

(2016) 03 CAL CK 0172
In the Calcutta High Court

Case No : A.C.O. No. 206 of 2015, A.P.O.T. No. 547 of 2015 and C.P. No. 89 of 2014

R.A.V. Dravya (P) Ltd.

APPELLANT

Vs

Concast Global Ltd.

RESPONDENT

Date of Decision : 14-03-2016

Acts Referred:

Companies Act, 1956 — Section 433, Section 434, Section 439

Citation : (2017) 200 CompCas 332

Hon'ble Judges : Ms. Indira Banerjee and Sahidullah Munshi, JJ.

Bench : Division Bench

Advocate : Mr. Jishnu Saha, Sr. Adv., Ms. Hashnuhana Chakraborty, Mr. Debjyoti Manna and Mr. Sutanu Karmakar, Advocates, for the Appellant; Mr. Abhrajit Mitra, Sr. Adv., Ms. Noelle Banerjee, Mr. Dipak Dey and Ms. Rimpa Rajpat, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

1. These appeals are against a common judgment and order dated 16th October, 2015 (since reported in R.A.V. Dravya (P) Ltd. v. Concast Exim Ltd., (2017) 200 Comp Cas 323 (Cal.) passed by the learned Company Court, whereby the learned Company Court disposed of four more or less identical winding up petitions filed by the appellant petitioning creditor, R.A.V. Dravya (P) Ltd. against four difference Companies, Concast Global Ltd., Concast Exim Ltd., Concast Ispat Ltd. and Dankuni Steel Ltd., hereinafter collectively referred to as the Respondent Companies, which appear to be group Companies controlled by one Sanjay Sureka.

2. By the judgment and order under appeal, the learned Company Court refused to admit the aforesaid four winding up petitions and relegated the petitioning creditor to the civil remedy available to the petitioning creditor. The learned Company Court directed that the period during which the winding up petitions had been pending in this Court may be excluded under Section 14 of the

Limitation Act, 1963, in computing the period of limitation.

3. The claims of the petitioning creditor against the respondent companies, which are on account of goods sold and delivered by the petitioning creditor to the respondent companies, are as follows :

(i)

Concast Global Ltd.

Rs.10,20,35,779.20

(ii)

Concast Exim Ltd.

Rs. 10,41,13,301.99

(iii)

Concast Ispat Ltd.

Rs.10,42,72,042.73

(iv)

Dankuni Steel Ltd.

Rs.10,78,67,248.36

4. It is not disputed that the goods have been supplied by the petitioning creditor to the respondent companies. It is the case of the respondent companies that the respondent companies are part of a group of eight companies, which may, for the sake of convenience, be referred to as the Concast group of companies. The Concast group of companies include Concast Bengal Industries Limited, hereinafter referred to as "Concast Bengal". Mr. Sanjay Sureka, controls the Concast group of companies including the four respondent companies, as well as Concast Bengal.

5. For the purpose of adjudication of this appeal we may proceed on the basis that Concast Bengal and the four respondent companies belong to the Concast group of companies. As noted above, supplies by the petitioning creditor to the respondent companies are admitted.

6. The respondent companies, however, contend that Concast Bengal had sold and delivered goods worth Rs.29,99,12,219/- the gross value of which was Rs.31,19,08,705/- to the petitioning creditor. According to the respondent companies, the factum of such sale would be borne out from VAT (Value Added Tax) returns, which would show that the entire VAT had been paid by Concast Bengal for the goods so sold and delivered by Concast Bengal to the petitioning creditor.

7. The respondent companies contend that it was agreed by and between the

petitioning creditor and the Concast group of companies that the price receivable by Bengal Concast and/or Concast group of companies would be adjusted and/or set off against supplies by the petitioner to the respondent companies/Concast group of companies.

8. Ms. Hashnuhana Chakraborty, learned advocate appearing on behalf of the appellant/petitioning creditor, in the four appeals, argued that the claim of the respondent companies to have sold materials worth Rs.31,19,08,705/- to the petitioning creditor was disputed by the petitioning creditor. Ms. Chakraborty submitted that all the documents produced in support of supply of goods by Concast Bengal were forged and fabricated. Whether the documents were forged or fabricated could not be decided in summary winding-up proceedings under the Companies Act, 1956. Whether the documents were forged or fabricated would necessarily have to be decided upon evidence by instituting a regular suit in the appropriate civil court.

9. The most important question in these appeals is, whether the respondent companies could claim adjustment of goods sold and delivered by Concast Bengal to the appellant petitioning creditor, assuming that Concast Bengal had actually supplied goods to the petitioning creditor, as claimed by the respondent companies.

