Asian Electronics Limited Vs. Murugan Power Systems (Private) Limited

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Court : Karnataka

Decided On : Oct-08-2002

Reported in : II(2003)BC424; ILR2002KAR4977; 2002(6)KarLJ301

Judge : H.L. Dattu, J.

Acts : Companies Act, 1956 - Sections 433, 434(1), 439 and 439(1)

Appeal No. : Company Petition No. 19 of 1999

Appellant : Asian Electronics Limited

Respondent : Murugan Power Systems (Private) Limited

Advocate for Def. : Amar Kumar, Adv. for ;Lawyers Inc.

Advocate for Pet/Ap. : Giri, Adv. for ;King and Partridge

Disposition : Petition allowed

Judgement :
ORDER

H.L. Dattu, J.

1. This is a petition filed under Section 433(e) of the Companies Act, 1956 (hereinafter for the sake of brevity referred to as the 'Act') praying for an order to wind up the respondent-company.

2. The petitioner is a company engaged in the manufacture/distribution of moralized polypropylene film, sprayed elements and capacitors. It has its registered office at Wagle Industrial Estate, Thane.

3. The respondent is a company incorporated under the provisions of Companies Act. It has its registered office at No. 333-A, Old Madras Road, Vijanapura, K.R. Puram, Bangalore. The nominal share capital of the company is Rs. 40,00,000/- divided into 40,000 equity shares of Rs.100/- each. The issued, subscribed and paid-up capital of the company is Rs. 19,08,000/- Apart from others, the main objects of the company is to manufacture, buy, sell, import and export all types of capacitors, power saving devices, electronic instruments and equipments, etc.

4. It is the petitioner-company's case that the respondent-company is due to it a sum of Rs. 43,33,732.78 ps. in respect of certain items of goods supplied by it to the company. It may not be necessary to set-out the details of the claim. Since that amount was not paid in spite of repeated requests and demands, petitioner-company was constrained to issue a statutory notice under Section 434 of the Act dated 7-2-1998 inter alia demanding the aforesaid amount and to make payment of the same within 21 days from the date of receipt of the notice.

5. The respondent-company has sent its reply to the statutory notice denying its liability for payment of any amount to the petitioner-company. In the reply it is also stated that the supplies made by the petitioner-company was of the inferior quality and hence, the capacitors supplied by the respondent-company to its customers burst and the respondent-company's customers refused to make any payment. After issuing a rejoinder dated 18-5-1998 and since the respondent-company failed to make the payment as demanded in the statutory notice together with interest of Rs. 2,05,794/- and further interest on the said sum at the rate of 2% per month from 1-12-1997, petitioner-company is of the view that the respondent-company is unable to pay their debts and has become commercially insolvent and is incapable of liquidating even its current dues and is therefore, liable to be wound up by this Court. Therefore, this petition under Section 433(e) of the Act.

6. The respondent-company has entered appearance through its learned Counsel and has filed its objections resisting the relief sought in the petition. The primary

grounds urged are, that there is no privity of contract between the parties that the films supplied were of sub-quality, with the result that the capacitors manufactured by the respondent-company were returned to it by its purchasers and lastly, the supplies made after cancellation of the supply order dated 26-2-1996, cannot give rise to any legal liability to pay the price thereof etc.

7. The defence offered had been considered by this Court while admitting the petition and permitting the petitioner-company to take out advertisement of the company petition, after prima facie coming to the conclusion that the defence pleaded by the respondent-company is frivolous, unsubstantial and lacking in good faith. In my view, the consideration of the defence offered once over again is unnecesary.

8. At the time of hearing of the petition, the learned Counsel for the respondent-company submits that for the enforcement of a contract, the petitioner-company should not be permitted to invoke the provisions of Section 433(e) of the Act and the petitioner-company should be directed to approach the Civil Court for recovery of alleged dues, if it is of the view that there is violation of the terms of contract. In support of his contention, the learned Counsel Sri Amar Kumar relies on the observation made by this Court in the case of Shakti Prakash Metal FinishersPrivate Limited, Bangalore v. Hindustan Machine Tools Limited (HMT Limited), Bangalore and Anr., : ILR 2002 KAR19 : : ILR 2002 KAR19 ; In the said decision, the Court was pleased to observe:

'7. On consideration, we find that as per the averments there is a contract between the appellant and the respondents and the same has to be dealt with as per the terms of the agreement. Any violation of the terms of the contract cannot ipso facto come within the purview of Section 433 of the Companies Act for winding up of the company. It is also seen that it is not the legislative intention that Company Court should be converted itself into an ordinary Civil Court and proceed to hold a trial at the instance of individual claiming to be a creditor of the company on the basis of a contract. Under the circumstances, no direction as prayed for can be issued'.

