(2018) 04 MP CK 0066

In the Madhya Pradesh High Court

Case No : Comp. P. No.01 OF 2016

Tata International Ltd APPELLANT

Vs

Arihant Coals Sales (India) Pvt. Ltd RESPONDENT

Date of Decision : 11-04-2018

Acts Referred:
Companies Act, 1956 — Section 433, 433(e), 433(f), 434, 434(1), 434(1)(a), 439

Citation : (2018) 04 MP CK 0066

Hon'ble Judges : SUJOY PAUL, J

Bench : Single Bench

Advocate : Sanjay Agrawal, H.K. Upadhyay

Final Decision : Dismissed

Judgement

In this petition filed under Section 439 read with Sections 433 (e) and 434 of the Companies Act, 1956 (hereinafter referred to as â??the Actâ?), the

petitioner has prayed for that the respondent-Company be wound up and an Official Liquidator be appointed to take charge of all assets, properties,

funds and affairs of the respondent-Company.

2. In short, the contention of the petitioner-Company is that the petitioner and respondent entered into a High Seas Sales Agreement (hereinafter

referred to as â??HSSAâ?) on 16.10.2013 (Ex-A) for supply and bulk purchase of 15,000 Mts of Steam (Non-cooking) Coal of Indonesian Origin

(hereinafter referred to as â??Coalâ??).

3. The aforesaid HSSA was amended on 17.10.2013 and 18.10.2013 (Ex-B & B-1).

4. The petitioner initially raised an invoice dated 18.10.2013 (Ex.-C) upon the respondent-Company for an amount of Rs.38,400,000/- for sale of

15,000 Mts of Coal. Shri Sanjay Agrawal, learned counsel for the petitioner submits that in order to maintain good relations with respondent-Company,

on the request of respondent-company, a no objection certificate was issued and in addition, an amended agreement dated 17.10.2013 (Ex-D) was

entered upon whereby the quantity of Coal was reduced from 15,000 Mts to 10,000 Mts.

5. The stand of the petitioner is that in view of HSSA read with subsequent amendments, the petitioner supplied the amended quantity of Coal i.e.

10,000 Mts. under bill of lading on 07.10.2013 (Ex-E).Â Furthermore, by orders dated 02.04.2014 and 14.10.2014, as per HSSA, delivery orders were

issued.

6. The petitioner issued a letter dated 18.10.2013 (Ex.F-1) to the Assistant Commissioner of Customs at Kandla confirming the sale of consignment of

10,000 Mts of Coal to the company.Â Yet another letter of this nature was issued by the petitioner, which is filed as Annexure-F-2.Â The petitioner

urged that out of 10,000 Mts of Coal imported, the amount of only 6933 Mts.Â of Coal has been paid by the respondentCompany leaving balance of

3066 Mts of Coal still unpaid. The respondent-company, as per terms of the HSSA, was bound to take delivery of entire Coal Cargo of 10,000 Mts

after payment within the stipulated time period.Â Reliance is placed on Clause 12 of HSSA.Â The attention of this Court is drawn on contractual

obligations on the part of the respondent as per HSSA. The petitioner contends that despite repeated requests made to the respondent, the delivery of

balanced Coal Cargo was not taken by him. In the result, the petitioner had to incur additional cost in the shape of plot rent, Port handling charges etc.

which comes to Rs.45,04,213/- as on 15.09.2015. Contractually, this must be solely borne by respondentcompany.Â The delivery orders dated

02.04.2014 and 14.10.2014 are filed as Ex-G-1 & G-2.

7. The petitionerâ??s claim is to the tune of Rs.79,28,000/- for which a chart is prepared in Para 14 of the petition.Â The petitioner placed reliance

on various e-mails asking the outstanding payment from respondents.Â The same are filed as Ex.H-1 to H-4.

8. The contention of the petitioner-company is that the respondent sent an e-mail on 05.08.2014 admitted to pay for 5,000 Mts. of Cargo on or before

09.08.2014 (Ex-1).Â In turn, the petitioner by its e-mail dated 11.08.2014 confirmed the receipt of above payment on 09.08.2014 and further

requested to release the payment for balanced quantity of 5,000 Mts of Coal along with additional cost.Â It is averred that the respondent made a

payment of Rs.50,000/- on 13.10.2014 and the balance principal amount i.e., Rs.79,28,000/- was decided to be paid by a cheque bearing No.001685

dated 05.11.2014 drawn on Bank of Baroda, T.T. Nagar, Bhopal.Â To demonstrate the aforesaid, reliance is placed on e-mail dated 13.10.2014

(Annexure-J-1).

