(2009) 03 MAD CK 0001

In the Madras High Court

Case No : C.P. No. 362 of 2003

Phosphate Chemicals Export Association Inc. APPELLANT

Vs

Southern Petrochemical Industries Corporation Ltd. RESPONDENT

Date of Decision : 17-03-2009

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24(2)
Companies Act, 1956 — Section 433, 434, 557

Citation : (2009) 150 CompCas 524 : (2009) 5 MLJ 1249

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : H. Karthik Seshadri, for the Appellant; A.R.L. Sundaresan, for A.L. Gandhimathi, for the Respondent

Judgement

S. Rajeswaran, J.—This petition has been filed by M/s. Phosphate Chemicals Export Association Inc., Illinois, U. S. A. to wind up the

company. According to the petitioner, the respondent placed an order for supply of approximately, 6,81,000 m.t. of Di-Ammonium Phosphate

(DAP) as per Export Sales Contract No. 01433 dated June 27, 2001, on cash against documents, 180 days from the date of bill of lading. The

petitioner shipped the contracted quantity of DAP to the respondent in two shipments. The first shipment of 32,950.754 m.t. DAP was sent under

bill of lading dated June 1, 2001 and the second shipment of 34,999.480 m.t. of DAP was sent under bill of lading dated June 12, 2001. The total

value of DAP was US $ 11,675,325.70 payable within 180 days. Both the shipments were duly accepted by the respondent on arrival.

2. In terms of the agreement, the payment for the first shipment of US $ 5,687,959.16 became due and payable on November 28, 2001 and the

payment of US $ 5,987,361.04 under the second shipment became due and payable on December 10, 2001. However, on November 26, 2001,

the respondent wrote to the petitioner stating that because of the financial difficulties faced by them, they were not able to make the payment on the

due date, i.e., November 28, 2001. They proposed re-scheduling of payments due to the petitioner in seven instalments beginning from February,

2002 and ending August, 2002. The proposed re-scheduling of due payment in instalments was a clear breach of the agreement. Still, as a gesture

of goodwill, the petitioner agreed for the proposal, with a condition that the respondent strictly adhere to the schedule without any default.

Thereafter, the petitioner received US $ 5,00,000 from the respondent in December 2001, but, the respondent did not make any in January or

February 2002, as per the schedule. The respondent paid a sum of US $ 3,00,000 in March, 2002 and thereafter, defaulted in paying the

subsequent instalments. Due to the repeated efforts of the petitioner, in May 2002, a meeting was held between the respondent and the petitioner,

and the respondent by letter dated May 6, 2002, submitted a revised payment plan, assuring that it would remit the outstanding payment in eight

instalments commencing from July 2002, till February 2003. However, the respondent again failed to honour its commitments and did not make the

payment of even the first instalment which became due in July 2002. They were able to make another payment of US $ 0.88 million in August

2002. Thereafter, they committed the breach and did not pay any of the instalments as agreed by them. After continued persua-tions from the

petitioner, the respondent was able to pay another sum of US $ 2,00,000 in January 2003. Therefore, the petitioner was compelled to issue a

notice on January 21, 2003, u/s 434 of the Companies Act, 1956, calling upon the respondent to remit the outstanding payment of US $

9,787,361.04 along with interest at the rate of 7 per cent. per annum from December 11, 2001. In response to the above notice, the respondent

by letter dated February 13, 2003, proposed a schedule of payment for the third time suggesting that they would remit the outstanding payment in

instalments from February 2003 onwards and they would clear the same by the end of 2004. To impress upon the petitioner, they also paid a sum

of US $ 5,00,000. As the petitioner decided to grant a final opportunity to the respondent, the petitioner informed the respondent that it was necessary to assure that the respondent would make payment in every month from February 2003 and they would also address to the issue of

interest. In April 2003, the respondent made part payment of US $ 5,00,000 for the periods March 2003 to July 2003. Thereafter, they failed to

make any payment at all. The petitioner sent another statutory notice under the Companies Act, calling upon the respondent to make payment of

US $ 8,787,361.04 within three weeks of notice along with interest at the rate of 7 per cent. per annum from December 10, 2001. In spite of

receiving the same, the respondent failed and neglected to pay the amount and therefore, it is very clear that the respondent is unable to pay its

admitted dues legally due and payable and the respondent-company has become commercially insolvent. Hence, they filed the above company

petition for winding up the respondent-company.

3. The respondent entered appearance through their counsel and filed a counter statement. According to the respondent, the company suffered a

set back during the financial year 2001-02 due to the reasons like:

(1) The move of the Government of India recovering fertiliser subsidy on an ad hoc basis ;

(2) The company''s DAP plants could not meet the production targets due to funds constraints as well as stiffening of terms of supply imposed by

the goods raw material suppliers and there was a shortage in the company''s fertiliser production in the financial years 2001-02 and 2002-03.

