(1984) 09 P&H CK 0020

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 4 of 1983

William Jacks and Company (India) Ltd. APPELLANT

Vs

Sraswati Industrial Syndicate Limited RESPONDENT

Date of Decision : 04-09-1984

Acts Referred:
Companies Act, 1956 — Section 439

Citation : (1984) 09 P&H CK 0020

Hon'ble Judges : R.N. Mittal, J

Bench : Single Bench

Advocate : R.P. Bhatt, with Mr. R.N. Narual, Mrs. Malini Sud, Mr. Sumit Sen and Mr. P.S. Saini, for the Appellant; Bhagirath Das with Mr. Ramesh Kumar, for the Respondent

Judgement

R.N. Mittal, J.—This is a petition u/s 439 of the Companies Act. It is stated by the petitioner that the respondents is a Limited Company and inter-alia carrying on the business of manufacturing and/or assembling hydraulic machinery. An agreement was entered into by the respondent on 2nd September, 1966 with the petitioner company by witch it agreed to act as the sole selling agents for specified territories for sale and distribution of the hydraulic machinery manufactured and/or assembled by the respondent. According to the terms of the agreement, the respondent was to pay to the petitioner a commission all the orders placed on the respondent. From time to time, the respondent received various orders from customers from the territories specified in the said agreement for hydraulic machinery which were executed by it. It also recovered the price of the machinery supplied by it to the customers. In May, 1981 an amount of Rs. 5,22,585.64 was due to the petitioner on account of its commission from the respondent. The petitioner, it is alleged, served a notice of demand dated 8th July, 1982 through their Advocate which was served upon the respondent on 12th July, 1982. However, it failed and neglected to pay the same. It is alleged that the respondent also admitted its liability in a letter and the balance sheets. Consequently it is prayed that the respondent be ordered to be wound up.

2. The petition has been contested by the respondent. It has inter-alia pleaded that the petition has been filed to pressurise it to pay bona fide disputed amount. There were certain obligations on the petitioner in the agreement and the same were not discharged by it. In particular, the petitioner did not comply with Clause 3 of the agreement which provided that during continuance of the agreement it would not, without the written consent of the respondent, engage themselves with any other indigenous manufacturer for the sale of hydraulic machinery of type and capacity similar to that made by the respondent. The petitioner, however, dealt with the sale of hydraulic press manufactured by other indigenous manufacturers. It is further pleaded that the claim of the petitioner is barred by limitation.

3. The petitioner filed a rejoinder wherein the allegations of the respondent have been controverted.

4. It is not disputed that the parties entered into an agreement by which the respondent agreed to appoint the petitioner as its sole selling agent for hydraulic machinery manufactured by it. The learned counsel for the petitioner in order to prove that the claim of the petitioner is bona fide and the above-said amount is due to it from the respondent referred to various documents produced on the record. Annexure P-2 is the special notice dated 20th May, 1981 to the petitioner in pursuance of rule 36 (2) of the Company Law Board Bench Rule, 1975, regarding proposed alteration of the respondent company''s Memorandum of Association. In the said notice it is admitted by the respondent that it owed a sum of Rs. 5,29,785.64 to the petitioner. In the affidavit filed by Shri S.K. Khurana, General Secretary of the respondent, to the application under Order XI, Rules 12 and 13 for discovery of the documents, he admitted that the name of the petitioner finds mention in the list of creditors maintained by the respondent-company for the years 1974 to 1982.

5. From the aforesaid admissions of the respondent itself, it is established that the aforesaid amount is due from it to the petitioner. The plea of the respondent that the amount claimed is barred by limitation has no merit. As already mentioned above, the respondent has admitted that the petitioner''s name finds place in the list of creditors maintained by the respondent. The amount which the respondent owes to the petitioner along with other creditors is also reflected in the balance sheets. It has been held by this court in Lahore Enamelling and Stamping Co. Ltd. Vs. A.K. Bhalla and Others, that debts due to creditors not mentioned by name but included in the item relating to ''Loans (unsecured)'' or as due to ''Sundry Creditors" mentioned in the balance sheet amount to an acknowledgement within the provisions of Section 19 of the Limitation Act, 1908 so as to extend the period of limitation with effect from the date of the signing of the acknowledgement. Thus the amount claimed is not barred by limitation.

6. The learned counsel for the respondent has argued that the alleged amount

which is given in the list of creditors of the company is a disputed amount. In order to support the contention, he made reference to letters (Annexures R-3, R-4, R-5 and R-6). Annexures R-4 and R-5 are the letters written by the respondent to the petitioner-company wherein it made reference to certain disputes regarding commitments to the Director General, Supply and Disposal Those letters have nothing to do with the amount in dispute. In the letters (Annexure R-3) written by Sh. G.S. Bamrarh on behalf of the petitioner to Shri Ranjit Puri of the respondent-company, it was enquired as to whether he i.e. Shri Ranjit Puri was coming to Delhi so that they could discuss some outstanding matters of vital importance. In the alternative they would reach Yamunanagar on Friday to sort out all the outstanding matters. There is no specific allegation in this letter regarding dispute relating to the agreement, therefore, it is of no avil to the respondent. In Annexure R-5, it is mentioned by Shri D. D. Puri on behalf of the respondent to the Managing Director of the petitioner-Company that they were not satisfied with the service rendered by the petitioner organisation. There is no specific mention that there was any dispute regarding the said amount. It has also not been stated that the petitioner did not comply with the terms and conditions of the agreement. The counsel for the respondent has not brought to my notice any correspondence that the petitioner was dealing with hydraulic presses manufactured by any indigenous manufacturers, and thus it violated Clause 3 of the agreement. In the aforesaid circumstances it cannot be held that the defence taken by the respondent has been taken in good faith and is of substance. It has been settled by the Supreme Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. (1972) 42 C.C. 125 that where the petition for the winding up of a Company is based on the ground of the inability of the company to pay its debts, it is well settled that if the debt is bona fide disputed and the defence is a substantial one, the court will not order winding up. The principles on which the court acts are; (i) that the defence of the Company is in good faith and one of substance; (ii) that the defence is likely to succeed in point of law, and (iii) that the company adduces prima facie proof of the facts on which the defence depends. Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt, but company chooses not to pay that particular debt. It is further held that 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. I have already held above that the defence is not in good faith and one of substance. It has also not been pointed out to me how the defence set up by the respondent is likely to succeed in point of law.

7. Faced with that situation Mr. Bhagirath Dass sought to urge that the respondent is ready to furnish bank guarantee regarding the money in dispute and the petitioner can establish the debt in a Court of law. He further submits that the respondent is in a sound financial position and has earned huge amount of profits. In the circumstances he submits that the petition should not be

advertised. I regret my inability to accept the submission. It has been held in Re : Focus Advertising Pvt. Ltd (1947) C.C. 67 that once there is non-compliance with a statutory notice given by a creditor u/s 434 (1) of the Companies Act, 1956. demanding payment of a debt owing by the company and the court is satisfied that there is no bona fide dispute in regard to the petitioner''s debt, the creditor is entitled to a winding up order Ex debit to justitiae, and the Court will not listen to a defence on the part of the company that it is not commercially insolvent or that its financial position is not such as to be unable to pay its debts. I am in respectful agreement with the above observations. The mere fact that the respondent is ready to give bank guarantee or it has earned huge profits is not sufficient ground for disallowing the petition. Consequently, I reject the submission of the learned counsel

8. For the aforesaid reason, I order that the petition be advertised in the English and Hindi Tribune and the Haryana Government Gazette. The petition is adjourned to 18.10.1984.