9. During the course of argument, Shri Agrawal placed heavy reliance on the Para 18 of the writ petitionÂ wherein it is averred that the aforesaid

cheque of Rs.79,28,000/-was never encashed by the petitioner because the respondent was unable to pay the dues due to insufficiency of funds.Â

One Shri M.L. Jain of respondent-company in a meeting dated 28.03.2015 assured the petitioner that company shall issue a fresh cheque as a security

towards the abovementioned outstanding amount of Rs.79,28,000/-. However, such cheque was never issued. Aggrieved, the petitioner sent a

â??breach noticeâ? to the respondent-Company on 22.06.2015 (Ex-K).Â The respondentCompany was called upon to clear all outstanding payments

including all additional charges mentioned hereinabove. Since the respondent did not meet the demand for payment, the petitioner sent a statutory

notice of demand underÂ Section 434 of the Act on 16.09.2015 (Ex-L).Â It is submitted that the said notice was duly served on the respondent. Shri

Agrawal submits that the respondent has not sent any reply to the statutory notice dated 16.09.2015, which was issued under Section 434 (1)(a) of the

Act which shows that the debt is admitted by the respondent and he is unable to pay the same. The petitioner has prepared a chart (Ex-N) to show

the outstanding amount payable by the respondent.

10. Learned counsel for the petitioner submits that e-mail sent by respondent dated 13.10.2014 (Ex.J) is a very important and crucial document.Â

This document clearly shows that amount of debt is crystallized and admitted.Â The judgment of Supreme Court reported in M/s Madhusudan

Gordhandas and Com. Vs. Madhu Woollen Industries Pvt. Ltd.- (1971) 3 SCC-632 is relied upon to contend that when debt is not bonafidely disputed

and defense is not substantial one, the court will have to pass necessary order for winding-up the company.Â It is held that where debt is undisputed, the court will not act upon the defense that the company has ability to pay the debt but the company chooses not to pay that particular debt.Â If the

defense is not likely to succeed in points of law, the defense cannot be treated as substantial. Shri Sanjay Agarwal placed reliance on Vijay Industries

V/s Natl Technologies Limited-(2009)3 SCC-527Â to bolster his submission that when a notice was issued under section 434 of the Act and same is

not replied, it can be safely concluded that amount was due and company is unable to pay the debt.Â Even otherwise, Section 433 of the Act does not

state that debt must be precisely a definite sum.Â On the strength ofÂ (2010) 10 SCC-553 (IBA Health (India) Private Limited Vs. InforDrive

Systems Sdn.Bhd.), it is argued that dispute/ defense would be substantial and genuine if it is bonafide and not spurious, speculative,Â illusory or

misconceived.Â The company court, at this stage, is not expected to hold the full trial of the matter.Â The court must decide whether the grounds

appear to be substantial. The grounds of dispute must not consistent on some ingenious mask invented to deprive just and honest entitlement and must

not be a mere wrangle.Â The judgment of Bombay High Court 2009 SCC Online Bombay 2114 (Corporate Management Council of India Pvt. Ltd.

Vs. Loanza India Pvt. Ltd.(formerly known as Camber India Pvt. Ltd.) and judgment of this court reported in (2013) 4 MPLJ-409 (Gwalior Sugar

Company Ltd, Dabra Vs. Ateet Impex Pvt. Ltd. and others) is relied upon to advance a contention that when defense of the other side is a

camouflage and debt is undisputed, the winding up is the only option.Â The respondent company has not filed the balance-sheet to substantiate its

economic condition or inability.Â An appropriate order in this case will be to wind-up the company in exercise of power under section 433(e) of the

Act.

11. Per contra, the respondent vehemently opposed the said contention and urged that the amount is neither crystallized nor admitted by the

respondent.Â The defense of respondent is bonafide one.Â The petitioner is infact trying to archive a benefit which can be granted in a suit for

specific performance and not in a company petition.Â The disputed claim cannot be gone into in a petition of this nature.Â The company petition

cannot be used for realization of debts.

12. Shri Rajeev Mishra, learned counsel for the respondent submits that the fact

is that initial quantity of purchase of 15,000 MT of coal was

subsequently reduced to 10,000 MT of coal.Â The HSSA contains an arbitration clause.Â Thus, the appropriate remedy for the petitioner is to avail

the remedy of arbitration.

This petition is not maintainable.