4. Therefore, it resulted in under-utilisation of plant capacities, thereafter, sharp rise in the specific consumption norms and also the direct cost of

manufacture. These adverse factors caused a temporary impediment in an otherwise sound performance that the respondent-company has been

consistent in turning out the financial year after the financial year. To overcome the difficult situation and also to tide over it at the earliest, the

respondent-company is taking various steps to revise its business strategy and to restructure the operations. It is further stated that a Corporate

Debt Re-structuring (CDR) mechanism was evolved by the Reserve Bank of India for facilitating a timely and transparency system for re-

structuring the corporate debts of viable corporate entities like the respondent-company which are affected by internal and external factors. It is

admitted by the respondent that though it is taking best efforts to make payments to the petitioner unsecured debts periodically, such payments are

subjected to the prior approval of the bankers consortium in the CDR group. It is further added that it is the cumulative effect of the above said

adverse conditions which is the reason for the respondent''s inability to repay the amounts which were payable to the petitioner on time. They

denied that they have become commercially insolvent and the inability to pay is not permanent and it is only temporary.

5. That apart, the respondent also alleged that the goods supplied by the petitioner were not as per the specification prescribed by the Government

of India and the same was established by the report of the quality control laboratory. This was also brought to the notice of the petitioner on

August 6, 2001. According to the respondent, the subject matter of the dispute is purely of civil nature and winding up proceedings are not

warranted. It is further stated that if at all the petitioner wanted to realise its dues, the proper remedy would be to file a suit and therefore, the

above company petition is not maintainable. The respondent also disputed the interest by saying that they have not committed to pay interest at 7

per cent. as alleged by the petitioner. Therefore, they prayed for the dismissal of the company petition.

6. Heard learned Counsel for the petitioner and learned Counsel for the respondent. I have also gone through the entire materials on record.

7. Learned Counsel for the petitioner submitted that the petitioner has clearly proved that the respondent-company is unable to pay its debts and

therefore, a case has been made out for winding up the same. He further pointed out that the defence put out by the respondent is not a bona fide

one with regard to the goods supplied by the petitioner by alleging that they were not as per the specification prescribed by the Government of

India. He further added that when the company has become insolvent as it is not able to pay its debts and when there is no bona fide defence put

up by the respondent-company, a case has been made out to wind up the company as per the provisions of the Act. In support of his submissions,

he relied on the following decisions:

1. Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, .

2. National Conduits (P) Ltd. Vs. S.S. Arora, .

3. Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., .

4. Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, .

8. Per contra, learned Counsel for the respondent-company submits that the failure to pay its debt is only temporary due to reasons beyond its

control and therefore, a case has not been made out to wind up the company. According to him, the company is undergoing a temporary crunch

and the same would be removed sooner or later. In such circumstances, he submits that proper remedy for the petitioner is to sue the company for

recovering its debts and the company petition is misconceived.

9. I have considered the rival submissions carefully with regard to the facts and citations.

10. It is not in dispute that the respondent-company placed an order with the petitioner-company for the supply of Di-Ammonium Phosphate, as

per export sales contract dated June 27, 2001. It is also not in dispute that the amount covered under this order was not duly paid by the

respondent-company. In fact, it is on record that the respondent-company asked for a re-schedule of payments in seven instalments initially by

letter dated November 26, 2001. Thereafter, they asked for another revised schedule of payments in May 2002. Yet another proposal for

reschedule of payment was suggested by the respondent in February 2003. Therefore, it was made very clear that the respondent admitted its

liability and therefore, the petitioner-company established that the respondent-company was unable to pay its debts in spite of the time granted as

requested by the respondent. That apart, the respondent in the counter statement itself clearly admitted that due to the adverse conditions prevalent

in this country, it was not possible for them to repay the amounts which were payable to the petitioner. However, they added that the delay in

payment is not indicative of their permanent disability to repay the debts or that they have become commercially insolvent. To this extent, the

decision is very clear that the company was not in a position and in fact they were not able to pay their admitted liability to the petitioner-company

towards order they made with the petitioner-company for the supply of DAP and it was also an admitted fact that the DAP sent by the petitioner in

two shipments were received by the respondent. Though an attempt was made belatedly by the respondent-company by putting a defence that the goods supplied by the petitioner were not as per the specification prescribed by the Government of India and the same was established by the

report of the quality control laboratory, I do not find any bona fide in this defence. Therefore, I am rejecting the attempt made by the respondent

that there was a dispute with regard to the quality of the goods supplied and also with regard to the amount due and payable by them to the

petitioner. What was attempted by the respondent is that they did not accept the interest portion and therefore, that was in dispute. But, the

respondent did not even pay the entire principal amount and therefore, there was no merit in their contention that there is a dispute and therefore,

the petitioner should only approach the civil court to recover the outstanding amounts.

