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Petrocarbon and Chemical Co. Vs Hindustan Febro and Industries Ltd.

Court: Allahabad High Court

Date of Decision: Nov. 10, 2005

Acts Referred: Companies Act, 1956 â€" Section 433(e), 434(1)(a)

Citation: (2008) 141 CompCas 721

Hon'ble Judges: Sunil Ambwani, J

Bench: Single Bench

Final Decision: Disposed Of

Judgement

Sunil Ambwani, J.
This creditor"s winding up petition was filed in the 1 year 2000 to wind up Hindustan Ferro and Industries Ltd., with its

registered office at first floor, 117/C-28/81, Sarvodaya Nagar, Kanpur (UP), on the ground that it has failed and is unable to pay its admitted dues

for the material supplied to the respondent-company and for which the advance cheques for Rs. 1,15,962 dated December 5, 1997 and Rs.

1,15,963 dated December 12, 1997, have been dishonoured on the instruction of the respondent-company. The statutory notice dated August 7,

1999, was sent by registered post to the registered office of the company demanding a sum of Rs. 2,52,508, to which no reply has been received

from the respondent-company. I have gone through the defence taken by the respondent-company in the counter-affidavit of Hausala Prasad

Tiwari holding power of attorney on behalf of the board of directors of the company. Paragraphs 7 to 11 of the counter-affidavit are quoted

below:

7. That, although the payment for the entire supply was made through post-dated cheques, but the raw material was not used. When the company

used the raw material namely, petro carbon supplied by the petitioner in manufacturing the ferro crome and ferro silicon, it was pointed out by the

factory manager that petro carbon supplied by the petitioner is not as per required specification, as such the company made a complaint to the

petitioner about the defect in the petro carbon supplied by the petitioner. The petitioner assured the company that the goods is as per the

specification and asked the company to use the material. It was also assured by the petitioner that in case there is any defect in the final product,

viz., ferro crome and ferro silicon the petitioner will indemnify the losses. On this assurance, the company started using the petro carbon supplied

by the petitioner. It is also pertinent to mention that the company had also intimated to the petitioner through letter dated August 1, 1997, that the

use of petro carbon supplied by the petitioner is at the risk of the petitioner and as assured by the petitioner, if there is any defect in the final

product, the petitioner will be bound to indemnify the same. A true copy of the letter dated August 1, 1997, is being filed herewith as annexure CA

2 to this affidavit.

That when the product was supplied to the customers by the company, the customers made a complaint about the final product, viz., ferro crome

and ferro silicon as such the company made an analysis of the final product and in the chemical analysis, it was found that the ferro silicon was

having excess percentage of aluminium and excess sulphur powdering and similarly the ferro crome was having excess percentage of carbon. Both

these defects were due to supply of defective petro carbon by the petitioner.

That, after ascertaining the defects due to defective supply of petro carbon by the petitioner, the company complained to the petitioner over phone

and the petitioner agreed to indemnify the loss to the extent of rupees two lakhs, although the company had suffered a loss to the extent of Rs. 2.82

lakhs. The petitioner also assured the company that a credit note to the extent of rupees two lakhs will be issued shortly. Despite the assurance, the

petitioner did not issue credit note of rupees two lakhs, hence the company has written a letter dated December 28, 1998, asking the petitioner to

issue credit note of rupees two lakhs so that the payment of two cheques be cleared. A true copy of the aforesaid letter dated December 28,

1998, is being filed herewith as annexure CA3 to this affidavit.

8. That despite assurance given by the petitioner to issue credit note of rupees two lakhs, the petitioner has not issued the credit note of the said

amount of rupees two lakhs, as such another request was made by the company to the petitioner to return the two cheques, each amounting to Rs.

1,15,962 and Rs. 1,15,963 so that the balance amount be paid to the petitioner. Despite this request made by the company, neither a credit note

of rupees two lakhs was issued nor the cheques were returned to the company as such the company had again, vide its letter dated January 13,

1999, made a request for issuing a credit note so that the balance outstanding could be paid. A true copy of the letter dated January 13, 1999, is

being filed herewith and is marked as annexure CA4 to this affidavit.

9. That it is pertinent to mention that the following dealers have suffered loss on account of the defective supply of material by the company. As

already stated above, the said defective material was supplied only on account of defective petro carbon supplied by the petitioner. It is reiterated

that the defective petro carbon was used by the company only after assurance given by the petitioner to indemnify if the company suffers any loss

on account of supply of defective petro-carbon. The details of the customers to whom the company has assured to compensate or indemnify is as

under:

(Rs.)

(a) M/s. Ambika Steel Ltd., 51/2, Industrial Area, Site No. 4,

Sahibabad, Ghaziabad 19,931

(b) Sri Ishar Alloy Steel Ltd., Sector-D, Industrial Area,

Sukhilia, Sanwer Road, Indore 49,522

(c) M/s. H.C. Ferro Alloy Ltd., 1165, Main Meerut Road,

Opposite DPS, Ghaziabad 1,54,510

(d) M/s. Alloys and Chemicals, 410, Konark, 16/2, Manoramganj,

Indore 60,785

2. A perusal of the defence in these paragraphs shows that the supply was made after receiving post-dated cheques. Initially, the respondent-

company pointed out that the material supplied were not as per required specification. However, on the assurance of the petitioner-company these

materials were used in manufacturing the product, namely, ferro crome and ferro silicon supplied to the purchasers. It is stated in paragraph 11 that

four of the purchasers of the finished products have withheld payments on account of defective material supplied to them. The respondent has

relied upon the statement of their accounts showing -an outstanding of the amounts mentioned in paragraph 11.

