

(2009) 04 MAD CK 0408
In the Madras High Court
Case No : O.S.A. No. 172 of 2008

Tata Iron and Steel Company Limited	Vs	APPELLANT
Omega Cables Limited		RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Companies Act, 1956 — Section 433, 434(1), 439(11)

Citation : (2009) 149 CompCas 457 : (2009) 3 LW 642 : (2009) 5 MLJ 686 : (2009) 95 SCL 101

Hon'ble Judges : D. Murugesan, J;C.S. Karnan, J

Bench : Division Bench

Advocate : R. Murari, for the Appellant; R. Srinivas, for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan, J.—The facts as put forth by the appellant are as follows:

Tata Iron and Steel Company Limited, the appellant herein, is a company incorporated under the Companies Act, 1956 (hereinafter referred to as "the Act"), having its registered office at Mumbai and regional office at Chennai. A company by name Tata SSL Limited used to supply materials to M/s. Omega Cables Limited (hereinafter referred to as "the respondent company"), a company incorporated under the Act and has its registered office at Chennai, from the year 2001. The said Tata SSL Limited raised various invoices on the respondent company amounting to a sum of Rs. 33,50,386/-, apart from an Interest Debit Note dated 18.7.2001 for a sum of Rs. 4,99,015/-. As against the said amount, the respondent company effected only a part payment of Rs. 4,54,542.81 and still a sum of Rs. 31,51,399/- remains due and payable by the respondent company. Without paying the outstanding amount, the respondent company, by a letter dated 21.3.2002, informed the Tata SSL Limited that they have taken steps to bring the normalcy and the company shall produce normal production and start releasing the payments against the outstanding bills. Subsequently, the said Tata SSL Limited was merged with M/s. Tata Iron and

Steel Limited (hereinafter referred to as "the appellant company") and the amalgamation was sanctioned by the order of the High Court, Mumbai, dated 3.4.2003 in C.P.No.100 of 2003. A notice was sent by the Tata SSL Limited earlier on 30.3.2002 and in spite of the undertaking given by the respondent company in their letter dated 21.3.2002, no payments were made. Hence, the Tata SSL Limited caused a statutory notice dated 23.8.2004 calling upon the respondent company to pay the said sum of Rs. 31,51,399/- with further interest thereon within 21 days of receipt of the notice. It is the case of the appellant company that though the said notice was duly served on 27.8.2004, the respondent company failed to pay the balance outstanding and therefore, another notice in the name of the appellant company was issued on 6.5.2005. The said notice was returned with the postal endorsement "company closed". Invoking Section 433(e) and (f) read with 434(1)(a) and 439(11)(g) of the Act, the appellant company approached this Court for winding up of the respondent company on the ground that the respondent company failed and unable to pay the debts.

2. The said petition was resisted by the respondent company on two grounds. Firstly, it was opposed that the appellant company had failed to prove that the amount due is undisputed and there was no proper statutory notice before a petition for winding up was filed. The learned Judge, while accepting the case of the appellant that proper statutory notice was served on the respondent company, did not accept the relief of winding up on the ground that the appellant company had failed to prove that there is no dispute in respect of the amount. Hence, the present appeal.

3. We have heard Mr. R. Murari, learned Counsel appearing for the appellant and Mr. R. Srinivas, learned Counsel appearing for the respondent.

4. Mr. R. Murari, the learned Counsel, would submit that the respondent company had accepted the outstanding amount in their letter dated 21.3.2002 and there is no dispute as to the amount. The statutory notice issued on 30.3.2002 in the name of Tata SSL Limited refers to the sum actually due to the appellant company. Further, in the lawyer's notice dated 23.8.2004 issued in the name of Tata SSL Limited, the amount was mentioned. Lastly, the notice dated 6.5.2005 issued in the name of the appellant company also contains the outstanding amount. The respondent company had not disputed the said amount by any reply. It is not necessary to quantify the amount in the notice. Hence, there is no dispute and the appellant company had proved the actual outstanding amount due to them from the respondent company. In terms of Section 434(1) (a) of the Act, the Company shall be deemed to be unable to pay its debts if the amount claimed in the statutory notice exceeding Rs. 1 lakh is not paid or the Company neglected to pay the said amount within three weeks from the date of receipt of notice. Further, it is contended that the authorised signatory of the respondent company had acknowledged the balance confirmation statement dated 19.7.2002 and had not objected to the balance amount mentioned therein,

