(2007) 08 CAL CK 0016

Calcutta High Court

Case No: APO No. 276 of 2007, APOT No. 374 of 2007, ACO No. of 2007 and C.P. No. 77 of 2005

Siddarth Automobiles Ltd.	APPELLANT
Vs	
Ashok Leyland Finance Ltd.	RESPONDENT

Date of Decision: Aug. 22, 2007

Acts Referred:

- Companies Act, 1956 - Section 433, 433(1), 434(1)

Citation: (2008) 1 CHN 1073

Hon'ble Judges: Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

Bench: Division Bench

Advocate: Hirak Mitra, Sivaji Sen, Debnath Ghosh, S.N. Mukherjee and Koushik Banerjee, for the Appellant; Ahin Choudhury, Debnath Basak, Sourya Sadhan Bose and Pallabi Mitra, for the Respondent

Final Decision: Dismissed

Judgement

1. This appeal is directed against an order dated May 18, 2007 when the Hon''ble First Court was pleased to admit the petition for a sum of Rs. 2.10 crore (Rs. 60 lakhs plus Rs. 1.5 crore) on account of principal together with interest at the rate of 8 per cent per annum on the principal sum of Rs. 60 lakhs from March 18, 2002 as by a letter of such date the petitioner was unconditionally offered to supply vehicles of value of Rs. 60 lakhs and sought to adjust it against the sum due in its books to the petitioning creditor.

2. The Hon''ble First Court further held that if the company pays a sum of Rs. 60 lakhs together with interest as aforesaid to the petitioner within six weeks from date and furnishes cash security of Rs. 1.5 crore to the Registrar, Original Side of this Court for the same being deposited in the highest interest bearing deposit within eight weeks from date, the petition shall remain permanently stayed. In such event, the balance claim of the petitioner, save to the extent of Rs. 60 lakhs and the interest

thereon, will relegate to a suit and the deposits in the name of the Registrar, Original Side will stand to the credit of the suit if such suit is instituted within four weeks from date of the security being furnished to the satisfaction of the Registrar. If either the sum of Rs. 60 lakhs with interest thereon is not paid to the company within six weeks from date or the security of Rs. 1.5 crore is not furnished within eight weeks from date, the petition will be advertised once in the "The Telegraph" and once in the "Jansatta". Publication in the Official Gazette will dispense with. The advertisements should indicate that the matter would be returnable on the next available Court day four weeks after the date of publication in the event, the petitioner fails to file the suit within time indicated, the company will be at liberty to seek discharge of the security.

3. The facts revealed from the case is that Ashok Leyland Finance Ltd. (hereinafter referred to as the "Ashok Leyland"), the petitioning creditor, is a manufacturer of vehicles and Siddarth Automobiles Ltd./the appellant herein was appointed as a dealer of the vehicles manufactured by Ashok Leyland. Pursuant to the dealership agreement, the petitioning creditor sold and delivered motor vehicles and spares to the appellant from time to time and the same was done on principal to principal basis.

4. Invoices, bills were raised against Siddarth Automobiles Ltd. and the appellant herein to pay the part of the vehicles supplied by the petitioning creditor, Ashok Leyland. On 12th August, 2002, according to the petitioning creditor, a sum of Rs. 2.84 crores was due from the appellant to the petitioning creditor.

5. It further appears that on 23rd February, 2002, a meeting was held at China and the appellant agreed to pay Ashok Leyland a sum of Rs. 60 lakhs before March, 2002. The said fact was duly recorded in the letter dated 12th August, 2002. It further appears from the facts that in the said letter (appearing at page 149 of the paper book) a reconciled statement was enclosed by the appellant showing that the petitioning creditor was to get Rs; 37,37,517.92/-against Ashok Leyland''s claim of Rs. 2,84,13,688.08/-. The letter further mentioned that "similar smaller amounts" totaling to Rs. 8,55,719.42/- was shown as due from Siddarth Automobiles Ltd. which was not actually payable.

6. Therefore, it is the case of the petitioning creditor that the letter itself concludes by saying that the claim set off to the extent of Rs. 37,37,517.92/-. It is also evident from the fact that there is no dispute that the debt in excess of Rs. 2.38 crores to be admitted by the said letter and there could not be any bona fide dispute with regard to the said debt.

7. It further appears that by letter dated 19th August, 2002 (appearing at page 152 of the paper book) it was clearly mentioned by the appellant that due amount was Rs. 2.84 crores but upon reconciliation by Regional Accountant of Ashok Leyland, the actual due should be Rs. 2,27,91,499/- and further the adjustment of Rs.

