.

8. Balco agrees to give MOU discount of Rs. 500/- PT subject completion of minimum 200 M.T. per month during the period 1.04.2003 to 30.06.2003.

For Anish Matals Pvt. Ltd. For Bharat Aluminum Co. Ltd. Sd/- Sd/-

3. Similar Memorandums of Understanding were also executed between the parties on 1st July, 2003, 1st October, 2003 and 1st January, 2004. Thereafter another Memorandum of Understanding (MOU) dated 4th April, 2004 was executed between the Petitioner and Respondent for the period 1st April, 2004 to 30th June, 2004. On 1st April, 2005, another MOU was executed between the parties for the year 2005-2006.

4. On 31st March, 2005, Petitioner and Respondent reconciled their accounts and the balance amount payable to the Petitioner was arrived at.

5. Between 11th January, 2006 and 24th January, 2006, Petitioner placed orders for purchase of various quantities of aluminium products with the Respondent. The Petitioner also sent, by way of an advance, a sum of Rs. 2 Crores to the Respondent.

6. On 30th January, 2006, Respondent informed Petitioner that it had adjusted an amount of Rs. 3,38,16,720/- from the sum of Rs. 3,52,26,499/- lying in its credit, as the amount of Rs. 3,38,16,720 was due to the Respondent from Petitioner''s sister company, namely, M/s. Anish Metals Pvt. Ltd. The aforesaid letter is reproduced herebelow for ready reference:

January 30, 2006 M/s. Pankaj Aluminium Ltd. 106, CRK Wadi 1st Floor 114 v. P Road Mumbai 400 0084 Dear Sir, A sum of Rs. 3,38,16,720/- is due to us from Anish Metals Pvt. Ltd., your sister concern. In such circumstances, we are adjusting the aforesaid sum of Rs. 3,38,16,720/- from out of the sum of Rs. 3,52,26,499/- lying in the credit of Pankaj Aluminium Industries Ltd. as on

30.1.2006. For the balance sum of Rs. 14,09,779/- lying to your credit, supply of shall be made to you. This is for your information. Thanking you For BHARAT ALUMINIUM COMPANY LIMITED Sd/- Associate Manager (Finance) (Emphasis supplied)

7. It is the Petitioner''s case that after they objected to the aforesaid adjustment, the Respondent not only accepted the Petitioner''s stand but also dispatched to Petitioner 26.379 metric tons of aluminium wire rods, ingots and another aluminium products. But later on Respondent contrary to its earlier stand, recalled the goods dispatched from Raipur.

8. Being aggrieved by the aforesaid decision, the Petitioner on 22nd March, 2006 filed a suit bearing Suit No. 1071/2006 in the Bombay High Court.

9. On 7th July, 2006, Petitioner also issued a winding up notice to the Respondent. As there was no response to the said winding up notice, the Petitioner on 9th April, 2008 filed the present winding up petition.

10. Mr. Krishna Kumar, learned Counsel for Petitioner submitted that Petitioner-company and M/s. Anish Metals Pvt. Ltd. are not group companies. He stated that MOU had been executed by different companies with Respondent to avail of certain discount offered by the Respondent only on bulk purchases. According to him, each of the companies with whom Respondent had entered into an MOU had separately made payment of goods ordered by it and it was never the practice of these companies to make payment for goods supplied by the Respondent to any other company. He also laid emphasis on the fact that it was not even the practice of the Respondent to adjust payment of one of the said companies towards amount owed to Respondent by any of the other companies.

11. Mr. Krishna Kumar further submitted that even if the Petitioner and M/s. Anish Metals Pvt. Ltd. were group companies, still set off or adjustment could not have been made by the Respondent. In this connection, Mr. Krishna Kumar relied upon decisions in P.C. Agarwala Vs. Payment of Wages Inspector, M.P. and Others, , Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, and Punjab National Bank v. Bareja Knipping Fasteners Ltd. and Ors. (2001) 103 C.C. 958 (Punjab and Haryana High Court).