13. The respondent placed reliance on clause 15 of the agreement and contended that as per this clause, the appropriate remedy for resolution of the

dispute is by way of arbitration and such arbitration proceedings can take placed within the territorial jurisdiction of Mumbai court.Â The

â??exclusive jurisdiction clauseâ?? was heavily relied upon by the respondents.

14. In the return respondents have denied that initial quantity of coal was reduced to 10,000 MT because of any request or difficulty in achieving

payment dead line on the part of the respondents.Â The petitioner always insisted upon advance payment.Â Only after making payment and

issuance of delivery order, coal could be lifted by the respondents.Â The respondents made payment of Rs.1,29,28,000/- by RTGS towards advance

payment of 5,000 MT.Â The copy of cheque is filed as Annexure R/21.Â Further amount of Rs.50,000/- was paid by respondent by cheque dated

13.10.2013 (Annexure R/22).Â It is averred that petitioner had not supplied 10,000 MT of coal as mentioned in para-10 of the petition.Â Ex.D is

merely a bill of lading which shows that 10,000 MT of coal had reached to Kandala port but this document is not an evidence of supply of 10,000 MT

coal to the respondents. The respondent averred that he has already made payment of Rs.1,29,28,000/- and Rs.50,00,000/- to the petitioner whereas

the petitioner-company has supplied only 6008.98 MT coal and still in possession of an amount of Rs.24,82,611/- for which no coal has been

supplied.Â The respondent, in fact, must get the balance of 696.770 MT of coal amounting to Rs.24,82,611/- for which no stock is available with the

petitioner. The respondents have filed Annexure R/23 to show the quantity of coal supplied by the petitioner and delivery to the respondents. It is

submitted that no further coal was made available.Â In December, 2015, the respondents sent trucks to the port in order to lift the coal but the trucks

returned back because coal was not available.Â The e-mail sent by the respondent in this regard to the petitioner is filed as Annexure R/24.

15. The next contention of the respondent is that petitioner/ company had

delivered the coal only after receiving the amount in advance and, therefore,

the cheque of Rs.79,28,000/- was issued by way of advance. Since petitioner/ company was not in a position to supply and deliver the coal, they

themselves did not present the cheque to encash it.Â In reply to para-18 on which heavy reliance was placed by Shri Sanjay Agarwal, it is contended

by counsel for the respondent that petitioner/ company itself was not in a position to deliver the goods.Â Nobody stopped the petitioner from

presenting the aforesaid cheque before the bank but since petitioner was aware that he is unable to supply the goods, hence cheque was not presented

by the particular.

16. Shri Rajiv Mishra in addition to oral submissions, submitted written submissions and placed reliance on certain judgments.

In the written submissions, the respondent has broadly raised three points: (a) the claim of the petitioner is not due and, therefore, appropriate remedy

for the petitioner is either before the civil court or before the arbitration tribunal; (b) the claim of the petitioner is highly disputed; (c) there is an

arbitration clause, hence, instant petition is not maintainable.

17. To elaborate these points, it is urged that claim of petitioner of Rs.79,00,000/- is for a quantity of coal i.e., 3067 mt. (approx.) for which no delivery

order was issued by the petitioner. In absence of delivery order being served on the respondent, it cannot be said that material was supplied to the

respondent. Hence, no amount is due to the petitioner. Indeed, petitioner must pay Rs.24,82,611/- for the remaining amount of coal i.e. 696.770 mt., for

which they have already received the money. The bone of contention of Shri Rajeev Mishra is that the company Court at the first place must decide

that defendant is liable and then it can proceed to assess what their liability is. But till such determination, there is no liability at all upon the defendant.

Reliance is placed on the judgment of A.P. High Court reported in 2018 (206) CompCas 0393 [MW High Tech Projects India vs. M/s. Grauer & Weil

(India)].

18. It is further argued that since respondent has disputed the quantity of coal with satisfactory explanation that there exists no amount of admitted

debt, the company petition is not maintainable. The judgment of Karnataka High Court in Cementation India Ltd. vs. Ssjv Projects Pvt. Ltd.

(AnnexureR/2) is relied upon to contend that in view of arbitration clause, the petitioner must approach the arbitration tribunal. The respondent has

also relied on the judgment of Supreme Court reported in 1994 (3) SCC 348, [Pradeshiya Industries & .. vs. North India Petrochemicals Ltd.], the

judgment of this Court passed in Comp. Petition No.13/1999 [M/s. Airen Associates vs. HEG Ltd.], judgment of P&H High Court reported in 1997

(116) PLR 210, [Berger Paints India Ltd. vs. Steel Strips Wheels Ltd.], judgment of Calcutta High Court reported in 2006 (4) CHN 76, [Mannesmann

Rexroth (India) vs. National Engineering Industries] and lastly judgment of Karnataka High Court reported in 2003 (113) Company Case 661, [M.R.