viz., Rs. 31,51,399/-. Therefore, even a mere failure to mention the actual quantum of amount will not by itself lead to the conclusion that the claim is disputed. Hence, the appellant company has not only established the actual outstanding amount due to them from the respondent company, but also has established that the respondent company is unable to pay their debts. Therefore, the petition for winding up should have been ordered.

5. Mr. R. Srinivas, the learned Counsel, would, on the other hand, submit that the notice issued in the name of the erstwhile company, M/s. Tata SSL Limited cannot be considered to be one of a statutory notice issued by the appellant company. The only notice sent in the name of the appellant company was dated 6.5.2005, which was not served, as the same was returned to the Counsel with postal endorsement "company closed". In the absence of any statutory notice, the appellant company cannot maintain a winding up petition. He would also submit that there is a dispute relating to the claim as such. At no point of time, the respondent company admitted the outstanding amount claimed by the appellant company. The endorsement of the authorised signatory of the respondent company in the balance confirmation statement dated 19.7.2002 cannot, by any stretch of imagination, be considered that the amount was accepted by the respondent company. In fact, in the note to the said balance confirmation statement, the appellant company itself had requested the respondent company by stating "Please confirm the balance as shown above within 10 days from the date of receipt", thereby meaning that even the appellant company was not sure about the actual outstanding amount due. Hence, there is a bonafide dispute as to the claim. Further, most of the claims as could be seen from the balance confirmation statement relate to the years 1998 and 1999 and those claims are barred by limitation. Therefore, the actual quantum of outstanding has not been proved. In the absence of the same, the petition for winding up has been rightly rejected by the learned single Judge, as the defence of the respondent company is not moonshine.

6. We have carefully considered the above submissions. Insofar as the issue whether the appellant company had served the statutory notice on the respondent company before the winding up petition was filed is concerned, the learned Judge had accepted that there was a service of notice on the respondent company before the winding up petition was filed and therefore, there was statutory compliance. The said finding has not been questioned by the respondent company by filing cross objections. Therefore, we are not inclined to go into the said question and on the other hand, proceed to consider the challenge to the order on the ground whether the appellant company had proved that the actual amount due is undisputed and whether the respondent company is unable to pay the debts.

7. In terms of Section 433(e) of the Act, the Court would order winding up of a company, if the company is unable to pay its debts. In the event a claim is doubtful requiring adjudication, it is not a debt as contemplated u/s 433(e) of the

Act. While considering whether there is a dispute as to the actual claim, the Court must not only satisfy itself as to the proof of such debt, but also the bona fides in opposing a petition for winding up with a defence which is not moonshine. The company Court cannot adjudicate the disputed questions and pass orders of winding up. The approach of the Court while dealing with a petition for winding up must be that a company should not be ordered to be wound up unless it is proved to the satisfaction of the company Court on the above two grounds that there was no dispute as to the claim and that the company against which the winding up petition is filed is unable to pay the debts. The provisions of Section 433 does not confer on any person a right to seek an order that the company shall be wound up. It only confers powers on the Court to pass order of winding up in appropriate cases and the right of the Court is discretionary. It does not empower a person to seek enforcement of bona fide disputed debts, as the proceedings of winding up cannot be adopted as a course to recover the debts.

8. Before we consider further, we may refer to the proposition of law as enunciated by the Apex Court. In *Amalgamated Commercial Traders (P.) Ltd. v. C.K. Krishnaswami and Anr.* (1965) 35 Comp. Case 456 (SC), the Apex Court has held as follows:

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. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order.