12. In the alternative, Mr. Krishna Kumar submitted that group transactions, if any, came to end after the Settlement dated 31st March, 2005.

13. Mr. Krishna Kumar lastly submitted that the conduct of the Respondent in the present case was improper inasmuch as the Respondent had misrepresented to the Petitioner that it was going to supply goods. According to him, it was only on Respondent''s misrepresentation that Petitioner had issued a pay order of Rs. 2 Crores.

14. On the other hand, Mr. Rajiv Nayar, learned senior counsel for Respondent submitted that the Petitioner cannot wriggle out of its own conduct. He submitted

that having taken advantage of discount as group companies, the Petitioner cannot now seek to disclaim its liability by urging that each company with whom Respondent had executed an MOU was a separate corporate personality.

15. Without prejudice to the aforesaid, Mr. Nayar submitted that Petitioner''s conduct in the present case entitled this Court to lift the corporate veil. In this connection, Mr. Nayar relied upon the observation of the Supreme Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, , Life Insurance Corporation of India (supra) and Singer India Ltd. Vs. Chander Mohan Chadha and Others, . According to him, upon lifting the corporate veil, Petitioner could not say that it was not liable for its sister concerns or that Respondent could not have adjusted set off debts of Anish Metals against Petitioner''s credit. Mr. Nayar emphasised that group accounts were kept and dealings between Respondent and Petitioner as well as other companies were as group companies.

16. Mr. Nayar also denied that the group transaction came to an end after Settlement dated 31st March, 2005. According to him, the Settlement was related to interest on account of late issuance of credit notes by Respondent, excess interest charged etc. Mr. Nayar stated that the said Settlement nowhere mentioned that group transaction had come to an end or that the Settlement was to settle all liabilities in this regard. According to him, the Settlement itself proposes a fresh reconciliation statement to be made and, therefore, it was open ended.

17. Mr. Nayar emphatically denied that the Respondent''s conduct was improper. In any event, he pointed out that the said issue was sub-judice in the suit filed by the Petitioner in the Bombay High Court.

18. Mr. Nayar also laid emphasis on the fact that a learned Single Judge of the Bombay High Court had specifically found that the Petitioner was not entitled to any interim relief as disputed questions of facts were required to be adjudicated after giving the parties liberty to lead evidence.

19. In rejoinder, Mr. Krishna Kumar submitted that order of the learned Single Judge of Bombay High Court was an interim order and could not operate as resjudicata in the present proceedings. He also laid emphasis on the minutes of Settlement dated 31st March, 2005 to show that the Respondent had dealt with each of the companies with whom it had executed Memorandum of Understanding as a separate independent corporate identity.

20. Having heard the parties and having perused the papers, I am of the opinion that it would be first appropriate to outline the principles which have to be kept in mind while deciding a winding up petition. A Division Bench of this Court in German Homeopathic Distributors Pvt. Ltd. v. Deutsche Homeopathic-Union DHU-Arznemittel Gmbh 161(2009) DLT 703 has held that in a winding up proceeding, the following principles need to be kept in perspective:

12. In winding up proceedings it is necessary to keep the following principles in

perspective

(i) If there is a bona fide dispute and the defence is a substantial one, the court will not wind-up the company;

(ii) Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay it;

(iii) Where the defence of the company is in good faith and one of substance, and the defence is likely to succeed in point of law, and the company adduces prima facie proof of the facts on which the defence depends, the petition should be rejected;

(iv) The Court may consider the wishes of creditors so long as these appear to be justified;

(v) The machinery of winding up should not be allowed to be utilised merely as a means of realizing its debts. (For the above propositions see Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, in which the observation in Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, and Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., have been paraphrased);

(vi) If the stance of the adversaries hangs in balance it is always open to the Company Court to order the Respondent Company to deposit the disputed amount. This amount may be retained by the Court and be held to the credit of the suit, if any.(see Ambala Bus Syndicate Pvt. Ltd. and Others Vs. Bala Financiers Pvt. Ltd. and Others, and Civil Appeal No. 720 of 1999 arising out of Nishal Enterprises v. Apte Amalgamations Ltd. SLP(C) No. 14096 of 1998decided on Febraury,5, 1999);

(vii) Generally speaking, an admission of debt should be available and/or the defence that has been adopted should appear to the Court not to be dishonest and/or a moonshine, for proceedings to continue. If there is insufficient material in favour of the Petitioners, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order XXXVII of the Code of Civil Procedure. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding up petition.