Srinivas vs. Golden Green Farms & Resorts] is cited to defeat the arguments of the petitioner.

19. No other point has been raised by the learned counsel for the parties.

20. I have bestowed by anxious consideration on the rival contentions of the parties and perused the record.

21. The first contention of petitioner was based on Section 434(1)(a) of the Act, the said provision reads as under:

Â Â Â Â Â Â Â â??434. Company when deemed unable to pay its debts.

(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the

company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay

the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable

satisfaction of the creditor;â??

[Emphasis Supplied]

22. The contention of petitioner was that the statutory notice send by petitioner under Section 434 of the Act was not replied by the respondent and,

therefore, because of deeming provision it can be safely concluded that: (i) the amount is admitted and crystallized; and (ii) the respondent-Company is

unable to pay the debt. These points require serious consideration. This is trite that in order to raise presumption under Section 434(1) of the Act as a

companyâ??s inability to pay its debt, it is not sufficient to show merely that the company has omitted to pay the debt due to petitioner despite service of the statutory notice, it must show that company has omitted to pay without reasonable excuse. [See: 1964 SCC online Allahabad 383, (Inre Fedral

Chemical Works Ltd.)]. The Delhi High Court in 1994 SCC online Delhi 179, [Wimco Ltd. vs. Sidvink Properties (P) Ltd.] held that there is a fallacy

in the argument that if statutory notice is not replied, it should be deeded that respondent has ignored to pay its debt. The Delhi High Court further held

that mere omission of respondent to comply with the statutory notice and not sending any reply to the communication would not mean that respondent

has admitted the liability. Similarly, in 2002 SCC online Delhi 1296, [Shadow Communications vs. Prince Gutka Ltd.], it was again held that no

conclusion can be drawn that winding up order must invariably be passed where no response to statutory notice has been made. This Court in the

order dated 27.09.2016 passed in Company Petition No.09/2013 [Citi Bank N.A. vs. M/s.GEI Industrial Systems Ltd.] opined that inability to pay

debts in terms of Section 433(e) read with Section 434(1)(a), may raise a presumption as to inability to pay its debt, but such a presumption is

rebuttable. Such a presumption may be rebutted on existing material and based on evidence which may be sufficient in the facts and circumstances of

the case. In view of said judgments, I am of considered view that as a thumb rule it cannot be said that merely because reply to said statutory notice

was not given by the respondent, the debt is either admitted or presumption can be drawn that respondent is unable to pay the debt.

23. The common string in the judgments of Supreme Court in M/s. Madusudhan Gordhandas; Vijay Industries; IBA Health and judgments of Bombay

& this Court (supra) is that: (i) winding up order cannot be passed on mere asking; (ii) if debt is bonafidely disputed and defence is substantial one, the

Court will not wind-up the company. Pertinently, in the case of Gordhandas (supra) the judgment of Re. Brighton Club and Horfold Co. Ltd., 1865

(35) Beava 204 was considered by the Supreme Court and it was held â??again, the petition for winding up by a creditor who claimed payments of

agreed a sum for work done for the company when the company contended that the work had not been properly, was not allowedâ?; (iii) when

defence is substantial and it is not like aÂ moonshine, winding up is not appropriate remedy. Thus, the core issue is whether the debt is bonafide

disputed and defence is substantial one or it is merely a moonshine. The petitioner placed reliance on lading memo (Annexure-E) to contend that

10,000 mt. coal was delivered at the port. The document dated 13th October, 2014 (Ex.J) is heavily relied up on to submit that the liability/debt was

crystallized and admitted. However, if this contention is examined in juxtaposition to the defence, it will be clear that there is no such admission

regarding debt. There exits no such crystallization or admission of the amount. The parties are at loggerheads on the question of supply of the coal.