In *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, , again the Apex Court, upon considering the judgment in *Amalgamated Commercial Traders (P.) Ltd.*, cited supra, had opined as under:

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 had 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 was not allowed: see *Re Brighton Club and Horfold Hotel Co. Ltd.*)

In the above judgment, the Apex Court had enunciated the following principles:

(i) Where the debt is undisputed, the court will not act upon a defence that the company has the ability to pay the debt but did not choose to pay that particular debt;

(ii) Where, however, there is no dispute that the company passed the creditor a debt entitled 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;

(iii) The principles 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 adduced prima facie proof of the facts on which the defence depends.

The above principles were again reiterated by the Apex Court in *Mediquip Systems v. Proxima Medical Systems (GMBH)* (2005) 124 Comp. Cases 473. In the said judgment, it was 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. There was no justification whatsoever for admitting the winding up petition.

9. In *Amalgamated Commercial Traders (P.) Ltd.*'s case, the decision first cited *supra*, the Apex Court was considering a dispute whether the creditor claimed a sum of goods sold to the company and the company contended that no price has been agreed upon and the sum demanded by the creditor was unreasonable. In circumstances, the Apex Court found that there was a bona fide dispute as to the claim as such. In *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.*, the decision second cited *supra*, the Apex Court has negated the contention that there was no precise sum which was owed to the petitioner, as it was not a sufficient answer to the petition. Of course, in the latter case, the Apex Court considered the rate of interest and while considering the same, it was held that it would be quite unjust to refuse a winding up order to a petitioner, who is admittedly owed moneys, which had not been paid merely because there is a dispute as to the precise amount owing.

10. Both the above judgments were considered by the Apex Court recently in the judgment rendered in *Vijay Industries v. NATL Technologies Ltd.* (2009) 2 Comp LJ 175 (SC). In the said case, while considering the scope of Section 433, the Apex Court had observed as follows:

33. Section 433 of the Companies Act does not state that the debt must be precisely a definite sum. It has not been disputed before us that failure to pay agreed interest or the statutory interest would come within the purview of the word "debt". It is one thing to say that the amount of debt is not definite or ascertainable because of the bona fide dispute raised thereabout or there exists a dispute as regards quantity or quality of supply or such other defences which are available to the purchaser; but it is another thing to say that although the due as regards the principal amount resulting from the quantity or quality of

supply of the goods stands admitted but a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not. In the latter case, in our opinion, the application for winding up cannot be dismissed.

In the said judgment, the Apex Court also considered the judgment of a Division Bench of this Court in *Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd.* (1990) 3 Comp LJ 322 (Mad), where the following principles relating to bona fide dispute had been evolved:

(1) If there is a dispute as regards the payment of the sum towards principal, however small that sum may be, a petition of winding up is not maintainable and the necessary forum for determination of such a dispute existing between the parties is the civil court;

(2) The existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to decide such a dispute before the civil court and in such an eventuality, the company court itself is competent to decide such a dispute in the winding-up proceedings; and

(3) If there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing of a civil suit as well as filing of a petition for winding-up of the company.

After discussing the above judgments, the Apex Court in *Vijay Industries case*, cited *supra*, ultimately found that it is not a requirement of law that the entire debt must be definite and certain.

11. Of course, Mr. R. Srinivas, learned Counsel appearing for the respondent company would submit that the finding rendered in *Vijay Industries case*, cited *supra*, is not applicable to the present case, as the debt is bona fide in respect of the principal amount. In our opinion, the judgment of the Apex Court in *Vijay Industries case* cannot be read as intended by the learned Counsel for the respondent. What is relevant is the bona fide dispute and correspondingly, the inability to pay the debts.

12. Keeping the above principle in mind, the facts of this case must be considered. The learned Judge had accepted the contentions of the petitioner in the company petition, viz., the appellant herein, as to the proper service of statutory notice and as already referred, the said finding is not questioned by the respondent. A statutory notice dated 30.3.2002 was issued in the name of Tata SSL Limited for payment of the outstanding amount. In response to the said notice, the respondent company, by their letter dated 21.3.2002, had informed the appellant company that it had taken steps to revoke B6 notice and as soon as the normality is restored, the company shall resume the normal production and shall start releasing the payments against the outstanding bills as per the understanding with the company. By the said letter, the Court could presume

that the debt was not disputed by the respondent company. In fact, in the balance confirmation statement, the appellant company had claimed the balance due to them as on 30.6.2002 in a sum of Rs. 31,51,399/-. The figures in the balance confirmation statement is disputed by the respondent company on two grounds. Firstly, that the balance confirmation statement includes the amounts due from the respondent company representing the years 1998 and 1999 and hence, those amounts are barred by limitation and it ought not to have been included in the balance confirmation statement. Secondly, in the first note to the said balance confirmation statement, the appellant company had asked the respondent company to confirm the balance as shown in the balance confirmation statement, thereby meaning that the appellant company was not firm in the actual quantum of moneys due.

13. Insofar as the first objection is concerned, in the balance confirmation statement, the appellant company had made a claim for a sum of Rs. 79,872/- vide document dated 3.5.2002 and further a sum of Rs. 2,48,418/- by document dated 31.3.2000. Even if the amounts claimed for the years 1998 and 1999 are excluded, still the amount shown in the balance confirmation statement was well within the period of limitation and was more than Rs. 1 lakh, as contemplated u/s 433(e) of the Act. The submission of the learned Counsel for the respondent is that in view of the claim on barred debt, the balance confirmation statement cannot be construed to be one of a definite claim as to the quantum, which is legally enforced. Of course, the learned Counsel would also rely upon the judgment of this Court in *Vijayalakshmi Art Productions Vs. Vijaya Productions Pvt. Ltd.*, . There cannot be any different opinion that the court must find out whether the claim is legally enforceable against the company. But, inasmuch as the amount claimed in the balance confirmation statement exceeds Rs. 1 lakh and the claim in respect of the years 2000 and 2002 is legally enforceable, the said judgment is of no assistance to the respondent.

14. Insofar as the second submission of the learned Counsel for the respondent, viz., that the appellant company itself was not definite about the actual amount due to them from the respondent company in view of the first note, it is true that the respondent company had been asked to confirm the balance confirmation statement by the said note. But, we do not find any response disputing the said claim by the respondent company over the balance confirmation statement. The main objection in the company petition appears to be that the respondent company was not served with the notice and except stating that there was a bona fide dispute as to the debt, no documents are made available to show that there was a bona fide dispute. On the other hand, the appellant company had heavily relied upon the communication of the respondent dated 21.3.2002 giving an undertaking that the outstanding bills would be settled once the company commenced its normal production. On the facts of this case, in our opinion, the appellant company has established that there was a debt exceeding Rs. 1 lakh due from the respondent company and there was no bona fide dispute.

15. One more argument advanced on behalf of the respondent company is that the amount was not a determined one and in the absence of any quantified amount, the appellant company cannot claim the benefit of Section 433(e) of the Act. The answer to the said objection is the judgment of the Apex Court in Vijay Industries case, cited supra, wherein it has been held that even when the amount is not quantified, but if the amount is more than the amount specified in Section 433 and the claim on the said amount is not denied, the company Court should not refuse the winding up of the company. Hence, we find that there was no dispute much less bona fide dispute by the respondent company as to the claim of the appellant company. In the light of the various judgments of the Apex Court referred to above, we are of the considered view that the appellant company had established its claim for a sum more than the amount specified in Section 433 and the said money was due to them from the respondent company.

16. This takes us to the last submission as to whether the respondent company is unable to pay the debt. When once a debt is established and by virtue of Section 434(1)(a) of the Act, a statutory notice was issued and the company neglects to pay the said sum within a period of three weeks, in law, it is deemed that the company is unable to pay the debts. In view of the deeming clause, the appellant company need not further prove that the respondent company was unable to pay the debts. As the respondent company had failed to honour the statutory notice by making payment, it must be held that it was unable to pay the debts.

17. For the above reasons, we are of the considered view that the appellant company is entitled to succeed. Accordingly, the appeal is allowed. No costs.