3. The company which is unable to pay its debts may be wound up by the court. The discretion, however, conferred u/s 433(e) of the Companies

Act, 1956, must be exercised on the settled principles of law. Where a creditor, after giving statutory demand notice u/s 434(1) (a) of the Act,

applies to winding up the respondent-company, the court has a duty to investigate and to find out whether the conditions of insolvency in the

commercial sense are indicated. The proceedings u/s 433 of the Act are not to be used for the purposes of enforcement of an agreement or for

recovery of the amount. The object of the proceedings is to find out whether the company is in a position to meet its current liabilities. If it is

commercially insolvent it is liable to be wound up, though it may have very valuable assets, which are not immediately realisable.

4. In Dhootpapeshwar Sales Corporation P. Ltd., In re [1972] 42 Comp Cas 139 (Bom), it was held that ""commercially insolvent"" means unable

to pay its debts or liabilities as they arise in the ordinary course of business.

5. The presumption u/s 434(1)(a) of the Companies Act, 1956, of the inability to pay, is not to be raised where the company has omitted to pay

the debt despite service of statutory notice of demand. It must be further shown that the company has omitted to pay, without reasonable excuse.

A debt may be admitted, there may, however, be a valid counter claim or a good reason not to pay. It is only when omission to pay, is coupled

with the fact that the company is unable to meet its current demands or its assets are insufficient to meet its liabilities and the company is heavily

indebted, that the court may deem that it is unable to pay its debts.

6. The presumption that the company had not paid its admitted dues exceeding Rs. 500, even after expiry of three weeks of service of demand

notice by registered post or otherwise at the registered office of the company, is not sufficient to wind up the company u/s 433(e) of the Act. The

requirement of the demand notice, as for the purposes of due information with regard to the currency of the debt, the respondent-company may,

given an opportunity to explain the circumstances in which the demand was not met.

7. The purpose of demand, and its non-compliance gives a right to the creditor to institute proceedings for winding up of the company. The

consequences can be avoided by showing reasonable cause. There may be various circumstances, namely, that there is a bona fide dispute, the

debt is time-barred or was deferred with the consent of the creditor, or that there was some arrangement for payment in due course. It is not

appropriate to lay down the circumstances in any detail, which may constitute reasonable excuse for not paying the debt. Where, however, the

court finds that the defence taking in moonshine, in that there is nothing to establish a bona fide dispute or reason or substantial ground not to pay

the debt, the court may investigate into the commercial insolvency and proceeded to take steps to wind up the company.

8. In the matters of delay, or failure to pay for the materials supplied or work carried out for the respondent-company, the court would be slow to

interfere, as there may be several reasons for non-payment. Though the court may not enter into a process of adjudication, the defence must be

examined to exercise the discretion conferred by the statute. There may be cases where the court may on the request of the respondent-company

or otherwise grant sometime to the company to satisfy the debt. But in any case the proceedings should not be substituted for the ordinary process

of law for realisation of debt.

9. In all the cases the enquiry must be confined only to find out whether there is any reasonable excuse for non-payment of the admitted debt.

Where the refusal to pay is coupled with a false defence, dishonoured cheque or promissory note, breach of undertaking, failure to pay taxes on

the transaction, etc., the court will be justified in taking strict stand and refuse to exercise its discretion in favour of the borrower.

10. On a close examination, the defence does not appear to be bona fide Firstly, the details of deficiency in the materials was not given. The

material was used in the manufacturing process and the finished products were supplied without examination of its quality. There is no reference to

any correspondence between the purchasers of the finished products and the respondent-company recording any deficiency in the finished

products. The chemical analysis of the final products and the correspondence with the purchasers have not been annexed. The story that the

petitioners assured to issue credit note of Rs. 2 lakhs, cannot be believed as there is no proof of such assurance. The statement of accounts of the

purchasers, do not demonstrate that the amounts were withheld on the ground of quality of the products.

11. In the aforesaid circumstances, I find that the respondent-company has not been able to establish its bona fides in stopping the payments of

cheques. The defence is, as such, moonshine and amounts to evade the liability.

12. Learned Counsel for the respondent-company fairly admits that the respondent-company has stopped its production and its factory lying

closed since the year 2000. It is clear that the respondent-company is not doing any business for last five years and is unable to pay its dues.

13. Having regard to the facts and circumstances, let the company petition be advertised under Rule 24 of the Companies (Court) Rules, 1959,

within a period of six weeks but not before December 12, 2005. Steps may be taken within two weeks. The respondent-company is given an

opportunity to pay the entire outstanding on or before December 9, 2005, failing which the petitioner shall proceed to advertise the petition.

14. Having regard to the facts and circumstances, the respondent-company is restrained from selling, disposing of, and encumbrancing its assets,

including the plant and machinery in any manner whatsoever.