The petitioner contended that amount of Rs.79,28,000/-, paid through cheque was in relation to coal already supplied, whereas respondent contended

that it was the advance payment for the coal which was yet to be supplied and such coal was actually never supplied because no such supply is

preceded by issuance of a delivery order. The delivery order was never issued nor filed in this case. Thus, in my view, there exits a serious dispute

between the parties on this aspect. Therefore, the defence of the respondent, in my considered view cannot be said to be an artificial defence. It is a

bonafide defence. This defence cannot be treated as a mask, a camouflage or a smoke screen created by it to hide the reality. The ancillary question

is whether in such a case, winding up proceeding is the appropriate remedy. In 2005 (7) SCC 42, [Mediquip Systems (P) Ltd. Vs. Proxima Medical

System GMBH], it was held that a debt under Section 433(e) must be determined or a definite sum of money. Expression â??unable to pay its debtâ?

in Section 433(e) of the Act should be taken in the commercial sense. The machinery for winding up will not be allowed to be utilized merely as a

means for realizing debts due from a company. It was further held that where defence raised is a substantial one and not mere moonshine, it is to be

finally adjudicated upon merits before the appropriate forum. If legal history on this point is traced in relation to winding up of the company, it will be

profitable to see that in the case of Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami, (1965) 35 Com.Cas. 456 (SC), it was held

by the Supreme Court that if a debt is not paid on account of a bona fide dispute, the same cannot be treated as inability to pay the debt. Similarly, in

the case of Madhusudan Gordhandas & Co. v. Madhu Woolen Industries Private Ltd., (1971) 3 SCC 632, it was held that the relief of winding up

cannot be granted in a case where the debt is bona fide disputed and the defence is substantial one. It was further held that the principles on which the

Court while dealing with the petition for winding up of the company bears in mind are that the defence of the company is in good faith and one of substance and the defence is likely to succeed in point of law and the company adduces prima-facie proof of the facts on which the defence depends.

In the case of I.T.C. Ltd. v. Fomento Resorts and Hotels Ltd., 1991 (70) Com. Cas. 459 (Bombay), it has been held that the creditor in order to seek

winding up of a company must prove that the debt is clear and unimpeachable in law and the debt must have been crystallized. It has further been held

that if the accounts are not settled, the debt cannot be said to have crystallized.

24. In the case of Kanchanaganga Chemical Industries v. Mysore Chipboards Ltd., 1998 (91) Com. Cas. 646 (Kar.), it has been held that to raise a

presumption of a company's inability to pay its debts it is not enough merely to show that the company has omitted to pay the debt despite service of

statutory notice, it must be further shown that the company omitted to pay without reasonable excuse and conditions of insolvency in the commercial

sense exist. In the case of IB A Health (India) Private Limited v. Info-Drive Systems SDN. BHD., (2010) 10 SCC 553, it has been held by the

Supreme Court that where there is a bona fide dispute as to the liability to pay the amount of debt, it is the duty of the Court to ascertain the cause for

refusal to pay the debt and invocation of section 433(e) and (f) of the Act is impermissible. The said view is taken by this Court in 2014 (4) MPLJ 612,

[Alpha Packaging vs. Som Distilleries].

25. The HSSA admittedly contains an arbitration clause which reads as under:

â??15. ARBITRATION, JURISDICTION AND APPLICABLE LAW:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to

an finally resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and amendments, if any.

The parties by mutual consent agree for a sole arbitrator.

Appointment of arbitrator should happen within 30 days of invocation of arbitration by either party.

The language of the arbitration shall be English.

The place of arbitration shall be Mumbai, Maharashtra. Mumbai Courts shall have exclusive jurisdiction.

The contract shall in all instances be governed and construed in accordance with Indian Law.â??

26. In Pradeshiya Industries (supra), the Apex Court poignantly held that there is no justification in admitting a winding up petition when the defence

raised is a substantial one and claim can be subject matter of arbitration.Â The petitioner has not disputed the existence of arbitration clause.Â

Indeed, the rejoinder shows that petitioner himself tried to invoke the arbitration clause.Â This Court in M/s Airen Associates (supra) declined

interference in view of substantial defence of respondent and availability of dispute resolution through arbitration.Â Â The Karnataka High Court in

Company Petition No.124/2011 (Cementation India Ltd. vs. Ssjv Projects Pvt. Ltd.) opined that when there is mutually agreed arbitration clause,

normally the company proceeding is not an appropriate remedy.

27. In the light of aforesaid legal position, I find substance in the objection of Shri Mishra that in view of existence of arbitration clause, the petitioner

may be relegated to avail the remedy of arbitration or any other remedy available under the civil law. Needless to emphasize, in appropriate

proceedings, the petitioner will be free to lead evidence and the said forum will be able to decide the disputed questions of fact.

28. In view of foregoing analysis, in the considered opinion of this court, this is not a fit case for exercising discretionary jurisdiction by the Company

Court.Â Accordingly, admission of this company petition is declined. Liberty is reserved to the petitioner to avail appropriate remedy in accordance

with law.