21. In the present case, I do not have to lift the corporate veil as Petitioner and its group companies had throughout been representing themselves to be a single economic entity. In fact, the Memorandums of Understanding clearly show that they were executed between the Respondent on the one hand as well as Petitioner and other group companies on the other.

22. In this connection, the Memorandums of Understanding dated 04th April, 2004 and 01st April, 2005 are reproduced hereinbelow:

i) 01st April, 2004

Ref: MKT/MOU/QTRY/04-05

Dated 4th April, 2004

MOU Between M/s. Pankaj Group (Pankaj Aluminum/Ashish Metals etc.) and Bharat Aluminum Company Limited (BALCO) FOR SALE OF EC/CG/Alloy Grade Aluminum Wire Rods.

M/s. Pankaj Group (Pankaj Aluminum/Ashish Metals etc.) Agrees to Purchase and Balco Agrees to supply approx. 600 MT of EC/CG/Alloy Grade Aluminum Wire Rods during the period 1.04.2004 to 30.06.2004 on company Prices & Terms.

ii) 01st April, 2005

Ref MKT/MOU/ANNUAL/05-06

Dated 1st April, 2005

MOU Between M/s. Pankaj Aluminum Industries Ltd. & Hiren Aluminum Ltd. and Bharat Aluminum Company Limited (BALCO) For Sale Of EC/CG/Alloy Grade Aluminum Wire Rods.

M/s. Pankaj Aluminum Industries Ltd. & Hiren Aluminum Ltd. Agrees to Purchase and Balco Agrees To Supply Approx. 3600 MT of EC/CG/Aloly Grade Aluminum Wire Rods During The Period 01-04-2005 to 31-03-2006 On Company Prices & Terms.

(Emphasis supplied)

23. Moreover, Petitioner''s own applications to the Respondent explicitly stated that they were group companies. The relevant extracts of the Petitioner''s representations are reproduced hereinbelow:

A) BHARAT ALUMINIUM COMPANY LIMITED P.O Balconagar, korba-495684 Chhattisgarh APPLICATION FORM FOR AUTHORISED DEALERSHIP FOR ROLLED PRODUCTS 1. Name of the firm Anish Metals Pvt. Ltd. xxx xxx xxx

X. Applied for any other name 1. PANKAJ METALS PVT. LTD. sister firms, etc.), if yes 2. PANKAJ ALUM. INDS. LTD. specify 3. PANKAJ EXTRUSION LTD. 4. HIREN ALUMINIUM LTD. xxx xxx xxx For ANISH METAL PRIVATE LTD. Sd/- Director/ Auth. Signatory Applicants Signature Name: B) BHARAT ALUMINIUM COMPANY LIMITED P.O Balconagar, korba-495684 Chhattisgarh APPLICATION FORM FOR AUTHORISED DEALERSHIP FOR ROLLED PRODUCTS

1. Name of the firm Pankaj Aluminium Industries. Ltd. xxx xxx xxx

Applied for any other name 1.ANISH METALS PVT. LTD. sister firms, etc.), if yes 2. PANKAJ METALS PVT. LTD. specify 3. PANKAJ EXTRUSION LTD. 4. HIREN ALUMINIUM LTD xxx xxx xxx For Pankaj Aluminium Ind. Ltd. Sd/- Director Applicants Signature Name: C) BHARAT ALUMINIUM COMPANY LIMITED P.O

Balconagar, korba-495684 Chhattisgarh APPLICATION FORM FOR AUTHORISED DEALERSHIP FOR ROLLED PRODUCTS 1. Name of the firm PANKAJ EXTRUSION LIMITED. xxx xxx xxx

Applied for any other name 1.ANISH METALS PVT. LTD. sister firms, etc.), if yes 2. PANKAJ METALS PVT. LTD. specify 3. PANKAJ ALUMINIUM IND.LTD. 4. HIREN ALUMINIUM LTD

xxx xxx xxx

For PANKAJ EXTRUSIONS LTD. Sd/- Authorised Signatory/Director Applicants Signature Name: D) BHARAT ALUMINIUM COMPANY LIMITED P.O Balconagar, korba-495684 Chhattisgarh APPLICATION FORM FOR AUTHORISED DEALERSHIP FOR ROLLED PRODUCTS

1. Name of the firm PANKAJ METALS PRIVATE LTD. xxx xxx xxx

Applied for any other name 1.ANISH METALS PVT. LTD. sister firms, etc., if yes 2. PANKAJ METALS PVT. LTD. specify 3. PANKAJ EXTRUSION.LTD. 4. HIREN ALUMINIUM LTD. xxx xxx xxx

For PANKAJ METAL PRIVATE LTD. Sd/- Director Applicants Signature Name: E) BHARAT ALUMINIUM COMPANY LIMITED P.O Balconagar, korba-495684 Chhattisgarh

APPLICATION FORM FOR AUTHORISED DEALERSHIP FOR ROLLED PRODUCTS

1. Name of the firm HIREN ALUMINIUM LIMITED.

xxx xxx xxx

Applied for any other name 1.ANISH METALS PVT. LTD. sister firms, etc.), if yes 2. PANKAJ METALS PVT. LTD. specify 3. PANKAJ ALUM. INDS. LTD. 4. HIREN EXTRUSION LTD. xxx xxx xxx For Hiren Aluminium Ltd. Sd/- Director Applicants Signature   Name: (Emphasis supplied)

24. Also from the documents placed on record, Petitioner''s group companies kept a group account which reflected the total dues payable by the Respondent to the Petitioner group companies. One such statement of claim sent by the Petitioner to Respondent and placed on record by the Respondent is reproduced hereinbelow:

ANISH METALS-GROUP

Name of the Party

Party Code

Amount

Total Claim Amt.

OLD PENDING CLAIMS WITH BHARAT ALU.CO. LTD. As on 31.03.2002

113063

Name of the Party

Party Code

Amount

Excise Duty on Basic Price Shortage of 304 Kgs (03/03/1999)

BC-204 BC-227

85028 28035

Total

113063

STATEMENT OF CLAIMS RECEIVABLE FROM BALCO AS ON 30.09.2002

Name of the Party

Party Code

Amount

Anish Metals Pvt. Ltd. BC-204/AA-452 1705213 Mumbai Anish Metals Pvt. Ltd. BC-205/AA-453 873030 Ahmedabad Anish Metals Pvt. Ltd. BC-236/AA-547 237865 Abu Road Anish Metals Pvt. Ltd. BC-236/AA-605 445531 SilvassaPankajAluminium AP-307/338 1782791 Inds Ltd. Pankaj Metals Pvt. Ltd. AP-308 2658085 Pankaj Extrusion Ltd. 341302 HirenAluminium Ltd. AH-156 881835

Total

8925650

8925650

EXCESS INTEREST CHARGED BY BALCO

Name of the Party

Party Code

Amount

Avnish Metals Pvt. BC-204/205/ 879440 Ltd. 226 /236 Pankaj Metals Pvt. AP-308 894775 Ltd. PankajAluminium AP-307/308 15858 Inds. Ltd.

Total

1790073

1790073

Total Pending Claims as on 30.09.2002

10828786

25. It is apparent from the Petitioner''s letter dated 02nd January, 2004 that it had asked for refund of Rs. 15,68,538/-, even though the said amount was payable by the Respondent to M/s. Hiren Aluminium Ltd.-- one of the Petitioner''s group companies. The relevant portion of the letter dated 02nd January, 2004 is reproduced hereinbelow:

PANKAJ ALUMINIUM INDUSTIES LTD. Cororate Office: 106-C, R.K. WADI, 114, V.P. ROAD, MUMBAI - 400 004 (INDIA) TEL.: ++91-22-3894202-03-04-05 FAX: ++ 91-22-389 4207 E-Mail: spankaj@bom8.vsnl.net.in Web site: www.pankajgroup.com Sales: 55-C, 1ST KHATTARALI LANE, THAKURDWAR, MUMBAI 400002. Tel: 3823726/27, 3853725. FAX: 3821324/2428175 Date 02-01-2004 To M/S. Bharat Aluminium Co. Ltd. 7, Kirol Raod, Vidya Vihar (West), Mumbai-400 086. Kind attention: Shri B.K. Bhatia, Regional Manager. Sub: Double recovery of payment through negotiation of LC documents against Invoice No. 02/8959 dated 31.10.2003 for Rs. 818798/- Dear Sir, xxx xxxx xxx We would also like to draw your kind attention regarding our refund of Rs. 15,68,538/- in the account of Hiren Aluminium Ltd. We have been following up the matter with your office since last so many months for the issuance of pending credit notes but regret to mention that, till date we have not even received the copies of the credit notes which were settled by our representatives with your SAG section at Korba during Nov'' 03.

xxx xxxx xxx

...Please confirm us in writing regarding the adjustment of this excess payment amount of Rs. 818798/- against invoice number 02/9232 dated 9-11-03 for Rs. 907469/-, so that we can make the balance payment of Rs. 88671/- against the said invoice as being confirmed by you.

Kindly look into the matter and respond us immediately considering the urgency and seriousness of this issue. This time as a special case we are releasing the payment, however, this type of lapses should be avoided in future.

Thanking You. Yours faithfully, For Pankaj Aluminium Industries Ltd. (Director) (Emphasis supplied)

26. The doctrine of single economic entity is not only well established but also well recognized by Courts. In DHN Food Distributors Ltd. and Ors. v. London Borough of Tower Hamlets (1976) 3 ALL ER 462 the Court held as under:

...We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: =there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group''. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Hold worth and Co. (Wakefield) Ltd. v. Caddies. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

27. The jurisdiction of Company Court is summary in nature and the issues of conduct of the parties cannot be examined in the present case as it involves disputed questions of fact.

28. The Petitioner''s further contention that a group transactions came to an end after the Settlement dated 31st March, 2005 is seriously disputed by the Respondent inasmuch as, the Respondent in its additional affidavit dated 18th September, 2010 has averred that the transaction for which adjustment had been made related to the year, 2004. It is pertinent to mention that there is no specific denial by the Petitioner to the said averment in its response to the additional affidavit. In any event, the same is a disputed question of fact which can only be decided after giving the parties an opportunity to lead evidence.

29. In fact, the Bombay High Court refused to grant the interim prayer asked for by the Petitioner in its suit on the ground that it would amount to grant of final relief and further disputed questions of fact could only be decided after the parties had led their evidence. The relevant portion of the order passed by the learned Single Judge of the Bombay High Court is reproduced hereinbelow:

As set out hereinabove, the main dispute raised by the Plaintiff in the suit, is that the Defendants are not entitled to appropriate Rs. 3,38,16,720 or any other amount therefrom towards the dues from Anish Metals Pvt. Ltd. from the Plaintiff or any of its sister concerns and have sought a declaration to that effect in terms of prayer Clause (b) of the plaint/suit. The Defendants have joined an issued with the Plaintiff by disputing the stand taken by the Plaintiff and have made submissions justifying their action/conduct. At the final hearing of the suit, an issue whether the Defendant was entitled to adjust the said amount, will have to be framed and decided after evidence of the parties is adduced and arguments advanced.

30. It is pertinent to mention that the aforesaid finding of the learned Single Judge has not been disturbed either by the Division Bench or by the Supreme Court.

31. Keeping in view the aforesaid, I am of the opinion that the defence raised by the Respondent-company is bona fide as well as a substantial one and it is

neither dishonest nor moonshine.

32. Consequently, the present petition is dismissed, but without any order as to costs.

