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**(2010) 10 CAL CK 0001**

**Calcutta High Court**

**Case No:** A.P.O. No. 305 of 2009, A.C.O. No. 97 of 2009 and C.P. No. 334 of 2008

Ram Krishna Mukherjee

APPELLANT

Vs

Ankit Metal and Power Ltd.

RESPONDENT

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**Date of Decision:** Oct. 4, 2010

**Acts Referred:**

- Companies Act, 1956 - Section 434, 557

**Citation:** (2011) 1 CHN 483

**Hon'ble Judges:** Pinaki Chandra Ghose, J; Ashim Kumar Roy, J

**Bench:** Division Bench

**Advocate:** Ratnanko Banerjee and Tarun Aich, for the Appellant; S.B. Mookherjee, D. Basak, D.N. Sharma, Aniruddha Roy and Ratnesh Kumar Rai, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Pinaki Chandra Ghose, J.

This appeal is directed against an order dated 7th September, 2009 passed by the Hon'ble First Court in a winding-up petition when His Lordship was pleased to finally stay the winding-up proceeding permanently and unconditionally. However, liberty was given to the petitioning creditor that the said order will in no way prevent him to initiate any other appropriate proceeding including a Civil Suit.

2. Being aggrieved, this appeal has been filed from the said order dated 7th September, 2009 in Company Petition No. 334 of 2008.

3. The facts of the case briefly are as follows:

4. The case of the petitioning creditor/Appellant herein is that the petitioning creditor sold and delivered to the company a total quantity of 3683.640 Metric Ton (one rake of 58 boxes) of Grade-E coal contained in 56 BOXN. The said goods were delivered at Rukni South Eastern Railway Siding. The value of the said coal is amounting to Rs. 87,30,22/- and further interest thereon at the agreed rate of 18%

per annum. It is further stated that the company was interested to purchase the said coal and the offer letters of the Petitioner were duly received and accepted by and on behalf of the company resulting to delivery of the said goods on 16th March, 2008 duly endorsed on a Railway Receipt (R.R.) dated 15th March, 2008 in favour of the company/Respondent herein.

5. The petitioning creditor, thereafter, made several demands from the company for payment of the said coal and on 8th July, 2008, in reply to the letter of the petitioning creditor received a letter dated 10th July, 2008 from the company inter alia alleging that the company had communicated to one Ashok Kumar Kathotia, the alleged representative of the Petitioner that the company had rejected the said coal supplied by the Petitioner to the company due to its alleged inferior quality. Further the company's addressed letter to one Ashok Kumar Kathotia dated 29th March, 2008 and the rejection Notice dated 28th March, 2008 was addressed to said Ashok Kumar Kathotia and the purchase order dated 8th March, 2008 was also addressed to Ashok Kumar Kathotia. But, it is the case of the petitioning creditor the Appellant herein is that the said Ashok Kumar Kathotia had no role to play in this matter and, therefore, the company tried to rely upon all the documents which were manufactured. In these circumstances, notice was served on the company for realization of the said amount u/s 434 of the Companies Act, 1956 which was duly replied on behalf of the company and the petitioning creditor and, thereafter, filed his winding-up petition.

6. In the affidavit-in-opposition the plea was taken is that on or about 8th March, 2008 the company, upon negotiation between the company and Ashok Kumar Kathotia, an agent of the petitioning creditor issued purchase order for 2370 MT of coal. Accordingly, coal were supplied on or about 16th March, 2008. Since the coal was poor quality and not as per the order specification, that was rejected. This was duly intimated to Ashok Kumar Kathotia by a letter dated 29th March, 2008 with a Rejection Note dated 28th March, 2008 and further requested him to take back the materials from the Company's plant. On 8th July, 2008 and 9th July, 2008, the company was surprised to receive letters from the petitioning creditor claiming payment against coal which was supplied to the company.

7. The company had rejected the coal and settled the matter with the petitioning creditor through his agent, Mr. Ashok Kumar Kathotia but, further, the point has taken that as the coal was rejected due to poor quality and duly returned, the company is not liable to pay any sum against the same.

8. Disputes between the parties, thereafter, came up before the Court and the Court after considering the facts of the case passed the impugned order.

9. It appears further that the Court directed Ashok Kumar Kathotia to file an affidavit and such affidavit was filed before the Court by Ashok Kumar Kathotia.

10. It is submitted on behalf of the Appellant that the learned Judge was wrong in staying the winding-up petition permanently. On the given facts it should have been held by the learned Judge that the company had failed to raise any genuine or bona fide or substantial defence to the claim of the Appellant as mentioned in the winding-up petition.

11. It is further submitted that the Hon'ble First Court was long in directing Ashok Kumar Kathotia to file an affidavit before this Court. In fact, it would have been held by the Hon'ble First Court that the Respondent company duly consumed coal which was supplied by the petitioning creditor and had to make payment bona fide on reasonable grounds. Accordingly it is submitted that it was the duty of the Court to pass a winding-up order in favour of the Appellant/petitioning creditor.

12. The findings of the Hon'ble First Court is that Ashok Kumar Kathotia acted on the basis of the letter dated 1st August, 2008 of the Appellant which refers to the word "representative" and on such ground the Court came to the conclusion that Ashok Kumar Kathotia did something in the transactions itself.

