

(1996) 09 GAU CK 0031

In the Gauhati High Court

Case No : Company Petition No. 6 of .1988

Pestoches (India)

APPELLANT

Vs

Bogphola Tea And Trading Company Pvt.Ltd.

RESPONDENT

Date of Decision : 12-09-1996

Acts Referred:

Companies Act, 1956 — Section 433(e), 433(e), 433(f), 433(f)
Contract Act, 1872 — Section 70, 70

Citation : (1996) 2 GLJ 536 : (1997) 1 GLT 18

Hon'ble Judges : D.N.Baruah, J

Bench : Single Bench

Advocate : D.K.Bhattacharyya, B.P.Kataki, B.M.Choudhary, Advocates appearing for Parties

Judgement

1. This company petition has been filed for winding up the respondent company, The petitioner is a registered firm carrying on business of manufacture and sale of the tea chest and their components ,to various tea gardens. The respondent is a Private Limited Company incorporated under the Companies Act and is an existing company within the meaning of the Companies Act, 1956. Its registered office is at Bogidhola Tea Estate, PO Letekujan in the district of Golaghat. As per verbal order of respondent company the petitioner .firm supplied about 1000.sets of 40 x 50 x 60 Cms size and 500 sets of 40 x 40 x 60 Cms size of tea chest complete with aluminum lining to the respondent company. Bartons had been supplied separately. After supply of the said articles the petitioner firm submitted bill for Rs.8Q,3o6/. On 28.4.87 the "Manager 6f the respondent company by a letter addressed to the petitioner acknowledged receipt of the main consignment of tea chest with fining on 25.4.87 except the bartons. On 9.5.87 45 bundles of bartons were sent to the Manager of Bogidhola Tea Estate through a carrier known as Estern Road Carriers Private Limited. The carrier submitted bill for carrying 45 bundles of bartons from Siligurito Golaghat and the petitioner firm paid the said carrying charge. Thus the price of the goods supplied to the respondent company \\vas Rs.73,000/ and Central Sales Tax was

Rs.7,300/. As the payment was not made, petitioner firm issued notice under section 434 of the Companies Act demanding said amount of Rs.80,300. to that with interest upto 30th September, 1978 Rs.18,6157calculating interest @ 18% per annum. Respondent company replied to the petitioner denying receipt of any goods directly from the petitioner against the said order. Respondent company, however, stated that they received finance from Binaya Finance Company against tea. All the requirements of the company from 198687 and 198788 were undertaken by the said firm. Hence the present petition. .

2. In the petition affidavitinopposition as well as reply affidavit has been filed. Respondent company has also filed additional affidavitinopposition against the reply affidavit.

3. In the affidavitinopposition the respondent company has stated that there was no agreement or contract with the respondent company and, as such, there was no privity of contract between them. The claim of the petitioner was illegal and the respondent company disputed the same. The respondent company has stated that no order was placed by the respondent company with the petitioner firm. Therefore, the question of payment did not arise. There was total denial regarding supply of goods to the respondent company on the basis of any order place by the respondent company. The respondent company has further stated that the company entered into an arrangement with Binoya Tea Company of Moranhat, Sibsagar through its Managing Partner Sri Sarat Saikia for obtaining finance against teas of the company. The said Binoya Tea Company as per arrangement supplied all the requirements of the respondent company including tea chest for the seasons 198687 and 198788 and the respondent company already cleared all dues for supplies made by said Binoya Tea Company. The respondent company had never placed any order for supply of tea chests nor had other business transaction with the petitioner firm. In fact, the petitioner firm supplied materials at the instance of Binoya Tea Company and if said Binoya Tea Company had any dues to the petitioner for that the respondent company was not liable. The respondent company, however, admitted that they received notice through counsel of the petitioner firm demanding Rs.98,915/ which according to the respondent was not tenable in law. The respondent company disputed the said demand and being without foundation. According to the respondent company the notice of demand was misconceived and was issued by the counsel on improper instruction. The claim made was untenable hi law and the respondent company was not liable to pay any amount whatsoever. Against that reply affidavit was filed by the petitioner firm reiterating what had been stated in the main petition. In the said reply affidavit, the petitioner firm also annexed copies of challans, bills, a letter issued by the Manager of the respondent company to the petitioner firm etc. An additional affidavitinopposition was also filed against the reply affidavit exactly reiterating what had been stated in the, affidavitinopposition.

4. Heard Mr. BP Katakya, learned counsel on behalf of the petitioner firm and Mr.

DK Bhattacharyya, learned counsel appearing on behalf of the respondent company.

5. Mr. Katakya submitted that the respondent company acknowledged receipt of the goods supplied by the petitioner firm. However, in spite of receipt of notice under section 434 of the Companies Act the respondent company neglected to pay the amount due to the petitioner firm and, therefore, it should be deemed that the company was unable to pay its debts and, as such, liable to be wound up. Mr. Katakya further submitted that the respondent company unnecessarily raised a dispute stating that there was no privity of contract, no order was placed and that it was Binoya Tea Company which actually placed orders. It was just to avoid payment and to raise point of law by way of defence. The facts and circumstances of the case would show that the goods were supplied to the respondent company and the respondent company received the Same and in spite of receipt of the goods the payment were not made.

6. Mr. DK Bhattacharyya, on the other hand, submitted that the winding up petition was not a legitimate means for seeking enforcement of the payment of debt which the respondent company had bonafide disputed. Mr. Bhattacharyya also submitted that if there was a bonafide dispute then the provisions of the Companies Act for winding up would not be applicable. The petitioner firm was to prove the case by producing positive evidence to show that the company was unable to pay. Mr. Bhattacharyya further submitted that the petition was not a substitute for a civil dispute. In the absence of a contract if any goods were supplied, according to Mr. Bhattacharyya, the company was not liable to make any payment.

7. On the submission of the learned counsel for the parties it is to be seen whether in the present facts and circumstances of the case the respondent company is liable to be wound up under the provisions of the Companies Act, 1956.

8. Winding up of companies by Court is dealt with in Chapter II of the Companies Act. Section 433 deals with the circumstances in which company may be wound up. The circumstances have been enumerated in the said section of which clauses (e) and (f) lay down that company may be wound up by the Court, if the company is unable to pay its debts and if the Court is of opinion that it is just and equitable that the company should be wound up. The principles under which a company may be wound up are well settled. Power under the Companies Act for winding up a company cannot be used for the purpose of enforcement of payment of debt, more so, if the debt is bonafide disputed by the company. Where a company hotly disputes its liability and when it becomes doubtful, the Court should be reluctant to invoke the power for winding up of a company. Besides, the Court should be very cautious in invoking the power of winding up in view of the fact that winding up means civil death of a company as held by the Supreme Court in SK Gupta & another vs. KP Jain & another, reported in AIR 1979 SC 734. If the claim of debt is disputed by the respondent company and

there are complicated facts to be considered, it is always advisable for the parties to go for a civil litigation.

9. In the instant case, the petitioner firm supplied goods to the respondent company. However, the goods were not supplied at the instance of the respondent company. Certain goods were supplied by the petitioner firm as per the orders placed by Binoya Tea Company. The said Binoya Tea Company had an arrangement with the respondent company inasmuch as there was an arrangement to finance respondent company and as per the terms of the agreement arrived at by and between the respondent company and said Binoya Tea Company, said Binoya Tea Company was to place orders for supply, of goods necessary for running the garden. What was the arrangement is not known in the present case. Be that as it may, it was Binoya Tea Company which placed the orders with the petitioner firm for supply of certain goods. This may be pursuant to the terms of the agreement. Therefore Binoya Tea Company actually placed the orders With a direction to make supply to the respondent company. There may be an agreement as to how to make payment between said Binoya Tea Company and the respondent company. There was a privity of contract between said Binoya Tea Company and the respondent company regarding supply of goods to the respondent company and it was the obligation of the company, which placed orders, to take payment for the goods supplied. It is immaterial whether the goods were supplied to the respondent company or to any one else, but the obligation to make payment would be with Binoya Tea Company which placed orders. Said Binoya Tea Company may realise the amount paid by it from respondent company. That, in my opinion, does not mean that the respondent company is indebted to the petitioner firm for making payment. The respondent company in its pleadings states that there was no obligation whatsoever of the respondent company to the petitioner firm and, therefore, the provisions of section 433 (e) is also not applicable. From the very inception the respondent company has been disputing the liability. Going through the affidavit and counter affidavit I find that the debt has been bonafide disputed. To resolve this dispute all facts are required to be gone into and this can be done only in a civil Court. An argument was raised by the counsel appearing on behalf of the petitioner firm that whether there was a privity of contract or not, the fact remains that the respondent company enjoyed the goods and, therefore, provisions of section 70 of the Indian Contract Act are attracted. Under section 70 of the Indian Contract Act, where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys die benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In the present case goods were delivered on the basis of an order placed by Binoya Tea Company and, therefore, actually the goods were delivered to Binoya Tea Company which placed the orders though delivery was made to the respondent company. In my opinion, provisions of section 70 of the Contract Act is not attracted. Since there was a bonafide dispute regarding liability to make

payment, the provisions of winding up under the Companies Act are not attracted.

10. In view of the above, I find no merit in the petition. Accordingly, it is dismissed with cost to be paid to the respondent company which I assess at Rs. 1,000/.