

(2004) 09 DEL CK 0100

In the Delhi High Court

Case No : CP 315/97, 1234/97, 1235/97 and 1288 of 2000

Shri Krishna Holding

APPELLANT

Vs

Auto Ignition Limited

RESPONDENT

Date of Decision : 25-09-2004

Acts Referred:

Central Excise Rules, 1944 — Rule 56A, 57A
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Companies Act, 1956 — Section 433, 434, 439
Partnership Act, 1932 — Section 69

Citation : (2004) 09 DEL CK 0100

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Narendra M. Sharma, for the Appellant; A.S. Chadha, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—In this petition filed by the petitioner, seeking winding up of the respondent company under the provisions of Section 433, 434 and 439 of the Companies Act (in short the "Act"), the case set up by the petitioner is that it had purchased value based advance licenses from the respondent in order to avail the Import/Modvat Credit under Rules 56-A and 57-A of the Central Excise Rules, 1944 (hereinafter referred to as the "Rules"). The said value-based advance licenses were freely transferable. The petitioner paid a sum of Rs.14,89,796/- against the three value based advance licenses with the explicit and clear understanding and acknowledgment that the petitioner would be able to avail the Modvat/Import credit and consequently the petitioner paid the said sum of Rs.14,89,796/- for these three value based advance licenses. The petitioner after obtaining the aforesaid value based advance licenses, approached the Custom Authorities for the purpose of import of goods under the said licenses. However, the customs Authorities informed that such credit has already been availed by the respondent whereas it was never informed to the petitioner

by the respondent that the respondent company has already availed the Modvat Credit and such a credit would not be available to the petitioner.

2. In these circumstances, alleges the petitioner, the petitioner became entitled to the refund of this amount of Rs.1489796/-. The petitioner made a demand for refund of this amount from the respondent which was of no avail. In these circumstances, statutory notice dated 28.12.95 u/s 434 of the Act was also served and the demand contained in the said notice also went unheeded. Although this notice was duly received by the respondent but no reply was given and thus, the present petition has been filed.

3. In the reply filed by the respondent the transaction in question entered into between the parties and the payment of Rs.14,89,796/- by the petitioner to the respondent in respect of these licenses is not denied. However, the defense rests on four contentions, which are as under:-

(a) The claim of the petitioner is time barred. In this behalf it is stated that perusal of Annexure "A" would show that the date of license and date of validity along with its sale value of the licenses are as under:-

Date of license				Validity date				Sl. No.	license No.
									(Rs.)
								1	2308957
23-08-1994	22-8-1995	6,61,027/-	2	2308944	19-08-1994	18-8-1995			
2,94,465/-	3	539313	28-7-1994	27-7-1995		5,34,230/-			
								Total	14,89,796/-

Although in para 8 of the petition the petitioner has not stated the date with regard to payment made by the petitioner in respect of these licenses, even if last date is taken as 28.7.1994, three years limitation period would expire on 27.7.1997. The present petition filed on 29.8.1997 would, Therefore, be barred by limitation.

(b) On merits it is alleged that the petitioner firm had come to know on 24.3.1995 that the licenses were valid and no credit at the input stage had been taken or at any rate the entries were reversed. Therefore, all the three licenses could be utilised because the licenses were expiring in July/August, 1995. The petitioner firm had approximately five to six months clear time for importing the material on the strength of the said licenses. It is stated that the respondent had sold licenses in similar circumstances to other persons like M/s. G.K. Winding Wires Pvt. Ltd., 134, BSIC Complex, Okhla Industrial Estate, Phase -I, New Delhi and M/s. Ishita Metals who had used and utilised the licenses within the said period and had imported goods on the strength of the similar licenses. Such a plea has been taken in the written statement and name of the firms have been disclosed in para 2 of the reply to the application under Order 39 Rules 1 and 2 of the Code of Civil Procedure. It is, Therefore, contended that as the petitioner firm became dis-interested or found that it was not profitable for it to import goods, it allowed

the validity period of the licenses to expire and thereafter started threatening the respondent that it would claim "damages" on account of alleged cheating.

(c) The respondent has also contended that the present petition is based on the allegations of misrepresentation, cheating and fraud etc. and thus, jurisdiction of this Court has been wrongly invoked as in the company petition these aspects cannot be adjudicated upon.