13. On the contrary, it was totally denied by Mr. S.B. Mookherjee, learned Senior Counsel, appearing on behalf of the Respondent company.

14. It is submitted on behalf of the Respondent that the petitioning creditor by two letters both dated 11th March, 2008 made its offer for sale of coal of a specific grade, namely grade "E" coal to the company. In response to the above offer of the petitioning creditor the company sent its representative to inspect the coal of the above specific grade and after inspection approved the quality of such coal on behalf of the company. Then the company agreed to purchase a total quantity of 3683.640 Metric Ton (M.T.) of such coal at a price of Rs. 2,370/-per M.T. and goods were sent as chosen by the company.

15. On arrival, the company took delivery of coal and engaged its own transporter to transport the coal to its factory. The allegation is that after the coal was transported to the factory of the company the said coal was duly consumed. Then the petitioning creditor submitted its invoice dated 26th March, 2008. No reply was received. Demands were made and application was filed.

16. Mr. Mookherjee contended that on 10th July, 2008 the company wrote to the alleged representative of the petitioning creditor that the said company rejected the said coal which was supplied by the petitioning creditor. The letter of the petitioning creditor is also annexed to the petition. The petitioning creditor has also brought a charge against the company that some of the documents were alleged to be manufactured. It would be evident from the affidavit of Ashok Kumar Kathotia that both the parties are known to him that he deals with coal as agent or representative of an intended buyer or seller of coal and that is his business.

17. From the facts pleaded in the petition, the Hon"ble First Court came to the conclusion which is reproduced hereunder:

However, on a plain reading of the petition for winding up, I find that the Petitioner himself has raised disputes which can only be properly adjudicated on a civil trial and not in a proceedings for winding up of the Company. The question whether the Company- has any legal obligation to discharge the alleged debt mentioned in the petition needs be decided with some degree of certainty and that can more appropriately be done by a Trial on evidence.

18. Therefore, the Court came to the conclusion that first, it has to be established whether Ashok Kumar Kathotia had any role to. play in the transaction or not?

19. After analyzing the facts the Hon"ble First Court held as follows:

It is very difficult, however, why the Petitioner has been so shy in disclosing the identity of his representative or stating in clear terms in reply to the assertion on the part of the company that Ashok never had any role to play as his representative or as the representative of anybody else including the Petitioner at all when it is an admitted position that Ashok is not a fictitious person and that Ashok was or rather has been known both to the Petitioner and the company and that the business of Ashok was and is to deal with coal and act as representative or agent of both seller and buyer of coal in general.

20. The sole dispute is with regard to the quality of the coal supplied. The Court on such question held that:

In a situation like this, it is, I find, extremely difficult to reject the stand of the Company holding it to be a dishonest one....

21. It further appears to us that there are allegations and counter-allegations in the matter and, accordingly, the Hon"ble First Court came to the conclusion that the dispute should be decided on better evidence on Trial.

22. In support of his contention Mr. Mookherjee, learned Senior counsel relied upon the following decisions:

1. Dunlop India Limited v. Anamika Udyog, reported in 1994(1) CHN 409;
2. Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami and Anr., reported in 1965 35 Com Cases 456;
3. [Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.,](#)
4. [Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH,](#)

23. After considering all these decisions and the facts of this case, we do not have any hesitation to hold that after applying the test laid down in the case of Madhusudan Gordhandas & Company (supra), the Supreme Court held as follows:

(a) 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 has 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 *In re: 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 done properly was not allowed. (See *In re: Brighton Club and Norfolk Hotel Co. Ltd.*)

(b) Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. (See *In re: A Company*). 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. (See *In re: Tweeds Garages Ltd.*) The principles on 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 adduces prima facie proof of the facts on which the defence depends.

(c) Another rule which the Court follows is that if there is opposition to the making of the winding-up order by the creditors the Court will consider their wishes and may decline to make the winding-up order. u/s 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the Court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps the Court may attach greater weight to the views of the creditors. The law on the point is stated in Palmer's Company Law, 21st edition, page 742, as follows:

(d) "This right to a winding-up order is, however, qualified by another rule, viz., that the Court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding-up order, the Court in its discretion may refuse the order."

(e) The wishes of the creditors will however be tested by the Court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding-up order is made. It is also well settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding-up will have an important bearing on the reasonableness of the case. (See *In re: P. & J. Macrae Ltd.*)

24. In the background of the given facts, in our considered opinion the Company in the Respondent herein have applied to raise a bona fide defence in the matter and,

therefore, in our considered opinion, the defence as put forward by the company cannot be said to be a moon sign defence.

25. Hence, we hold that the order so passed by the Hon"ble First Court does not suffer from any illegality or irregularity and, accordingly, the said order does not warrant any interference by this Court and, accordingly, we affirm the said judgment and order dated 7th September, 2009 passed by His Lordship.

26. Hence, we dismiss this appeal.

27. Xerox certified copy of this order, if applied for, be supplied to the parties on usual undertakings.

Ashim Kumar Roy, J.

I agree.