8,55,719.42/- is repeated. Therefore, even after taking such plea on the basis of the said letter, it appears to us that the debt in excess of Rs. 2.19 crores on account of principal stood admitted as submitted by the petitioning creditor.

8. It further appears that since Siddarth Automobiles Ltd. was unable to meet its commitment of paying Rs. 60 lakhs by 31st March, 2002, instead they proposed that they would be adjusted against the outstanding dues of Siddarth Automobiles Ltd. which would be evident from a letter dated 15th March, 2002 (appearing at page 141 of the paper book).

9. Thereafter, it appears from the fact that a request was made to Ashok Leyland so that the supply of vehicles can be made to adjust Rs. 60 lakhs (appearing at page 151 of the paper book). It further appears that a promise was made by Siddarth Automobiles Ltd. to maintain their commitment and honour the same. It is also admitted that Siddarth Automobiles Ltd. specifically stated that they are facing financial problems and could not liquidate the liabilities as planned and assured that they were arranging some part payment to the tune of Rs. 20-22 lakhs within a period of six to eight months. Several cheques were issued and were dishonoured on presentation. Hence, a statutory notice was served and the petition was filed before the Hon''ble First Court.

10. In the affidavit, the company denied all the allegations and submitted that the accounts between the parties were not running mutual, current or continuous accounts and further the appellant''s entitlement on account of commission on sale of vehicles and also on other accounts were not accounted for and/or settled by the respondent despite repeated requests by the appellant to do so and the company sought to raise a bona fide defence in the said application and reliance was placed in the cases of Federal Chemical reported in 34 CC 963 & Bharat Vegetables reported in 56 CWN 29, 41 CC 174, Ofu Lynx Ltd. & 35 CC 456 Amalgamated Commercials.

11. According to Mr. Mitra, learned Senior Advocate appearing in support of this appeal submitted that all accounts between the parties are not reconciled and the accounts are required to be taken between the parties. It is further submitted that after giving credits to all the amounts payable to the respondent a sum of Rs. 22,78,521.37/- is due and payable by the respondent to the appellant. Therefore, the counter-claims in which the company as against the respondent, were not gone into by the Hon''ble First Court.

12. It is further submitted by Mr. Mitra that the debt u/s 433 of the Companies Act, 1956 must be determined and since the account has not yet been settled between the parties and there is no firm figure of debt of the company or it can be ascertained. Hence, the petition should not be admitted and he relied upon a decision reported in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , where the Hon''ble Court held that if the debt is bona fide disputes there cannot be

"neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956 or "due" within the meaning of Section 434(1)(a) so as to incur liability u/s 433(e) of the Companies Act and he relied upon the decisions reported in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prosad Chamaria and Others, , Tilak Ram and Others Vs. Nathu and Others, , Tilak Ram v. Nathu, in support of his contention.

13. He further relied upon the decision reported in SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., and submitted that the Court had no jurisdiction to pass an order for furnishing security on a petition for winding up in view of the ratio laid down in the said decision. In these circumstances, he submitted that the order should be set aside.

14. On the contrary, Mr. Chowdhury, learned Senior Advocate appearing in support of the petitioning creditor/respondent submitted that there was a definite claim recognized by Siddarth Automobiles Ltd. and he further drew our attention to the letter dated 19th August, 2002 (appearing at page 152 of the paper book) where the indebtedness to the extent of Rs. 2,27,91,449/- has been recognized by the company.

15. Therefore, it is submitted that on the one hand, there was a definite claim recognized by Siddarth Automobiles Ltd., while on the other, there was a feigned claim of adjustment on account of commission, incentives and concession and they merely "apprehended" that "similar smaller amounts" might not have been adjusted. By just mentioning the same, they could not oust the petitioner''s winding up application as not entertainable. The company deliberately did not indicate any definite figure. Whatever definite figure the company had mentioned, has been deducted and the figure of Rs. 2.10 crores has been arrived at after such deduction and also after making some allowance for "similar smaller amounts".

16. He further pointed out that the company very aptly observed that it is a part of the company''s strategy to make some kind of a vague assertion in the hope that the plea of undetermined quantum of indebtedness would help to resist the winding up petition. The company by merely raising a plea that some amount of counter-claim on account of commission, incentives needed to be determined in a regular suit, the winding up petition could not be defeated. Giving all possible benefit of doubt to the company, security was directed to be furnished to the extent of Rs. 1.50 crores only, although, the Hon''ble First Court had found with regard to the so-described "similar smaller amount" on which it cannot be held that there was a bona fide dispute with regard to the claim of the petitioning creditor to the extent of Rs. 2.10 crores for which the petition was admitted.

17. He also drew our attention to the decision reported in the case of 1955 ER 873, Brighton Club & Norfolk Hotel Co. Ltd. in support of his contention (appearing at pages 329 and 330 of the paper book) and submitted that complicated and

contested accounts between two solvent companies could not appropriately be decided in winding up proceedings. A company carrying on a thriving business cannot be declared to be insolvent, because of the quarrel between the two parties as to what is the amount exactly due. But at the same time, when there is no doubt that the company owes the creditor a debt entitling it 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.

18. He further drew our attention to the decision reported in the case of (In re: 1962 Chancery 406, Tweeds Garages Ltd.) and submitted that this case has been referred to and relied upon by the Supreme Court in the case of M. Gordhandas Das & Co. (supra). The principles on which the Court acts are that the defence of the company is in good faith and one of substance and 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 and he relied upon the decision reported in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., .

19. He further submitted that there is no proposition of law which says that out of a claim of Rs. 1 crore if a dispute is shown to exist with regard to a fraction of the claim say amounting to Rs. 1 or Rs. 2 lakhs the winding up petition must fail and cannot be admitted for any amount. If that was the real principle, it will lead to an absurd situation. Any company faced with a winding up petition will assert a dispute with regard to the quantum of Rs. 5/- or Rs. 10/- and would come with the plea that since the exact quantity is in dispute, the entire petition should be thrown out and cannot be admitted which cannot possibly be a reasonable interpretation of law.

20. In the case of Mediquip Systems (supra) when it is stated that the debt u/s 433 of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date, it is meant that the claim in the petition for winding up must be a liquidated claim or a quantified claim. The claim should not be in the nature of unliquidated damages.

21. In the instant case, he further submitted that the Court has found with regard to Rs. 60 lakhs, there was a clear admission. With regard to at least Rs. 2.19 crores out of the sum of Rs. 2,32,90,163.63/-, there was no bona fide dispute. He further drew our attention to the paragraph 21 of the decision reported in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, and submitted that the Hon''ble Supreme Court specially noted that the financial condition of the company was sound. The company is in considerable financial difficulty and the cheques are dishonoured. It cannot meet its commitment by reason of precarious financial condition. The other question relates to the order directing the furnishing of security where it is submitted that the case reported in SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., is not an authority for the proposition that in no circumstances the company can give or furnish security and he further drew our attention to paragraph 36 of the judgment and submitted that the Court was not concerned with

the question of order any security in that case.

22. Relying upon the case of Sir George Jessel reported in 49 Law Times 147, he submitted that it is stated that a debt does not become disputed merely because the company states that the company disputes it. Furtheremore, he submitted that the last question urged was that of limitation, on the face of which, the plea of limitation is untenable in several documents mentioned above. This plea of limitation has been considered and rejected by the Hon''ble First Court. Hence, it is submitted that there is no merit in the appeal and it should be dismissed with costs.

23. After considering the aspects of the matter and the decisions cited on behalf of the parties and after perusing the materials on record, we come to the conclusion that in this case there is no question of any unascertained debt, the amount so due and payable is absolutely clear which would be evident from the letter dated 19th August, 2002 and the company is trying to find out a loophole to mislead the Court. The company has made the vague assertion in the affidavit only to get the benefit.

24. Furthermore, we also want to keep it on record that no proposition of law which can give a right to raise a dishonest plea to a company and the company also cannot raise a vague dispute with regard to a fraction of the claim with an intention to stall the bona fide claim of a petitioning creditor and shall try to get an advantage thereof and prays before the Court that the winding up petition must fail, since, there is a dispute with regard to he quantum and would try to submit that the entire petition should be thrown out of the Court and should not be admitted by the Court. This plea cannot be accepted by any Court. Hence, we conclude that this cannot be possibly a reasonable interpretation of law. If the Court interprets the law in that way, that will only strengthen the influence of the dishonest Companies who will in turn come before the Court and shall try to get away with the absurd principle of law.

25. Hence, we hold that the Hon''ble First Court correctly came to the concldsian after assessing the facts properly. We do not find any reason that the company/appellant has been able to make out a case for interference by us on the opinion expressed by the Hon''ble First Court and accordingly, we affirm the order so passed by the Hon''ble First Court and dismiss this appeal. hus, the application is disposed of on the above terms.