11. In Mediqup Systems P. Ltd. v. Proxima Medical System GmbH [2005] 124 Comp Cas 473 : [2005] 4 LW 475, the hon''ble Supreme Court

held as under (pages 481 and 483):

19. This Court in catena of decisions held that an order u/s 433(e) of the Companies Act is discretionary. There must be a debt due and the

company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a

future date and that the liability referred to in the expression ''unable to pay its dues'' in Section 433(e) of the Companies Act should be taken in the

commercial sense and that the machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a

company . . .

28. The rules as regards the disposal of winding up petition based on disputed claims are thus stated by this Court in Madhusudan Gordhandas

and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . This Court has held that if the debt is bona fide disputed and the defence is a substantial one, the

court will not wind up the company. The principles on which the court acts are:

(i) that the defence of the company is in good faith and one of substances ;

(ii) the defence is likely to succeed in point of law ; and

(iii) the company adduces, prima facie proof of the facts on which the defence depends.

12. From the above, it is very clear that an order u/s 433(e) of the Companies Act is discretionary and there must be a debt due and the company

must be unable to pay the same. That apart, the defence raised should be a substantial one and not a mere moonshine. Only when the debt is bona

fide disputed and the defence is a substantial one, the court will not wind up the company.

13. In Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , the hon''ble Supreme Court held that if the debt is bona fide

disputed and the defence is a substantial one, the court will not wind up the company. The hon''ble Supreme Court further added that 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 that

particular debt. The principles on which the court acts are that firstly, the defence of the company is in good faith and one of subsistence, secondly,

the defence is to succeed in a point of law and thirdly, the company adduces prima facie proof of the facts on which the defence depends.

14. In Pradeshiya Industrial and Investment Corporation of Uttar Pradesh v. North India Petro Chemical Ltd. [1994] 79 Comp Cas 835, the

hon''ble Supreme Court observed that if there is a decision to the making of winding up order by creditors, the court will consider their wishes and

may decline to make the winding up order u/s 557 of the Companies Act, 1956, in all matters relating to winding up of the company, the court may

ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though the court may attach greater weights to the view

of the creditors.

15. In National Conduits (P) Ltd. Vs. S.S. Arora, , the hon''ble Supreme Court held that a petition for winding up cannot be placed for hearing

before the court unless the petition is advertised and that is cleared from the terms of Rule 24(2) of the Companies (Court) Rules, 1959.

16. In the light of the above settled legal principles, if the facts of the present case are considered, I am of the considered view that the debt due to

the petitioner-company was duly established and it is a determined sum of money payable by the respondent. That apart, it has also been

established that the respondent was unable to pay its dues. In fact, the liability to pay also was admitted by the respondent. A weak attempt was

made to put up a defence which is not a substantial one and there is no bona fide dispute with regard to the sum payable towards the principal.

Therefore, I am of the considered view that the petitioner can very well maintain the company petition. In the circumstances, the following order is

passed:

(i) Admit. Notice returnable by April 28, 2009.

(ii) The petitioner is directed to publish the company petition in one issue of Tamil daily Malai Murasu, one issue of English daily Deccan Chronicle

and also in the Tamil Nadu Government Gazette returnable by April 28, 2009 and also serve notice on the respondent-company.

(iii) The petitioner is directed to publish the company petition giving atleast fourteen days of clear advance notice.

17. Call the company petition on April 28, 2009.

Later on:

18. The company petition has been posted before me for ""being mentioned"" at the instance of learned Counsel for the petitioner.

19. On March 17, 2009, this Court passed the final order in the company petition. As there was no mention about the names of the news papers

in which publication has to be effected, this company petition has been brought before me.

20. Learned Counsel for the petitioner submits that the publication could be effected in Malai Murasu and Deccan Chronicle and the names of all

those papers could be mentioned in the order.

21. Learned senior counsel Mr. AR. L. Sundaresan, appearing for the respondent submits that the order passed by this Court on March 17, 2009,

could be suspended for a period of two weeks to enable them to move the appellate forum, as the publication itself would affect the interest of the

respondent-company. But it is being opposed by learned Counsel appearing for the petitioner.

22. Considering the submissions made, I have incorporated the names of the two papers in which the publication has to be carried out. Regarding

suspension of the order, I am of the view that this order could be suspended for a period of two weeks from today.

23. Accordingly, the order passed by this Court on March 17, 2009, is suspended for a period of two weeks from today.