(d) Otherwise, it is contended, it is neither a case of admitted debt on the part of the respondent nor its inability to pay or neglect to pay. The respondent company is solvent and even on the date of filing the reply to the application for interim injunction it had to recover sum of Rs.12 crores from various debtors; it had a paid up capital of Rs.5 crores; reserved capital of Rs.9 crores; it has viable factory at Faridabad employing approximately 450 employees; annual turnover is of Rs.49 crores; and the company was earning profits which will be clear from the profit and loss account and balance sheet as on 31.3.1999 placed on record.

4. Learned counsel for the petitioner highlighted the averments made in the petition and submitted that when the respondent company had admitted having received the amount in question against sale of value based advance licenses and also admitted that it is the respondent company which had availed the Modvat Credit, the petitioner could not have imported the goods availing the said credit against these licenses and, Therefore, in view of this admitted fact, the debt was payable which is in the nature of admitted debt and non-payment thereof gives rise to the filing of the present petition. It was also his submission that the defense taken by the respondent company is not at all bona fide and it is sham and, Therefore, the same be discarded. Learned counsel in support of the prayer made in the petition placed reliance upon the judgment in the case of Kala Iron Store v. Faridabad Fabricators (P) Ltd. 1991 Comp. LJ 177 (Delhi.) wherein it was held that:-

""9. Reverting to the second objection, it has to be borne in mind that Section 69 of the Indian Partnership Act only contains a prohibition or an unregistered firm filing a suit to enforce a right arising from a contract or conferred by the said Act. The firm has to be registered and the person suing has to be a registered partner. The suit to attract Section 69 has to be the one to enforce a right arising from a contract or conferred by the Act. Mr. Khanna has not been able to cite any judgment holding that Section 69 would be applicable to winding up proceedings under the Companies Act. In the winding-up petition, primarily, the court is required to adjudicate whether the respondent is commercially solvent or insolvent and is not to enforce any right arising from a contract. The proceedings are not a "suit". No decree like a suit is passed. The petitioner in this case, is only exercising statutory right under the Companies Act. The right is not arising from a contract between the petitioner and the company. In my view, the provisions of Section 69 have no applicability to the proceedings under the Companies Act. I am fortified in my view by a Division Bench decision of the Madras High Court in Kottamasu Sreeman Narayanmurthy and Anr. v. Chakk

Arjanadu AIR 1939 Mad. 145, holding--

A petition for the adjudication of a debtor as insolvent is not a proceedings to enforce a right arising from a contract. The right which the creditor who files the insolvency petition against his debtor is seeking to exercise is the right a creditor who finds his debtor in insolvent circumstances to have the assets of the debtor administered in insolvency and distributed for benefit of the creditors as a body, this is a right which is conferred upon the creditors by statute and is not a right arising out of a particular contract of loan between a petitioner creditor and a debtor. The mere fact that the petitioning creditors constitute a firm and the debt is due to the firm in which the petitioner are partners and they cannot file a suit to recover the amount due to them unless the firm is registered, does not deprive the petitioners of their right to file a petition in insolvency."''

He further relied on the following observations in the case of KTS (Singapore) Pte. Ltd. v. Associated Forest Products P. Ptd. (1996) Comp. Cas 190 (Cal.):-

''''''''Bonafide disputes should be raised for the purposes of opposing the petition at a time when the company has first to confront a notice of demand, where at the time the company was not only not raised any objection, it did not even reply to the statutory notice and raised the dispute and counter claim for defective goods only after the winding up petition, the dispute was held to be an afterthought and Therefore lacked the characteristics of bonafides''''.

He also tried to take sustenance from the following observations appearing in Bajrangbali Engineering Co. Ltd.; Re (1991) 70 Comp. Cas 488:-

''''Where the company admitted the debt but challenged for the first time in the winding up petition the right of the petitioners to claim the debt and obtain the decree, the dispute was held to be not bonafide.'''

For the proposition that failure to pay in spite of several communications, including service of statutory notice was held to be evidence of neglect and inability to pay, he placed reliance upon Arrow Electronics International Inc. Vs. Nitul Data System, .

He pointed out that it was further held in G. Claridge and Co. Ltd. v. Nav Bharat Investments Ltd. (1977) 47 Comp. Cas 428 that:-

''''Where the company admitted its liability and had neglected to pay its debts, the presumption was that the company was commercially insolvent and hence ordered to be wound up.'''