10. Ms. Chakraborty strenuously contended that there was no agreement between the appellant petitioning creditor and the respondent companies for adjustment of the price of goods supplied by the petitioning creditor to the respondent companies against the alleged dues of the petitioning creditor to Concast Bengal on account of supplies allegedly made by Concast Bengal to the petitioning creditor.

11. To strengthen her argument, Ms. Chakraborty referred to invoices to show that there were due dates printed in the invoices. Ms. Chakraborty argued that it was not the contention of the respondent companies that the due dates had been mentioned erroneously. In any case, there are no materials to show that the due dates had been objected to by the respondent companies.

12. Ms. Chakraborty also argued that the adjustment of amounts alleged to be outstanding and payable by the petitioning creditor to Concast Bengal on account of supplies allegedly made by Concast Bengal to the appellant petitioning creditor was not reflected in the annual reports and balance sheets of Concast Bengal. The adjustments were not recorded in the balance sheets of the petitioning creditor.

13. Ms. Chakraborty emphatically argued that the balance sheet of Concast Bengal has been annexed to the affidavit in opposition filed by one of the respondent companies. The column relating to Related Party Disclosures does not say anything about the purported adjustment of the amounts due and payable by the respondent companies against the amounts allegedly due and payable by the petitioning creditor to Concast Bengal. Ms. Chakraborty pointed out that it was a

mandatory requirement of law as per Accounting Standards (A.S.) 18 that a company would have to make Related Party Disclosures.

14. Ms. Chakraborty argued that the notices under Section 434 of the Companies Act were received by the respective respondent companies, who did not give any reply to the same. This in itself raises a presumption of admission of debt. After receiving the statutory notices, the respondent companies did not say that dues of the petitioning creditor had been adjusted against alleged dues of Concast Bengal.

15. There can be no doubt that failure to reply to a statutory notice of winding up under Section 434 of the Companies Act gives rise to presumption of acknowledgement of liability. However, it is well settled that such presumption is rebuttable. The question is whether the respondent companies have been able to rebut the presumption, at least prima facie.

16. Adverting to paragraph 14(e) of the affidavit in opposition to one of the stay petitions, Ms. Chakraborty argued that there was no agreement relating to adjustment between the parties. She relied on the following sentence -

"It was thereafter proposed by the Concast group that the petitioning creditor, R.A.V. Dravya [P] Ltd., would effect supply of iron and steel goods to Concast group which would be adjusted against the amount payable by R.A.V. Dravya [P] Ltd. to Concast Bengal Industries Ltd."

17. It is the overall case of the respondent companies that there was an arrangement for adjustment of the consideration for supply of goods to the Concast group against the amount payable by the petitioning creditor for goods supplied by the Concast Bengal. The pleadings in affidavits are to be read in a whole. Pleadings cannot be truncated and read out of context. The intent of the pleadings is to be considered.

18. Whether the proposal referred to in the affidavit in opposition fructified into an agreement, is also a matter which is to be decided on evidence. An agreement is not necessarily always in writing. Oral agreements, if proved, are enforceable in law.

19. Section 171 of the Contract Act which specifically empowers bankers, factors, wharfingers, attorneys of High Court and policy brokers to retain as security for a general balance of account, any goods bailed to them, even in the absence of any contract, has no application to the instant case as no lien has been claimed in respect of goods by way of security. Moreover, the respondent companies claim that there is an agreement for adjustment. The veracity of the claim has to be adjudged upon evidence, as observed earlier.

20. In M/s. H. M. Kamaludin Ansari and Co. v. Union of India & Ors., reported in (1983) 4 SCC 417, cited by Ms. Chakraborty, the Hon'ble Supreme Court interpreted clause 18 of the concerned contract. The judgment was rendered in the particular facts of the case.

21. A judgment is a precedent for the issue of law that is decided. There is no issue of law decided in the aforesaid judgment which supports the contention of the petitioning creditor that the dues of the petitioning creditor to Bengal Concast could not have been adjusted against the claims relating to the supplies in question. The judgment in *Union of India v. Raman Iron Foundry* reported in (1974)2 SCC 231 which interprets the contract concerned, is also distinguishable on facts and has no application in this case for the same reason.

22. Ms. Chakraborty argued that the respondent companies cannot seek to set off supplies made by Concast Bengal to the petitioning creditor against supplies made by the petitioning creditor to the respondent companies, as supplies had been made by Concast Bengal to the petitioning creditor between January and March, 2009 and since then there had been no acknowledgement of outstanding dues by the petitioning creditor.

23. Ms. Chakraborty argued that the entire claim, if any, of the Concast Bengal was barred by limitation. Concast Bengal could not, therefore, seek legal set-off of such dues against the amounts paid by the respondent companies to the petitioning creditor.

24. Ms. Chakraborty argued that it is settled law that equitable set-off debts is payable only if the same arise out of the same transaction. In support of her arguments, Ms. Chakraborty cited *Union of India v. Karam Chand Thapar & Bros. (Coal Sales) Limited & Ors.*, reported in (2004) 3 SCC 504 and *Jitendra Kumar Khan v. Peerles General Finance & Investment Co. Ltd. & Ors.*, reported in (2013) 8 SCC 769.

25. In *Karam Chand Thapar (Supra)*, the Supreme Court held that "Such mutual debts and creditors or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so."

26. In *Jitendra Kumar Khan (supra)* the Hon"ble Supreme Court held that equitable set-off exists not only in cases of mutual debits and credits, but also where cross-demands arise out of the same transaction. The mutual debits and credits or cross-demands must have arisen out of the same transaction or be connected in the nature and circumstances. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due. For equitable set-off the debits and credits may arise out of the same transaction or be connected in the nature and circumstances. The crucial words are connected in the nature and circumstances.

27. Ms. Noelle Banerjee, learned Advocate appearing on behalf of the respondent companies, argued that the Court was entitled to lift the corporate veil to find out

the true nature of the transactions. In support of her contention she cited the following judgements:

" (I) New Horizon Limited and Another v. Union of India and others reported in (1995) 1 SCC 478;

(ii) 2008 (3) CHN 384 Kamal Kumar Mitra, deceased and Taxation Services Syndicate Ltd.

(iii) 1999 1 CLJ 105 Food Corporation of India v. Williamson Magor & Co. Ltd.

(iv) 2011 1 CHN (Cal) 762 Niranjana Lal Todi & Anr v. Nandlal Todi & Ors;

(v) 157 CC 413 Dallah Albaraka (Ireland) Ltd. v. Pentasoft Technologies Ltd."

28. There can be no dispute with the proposition laid down in the judgements cited by Ms. Chakraborty. It is well settled that the Court can in appropriate cases lift the corporate veil to find out the true nature of the transactions. However, ordinarily in proceedings for winding up of a company or for that matter in civil proceedings for recovery of a claim a group of companies does not automatically become liable nor can a group of companies automatically claim entitlement to payment of dues payable to a different group of companies.

29. The question is whether there was any arrangement by which a right to adjustment can be claimed. This is a factual issue which may have to be decided on the basis of evidence, documentary as also oral.

30. The learned Company Court rightly held that a company would be liable to be wound up if it was unable to pay its debts. The question posed by the learned Court was how the Court could adjudge if a company was unable to pay its debts. The learned Company Court drew an analogy between the circumstances in which a Court trying a summary suit could grant a decree or grant leave to defend and held that the principles would apply to winding-up proceedings.

31. In *Madhusudan Gordhands & Co. v. Madhu Woollen Industries [P] Ltd.* reported in AIR 1971 SC 2600 relied upon by the learned Company Court, the Supreme Court held that if a company raised a defence in good faith or a defence which was likely to succeed or prima facie likely to succeed at the trial, in that event the winding-up application would fail.

32. In *London & Paris Banking Corporation* reported in 19 Equity Cases 444, Sir George Jessel said that the companies should have reasonable ground for not paying the debt of petitioning creditor to avoid liquidation proceedings.

33. The learned Company Court also referred to *SRC Steel Pvt. Ltd. v. Bharat Industries Corporation Ltd.* reported in 2005 [4] CHN 343 where a Division Bench of this Court presided over by Ajoy Nath Ray, A.C.J., opined that in a winding-up application, the Court had to come to the conclusion that the claim of the petitioning creditor was indisputable. This determination had to be final and not prima facie, at both stages of winding up, the admission stage and the trial

stage. At the admission stage it was final and conclusive as between the petitioning creditor and the company, but at the final stage it was conclusive between the petitioning creditor, the company, the creditors and all other persons who joined the winding-up.

34. In SRC Steel Pvt. Ltd. supra, the learned Division Bench held that the standard of proof required by the petitioning creditor to prove his case in the winding-up application was the same standard that was required to prove a plaintiff's case in a summary suit. The learned Company Court rightly concluded that the company must be in a completely defenceless position, for it to be wound up. It would suffice if the company raised a triable issue for relegation of a winding-up application to a civil forum, the defence is a completely sham defence, the Court may direct the company to be wound up. If, however, the defence raised by the company in the winding-up proceedings is not a sham defence but a plausible one, the Court ought not to direct winding-up of the company.

35. We find no infirmity whatsoever in the order of the learned Company Court which calls for interference in appeal.

36. The appeals and the connected applications are, therefore, dismissed.

37. We, however, make it clear that the period during which the appeals have been pending in this Court, shall also be excluded for computation of limitation under Section 14 of the Limitation Act, 1963.