
(2010) 12 DEL CK 0312

In the Delhi High Court

Case No : Company Petition No. 91 of 2008

RPG Cables Limited

APPELLANT

Vs

Logic Eastern India Pvt. Limited

RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Companies Act, 1956 — Section 433(1), 434(1)

Citation : (2011) 2 BC 427 : (2011) 161 CompCas 443 : (2011) 3 CompLJ 637 : (2011) 176 DLT 641 : (2011) 107 SCL 38

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Jayant Bhushan and Shruti Verma, for the Appellant; Priya Kumar, for the Respondent

Final Decision : Dismissed

Judgement

1. Petitioner-RPG Cables Limited (hereinafter referred to as RPGCL, for short) seeks winding up of the Respondent-Logic Easter India Pvt. Limited (hereinafter referred to as the Respondent-company, for short) on the ground of inability of the Respondent-company to pay debt due u/s 433(e) read with the presumption raised u/s 434(1)(a) of the Companies Act, 1956. The allegation of the Petitioner is that the Respondent-company has failed to pay the undisputed/ admitted debt inspite of service of statutory notice dated 21st January, 2008 u/s 434(1)(a) of the Act. Clause (c) of Section 434(1) is also evoked by the Petitioner.

2. The Respondent-Company has defended the present proceedings, inter alia, on the ground that the debt claimed is not debt due but a disputed debt and the present proceedings are nothing but arm-twisting tactics. It is also alleged that the Petitioner has not approached the court with clean hands.

3. Both the parties have not disputed that they had entered into an Agreement dated 15th December, 2002 (hereinafter referred to as the Agreement, for short) and that an amount of Rs. 4.73 crores was paid by the RPGCL to the Respondent-

Company.

4. The Agreement, as per Schedule I required the Respondent-Company to develop the equipment, including software, mentioned in it and transfer of rights to enable RPGCL to manufacture the said product. Schedule I reads as under:

SPECIFIED PRODUCT

1. Specifies Product shall include (switching functionality) CoT Broad Band Router meeting the Clause 6.5.2.1 and all its Sub-clauses (6.5.2.1.1 to 6.5.2.1.3 and 6.5.2.1.3.1 & 6.5.2.1.3.3) of the TEC, BSNL specification for Generic Requirements of Optical Multi Service Access Network Equipment on STM-1/4/16 SDH transport No. GR/OMSAN-01-01 MAR" 2003 or its latest amendment.

It is hereby clarified that the same generic product specified under the framework of different specifications/amendments would be treated as same products.

It is also clarified that the Product includes NMS (Network Management Software) that would be an integral part of the product.

2. All components, accessories and spares used for the manufacture of above;

3. Such other items/components/accessories as may be mutually agreed upon by the Parties.

5. RPGCL, in support of its claim, has relied upon Clause 2 of Article XIII of the Agreement which reads:

2. In the event this agreement is terminated due to breach of contractual terms by LE, prior to obtaining TEC approval or for not meeting the development within three months of dates mentioned in Schedule II and keeping into account the considerations mentioned in Article XII Clause 7, LE shall refund (with 14% interest) Development expenses received from RPGCL and to secure such refund there shall have to be made an Escrow arrangement over the Bank account of LE. Payment received in any form for other products licensed to other parties will be diverted to RPGCL to meet LE's payment obligations to RPGCL.

(LE stands for the Respondent company)

6. RPGCL relies upon Schedule II of the Agreement in support of the contention that the product had to be designed within a specific time limit as stipulated in the said Schedule. My attention was drawn to specific milestones indicated in Schedule II along with the time/schedule of delivery. It is stated that the Respondent has failed to adhere to the said schedule and therefore Clause 2 of Article XIII of the Agreement is applicable.

7. On the other hand, the Respondent-Company has defended the present proceedings on the ground that the time schedule for payments was not adhered to by RPGCL as there were delays in making payment of the instalments fixed in Schedule-IV of the Agreement. The case made out by the Respondent-Company

is that delay in payment had an adverse impact on the timely development of the product which resulted in delay in procuring equipments to test, debugging the product etc. Further, development of a telecom product, like CoT routers, required a team of dedicated experts who were required to be paid adequate and suitable salary. It is submitted that the Respondent-Company had to put in great efforts and on account of the personal credibility of directors and after putting in money from all sources, they had developed the first prototype CoT broadband router and that the Respondent-Company had thus complied with the terms of the Agreement.

8. As far as delay is concerned, it appears that there were delays on both the sides. There was delay on the part of RPGCL in making payments and payments were not made as fixed in Schedule-IV. The Respondent-Company also did not adhere to the time schedule with regard to milestones mentioned in Schedule-II. Apparently, both the parties did not abide by the time schedule stipulated in the Agreement. The same was not regarded as binding and essence of the contract. Leverage was granted by both the parties and the delays were ignored and not taken seriously. Thus delay alone does not entitle the Petitioner to claim refund with interest. Neither the Petitioner nor the Respondent had cancelled/terminated the agreement on the ground of delay by the other side. When there was delay in making the payments on the part of the Petitioner itself and the schedule fixed in the agreement was not adhered to, it does appear that the Petitioner cannot rely upon the time limit fixed in the Schedule II of the Agreement to seek a winding up order. Whether or not delay in payments was responsible for the delay in "development" of the product, is a debatable issue, which cannot be decided in a summary manner without oral evidence. Defense raised by the Respondent company in this regard is substantial.

9. Learned Counsel for the Petitioner has submitted that the prototype of the final product as required in Schedule-I was never developed by the Respondent-Company and therefore the Respondent-Company must return the entire amount of Rs. 4.73 crores paid by the RPGCL.

10. Respondent-Company, on the other hand, has placed on record a copy of letter dated 26th July, 2004 written by RPGCL congratulating them on successful completion of field trials of EDGILE 4000 (routers) and Access Switches. This letter reads:

We take this opportunity to congratulate you on the successful completion of "Field Trials" of:

1. Router - EDGILE - 4000
2. Access Switch

We also write to inform you that we are making necessary arrangements to start the commercial production of the said telecom equipment with the technology indigenously developed by you at our works at Hebbal Industrial Area,

Hootagalli, Belavadi Post, Mysore - 571 186.

We will need your support and guidance in setting up of assembly lines and shall be thankful if you could please organize a workshop at your R&D facility for our production team on 6th or 7th August, 2004.

We plan to manufacture about 20-22, EDGILE 4000 (Routers) and 7500-8000 Access Switches during the current financial year.

We solicit your cooperation in the matter.

Thanking you,

Yours sincerely,

FOR RPG CABLES LIMITED

Sd/- C.N. Banerjee

Chief Manager

11. By another letter dated 17th January, 2006, RPGCL had informed the Department of Scientific and Industrial Research that the Respondent-Company was working to develop telecom/datacom products for the last four years and the results were then apparent. The Petitioner had provided funds of over Rs. 5 crores for the development. This letter however does not refer to the Agreement.

12. During the course of hearing, it was stated by the counsel for the Respondent-Company that EDGILE 4000 Routers mentioned in the letter dated 26th July, 2004 are the same routers which are referred to in Schedule-I of the Agreement. Thus, as per the case of the Respondent-company the equipment mentioned in Schedule I was developed by them and this fact is admitted and acknowledged by RPGCL. In what context, how and why this letter dated 26th July, 2004 was written is disputed and can be explained by RPGCL but this would require oral evidence for any determinative finding. It is also noticed that RPGCL has not mentioned or referred to their letter dated 26th July, 2004 in the present petition. This fact was concealed.

13. Para 19 of the winding up petition reads:

19. The Petitioner was further surprised to find out that the Company had in fact, developed some of the products undertaken to be developed by the Company for the Petitioners and have been illegally trading the same in the market under its own brand name. It is therefore, clear that the Company diverted the funds invested by the Petitioner to their own use and falsely informed the Petitioner that the products could not be developed. Thereafter, the Company failed to repay the said amounts and made repeated false promises only to hoodwink and betray the Petitioner. The Company developed products at the cost of the Petitioner and reaped the benefits thereof by clandestinely selling the same in the market, which they were not authorized to. The Petitioner has also filed further proceedings in the competent criminal court against the Company and its

directors praying for their prosecution for committing such criminal acts.

14. Thus there is admission in para 19 of the petition that the Respondent-Company had developed some products, details of which have not been stated. In fact the stand of RPGCL is that the products were developed and the RPGCL was falsely informed that the same could not be developed. There is a clear distinction in the allegation that the products mentioned in Schedule-I of the Agreement were not developed and the products were developed but technology and rights in the products were not transferred to RPGCL in terms of the Agreement.

15. RPGCL has referred to e-mails which were exchanged between the parties during the period of October 2006 till September 2007. A perusal of these emails shows that the parties were trying to negotiate a settlement and points of agreement were also exchanged. The points of agreement mentioned in the emails suggest that part of the investment by RPGCL was to be converted into equity with rights to RPGCL in intellectual property and marketing of the products developed by the Respondent company. Valuation of the Respondent company was to be undertaken to fix the purchase price of the equity. An amount of Rs. 1 crore was to be transferred/paid to RPGCL including payment of Rs. 20 lakhs as soon as the Respondent- company would receive their first payment from Dhaka.

16. Learned Counsel for the Petitioner is right in contending that in some emails the Respondent-company has admitted financial crunch and lack of funds in their bank accounts. He has pointed out that cheque of Rs. 20 lakhs given by the Respondent company was dishonoured. Thereafter, in response to legal notice the Respondent-company had paid Rs. 10 lakhs by way of two demand drafts and the balance sum of Rs. 10 lakhs was paid subsequently. In their reply dated 20th September, 2008, the Respondent- company had stated that a cheque of Rs. 20 lakhs was handed over to RPGCL not for repayment of the funds invested under the agreement but for a separate transaction for purchase of various broadband components under invoices raised. This payment of Rs. 20 lakhs, as per the Respondent-company, was unconnected with the agreement. During the course of argument the Respondent had produced before the court an invoice dated 22nd December, 2005 for supply of equipment worth Rs. 21,55,787/- raised by RPGCL against the Respondent company. These are again disputed questions of fact, which cannot be decided without oral evidence, cross examination etc.

17. As per the points of the agreement exchanged in the emails, the Respondent company had to refund Rs. 1 crore out of the investment of Rs. 5 crores. Rs. 1 crore was payable after the Respondent company received soft loan from the Department of Scientific and Industrial Research (DSIR). The emails referred to, state that a legal agreement was to be drafted and that RPGCL and Respondent company would sign the same to concretely agree on the path forward. No such formal agreement was signed or even exchanged. RPGCL has not based its claim on the points of agreement mentioned in the email. The claim of RPGCL is for

refund of Rs. 4.73 crores with interest @ 14% per annum and not for Rs. 1 crore out of which payment of Rs 20 lakhs has been received. RPGCL is not making any claim for investment in equity of the Respondent-company. It is not the case of RPGCL that any binding contract in terms of the emails had come into existence, novating the agreement. Emails, however, do show that attempts were made by the parties to amicably settle the matter. It is difficult to decipher and state conclusively merely on the basis of emails that the defense of the Respondent company is make believe and a camouflage to avoid paying an admitted debt. These are contentious issues which require trial before any judicial finding can be given one way or the other. It is difficult in summary proceedings to conclusively hold that there are admissions by the Respondent company towards liability to pay the debt due.

18. The law relating to winding up of a company on the ground of neglect or failure to pay a debt due is well settled. If a debt is bona fide disputed and the defense is substantial and not dishonest or moonshine, the court will not wind up the company. A prima facie view of the facts has to be taken to decide whether not to admit/reject the petition. The machinery of winding up should not be allowed to be used as merely a means of realizing debts. However, where a debt is undisputed and the defense is sham, the company court will reject the defense that the company has ability to pay the debt but chooses not to pay. The Supreme Court, in the celebrated case, *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, has expounded the following principles:

20. Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See *London and Paris Banking Corporation*) Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been properly done was not allowed. (See *Re. Brighton Club and Horfold Hotel Co. Ltd.*)

21. 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, see *Re. A Company*. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely See *Re Tweeds Garages Ltd*. The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

19. In *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, the Supreme Court has observed:

18. This Court in a catena of decisions has 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 inability referred to in the expression "unable to pay its debts" 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.

19. ...

20. ...

21. ...

22. ...

23. The Bombay High Court has laid down the following principles in *Softsule (P) Ltd., Re*:

Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order.

Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434(1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability u/s 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

24. x x x x x

25. 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. v. Madhu Woollen Industries (P) Ltd.* This Court has held that if the debt is bonafide 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 substance;

(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.

20. Recently, the Supreme Court decision in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., examined the case law on the subject and has held that if the creditor's debt is disputed on substantial grounds, the court should dismiss the petition so as to avoid the abuse of the procedure of winding up. It was observed:

17. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt.

18. In this connection, reference may be made to the judgment of this Court in Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami and Anr. (1965) 35 CC 456 (SC), in which this Court held that "It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court.

19. The above mentioned decision was later followed by this Court in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . The principles laid down in the above mentioned judgment have again been reiterated by this Court in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , wherein this Court held that the defence raised by the Appellant-company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The above mentioned judgments were later followed by this Court in Vijay Industries Vs. NATL Technologies Limited,

21. Thus, a petition for winding up with an aim of coercing payment of a disputed

debt is an abuse of the process of court. The defense raised in the present case is substantial. In view of the abovementioned decisions and discussion, the present petition for winding up is not admitted and is dismissed. The observations and findings made above are for the disposal of the present winding up petition and will not prejudice any litigation inter se parties. No costs.