Lastly, he referred to the Apex Court's judgment in the case of Madhusudan Gordhandas and Co. v. Madhu Woolen Industries Pvt. Ltd. (1972) Comp. Cas 125 laying down the proposition that:-

''''Where the debt is undisputed the court will not act upon a defense that the company has the ability to pay the debt but chooses not to pay that particular debt.'''

5. Learned counsel for the respondent on the other hand, reiterating the submissions noted above, relied upon the following judgments:-

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

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

C) Amalgamated Commercial Traders pvt. Ltd. v. ACK Krishna Swamy and Anr. 1965 (35) Comp. Cas 465.

6. In Madhusudan Gordhandas (supra) it was held by the Supreme Court that where the petition for winding up of a company is based on the ground of inability of the company to pay its debts and if the debt is bona fide disputed and the defense is substantial one, the Court will not order winding up. In this case the Court upheld the order of the High Court refusing winding-up, as it was found that (i) the alleged debt of the appellant was disputed by the company and at least in one instance proved to be dishonest; (ii) the creditors opposed the winding-up; and (iii) the facts indicated that the appellants had an improper motive in presenting the petition.

In the case of Pradeshiya Industrial and Investment Corporation of U.P. v. North India Petrol Chemicals Ltd. and Anr., (Supra), the Supreme Court laid down the principles that nature of liability referable to the expression ""unable to pay its debts"" which should be taken in commercial sense, the court in that case refused to pass the winding-up order on the ground that the appellant was a profit making organisation having sound financial position and machinery for winding-up could not be allowed to be utilised merely as means of Realizing debt. It was also found as fact that the appellant was not a debtor nor the respondent a creditor.

The judgment in the case of Amalgamated Commercial Traders (supra) lays down the same principle and was followed in the cases of Pradeshiya Industrial and Investment Corporation of U.P. v. North India Petrol Chemicals Ltd. (supra) as well as Madhusudan Gordhandas (supra).

7. We have to consider the present case keeping in view the principles laid down in the judgment cited by both the parties and, Therefore, to find out whether the dispute/defense raised by the respondent is bona fide or it is sham. The entire case of the petitioner hinges on the fact that although the licenses in question were sold by the respondent to the petitioner for which the amount in question was taken by the respondent company, it transpired that the Modvat Credit in respect of these licenses has already been taken by the respondent company and, Therefore, the petitioner could not utilise these licenses. In the reply the respondent has clarified that against the aforesaid licenses, at one stage Modvat Credit was availed because of some misinterpretation of law by the respondent company but on 23.3.1995 vide PLA Entry No.152 the said entries having shown credit were reversed by the Central Excise Department at the instance of the

respondent. Thus, much before the expiry of the licenses the Modvat Credit shown to have been availed by the respondent had been negated in the record of the Central Excise Department, thus, fully empowering the respondents to import the goods on the strength of the said licenses and availed the benefit of the custom duty. This submission of the respondent appears to have force. It may be mentioned that the petitioner has itself, along with the petition, filed certificate dated 24.3.1995 (at page 26). This is on the letter-head of the respondent wherein, no doubt, it is stated that the respondent had availed off the inputs stage credit under Rule 56A or 57A of the Rules but the same was reversed specifically vide PLA entry No.152 dated 22.3.1995. It is, thus, clear that the petitioner was informed at that time about the reversal of the entry. Thus, the licenses could be utilised by the petitioner which were expiring in July, 1995, 22nd August, 1995 and 28th August, 1995. The basic premises of the petitioner's case is that the petitioner could not have made an use of these licenses as the respondent had claimed Modvat Credit. This is not correct in view of the position explained above. It is not at all explained by the petitioner as to why it could not utilise these licenses between March, 1995/July, 1995/August 1995 and there is parrot like repetition of the averment that the respondent has admitted that it had availed Modvat Credit in respect of these licenses. After receiving the clarification vide certificate dated 24.3.1995, the petitioner kept quiet and when the licenses expired in July/August, 1995, it started making demands for refund of the amount. Therefore, the dispute raised by the respondent cannot be treated as sham. It is a bona fide dispute. This aspect coupled with the averment by the respondent that it is a solvent company with particulars given in that behalf, it is not a case where this Court would exercise its discretionary jurisdiction and order the winding-up of such a company. The petitioner, if so advised, may file civil proceedings against the respondent as various triable issues arise, including that of limitation.

8. This petition is dismissed with these observations.