9. Per contra, learned Counsel Sri Giri, appearing for the petitioner-company submits that where the debt is disputed but that dispute raised is not in good faith

and the defence offered is frivolous and the debtors have failed to pay their debts or which are unable to pay their debts, this Court could definitely exercise its discretionary jurisdiction under Section 433(e) of the Act, instead of relegating the creditor to approach the Civil Court. In support of his submission, the learned Counsel invites my attention to the observations made by Apex Court in the case of Harinagar Sugar Mills Company Limited, Bombay v M.W. Pradhan (now G.V. Dalvi), Court Receiver, High Court, Bombay, : [1966]60ITR508(SC) In the said decision, the Court has observed:

'7. The relevant provisions of the Indian Companies Act also lead to the same position. Section 434 speaks of a creditor by assignment or otherwise to whom the company is indebted in a particular sum. Such creditor can file a petition for winding up under Section 439 of the said Act. A creditor, therefore, under the Indian Companies Act is any person who acquires that character by assignment or otherwise. The expression 'otherwise' takes in any person to whom another becomes indebted howsoever the relationship of creditor and debtor is brought about between them'.

10. This Court by its order dated 3-10-2001, while admitting the petition has prima facie come to the conclusion that the defence offered by the respondent-company is frivolous, unsubstantial and a mere moonshine, which on the face of it cannot be accepted. Therefore, the dispute raised cannot be termed as a bona fide dispute.

11. The Apex Court while dealing with the scope of Section 433(e) of the Act was pleased to state:

'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'.

12. The Court has further observed:

'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'.

13. The learned Single Judge of this Court while considering the object of Section 433 of the Act in the case of Kamadhenu Enterprises v. Vivek Textile Mills Private Limited, 1982(1) Kar. L.J. 296 has observed:

'The Court having jurisdiction under Section 433 of the Companies Act is not a Court essentially meant for settling money disputes between parties. This jurisdiction is to subserve the object of winding up the companies which have not paid their debts or which are unable to pay their debts'.

14. The factual background of the present case is that, on the request made by the respondent-company on one of its distributors, petitioner-company has supplied polypropylene films, which the respondent-company uses for manufacture of capacitors, which is its main business. An amount of Rs. 4,33,732.78 ps. appears to be due to the petitioner-company towards the value of goods supplied. Since that amount is not paid in spite of repeated requests and service of statutory notice, the petitioner-company is of the view that the respondent-company is unable to pay its debts due to its creditors and has become commercially insolvent. The defence offered by the respondent-company is found to be not bona fide and lacking in good faith and therefore, there is a debt due and the respondent-company is unable to pay the same. However, the learned Counsel Sri Amar Kumar for respondent-company submits that in view of the decision of this Court in Shakti Prakash Metal Finishers Private Limited's case, supra, the petitioner-company is not entitled to the relief claimed in the petition.

15. In the aforesaid decision, the Court on facts had come to the conclusion that there is a contract between the parties and the same has to be dealt with, as per the terms of the contract and for breach of the agreement, the effective remedy is a civil suit and not a petition for winding up. The observation made in the said decision, in my view, would not assist the respondent-company, since the facts and circumstances of the present case is entirely different.

16. In the instant case, the supply of raw-materials by the petitioner-company to the respondent-company by raising invoices is not in dispute. An amount of Rs. 4,33,732.78 ps. appears to have in the process accumulated excluding interest towards the price of the goods supplied. Therefore, the respondent-company is

indebted to petitioner-company in a particular sum and therefore, there is a relationship of a creditor and debtor and such creditor can file a petition for winding up under Section 439 of the Act and this is what the Apex Court has observed in Harinagar Sugar Mill Company Limited's case, supra. Therefore, the relief sought for by the petitioner company requires to be granted.

17. Accordingly, the following: