THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.04.2014

+ CO. PET. 302/2012 & CA No. 1209/2012

M/S OLAM AGRO INDIA LTD ..... Petitioner

versus

M/S MOTHER V IMPEX PVT LTD ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Arun Kathpalia, Mr Rajat Jariwal, Mr Angad & Ms Anisha Somal.

For the Respondent : Mr Raman Kapur, Sr. Adv. with Mr Rishab Raj Jain.

CORAM:-
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present petition has been filed by the petitioner company under Sections 433(e) and 434 of the Companies Act, 1956 (hereinafter referred to as the 'Act') *inter alia* praying for winding up of the respondent company on the ground that the respondent company is unable to pay its debts. It is alleged that the respondent had failed and neglected to pay a sum of ₹8,45,89,296/- alongwith interest, which was claimed as due and payable by the respondent company on account of supply of goods by the petitioner to the respondent. The respondent denies that the amount claimed by the petitioner is due and payable and states that there is a bona fide dispute with regard to the amount claimed by the petitioner and therefore, the present petition is not maintainable.

2. The controversy that needs to be addressed in the present case is whether the defense raised by the respondent is bonafide or a sham defence. And, whether the petition needs to be admitted in view of the defence raised by the respondent.

3. Briefly stated, the relevant facts are that the petitioner company and the respondent company entered into Commodity Trade Finance Agreement dated 27.01.2010 (hereinafter referred to as 'Agreement') whereby the parties agreed to source, supply and make payment for the import of almonds, pistachios, raisins etc. In pursuance of the said agreement, the petitioner supplied the agreed goods to the respondent, during the period between 01.07.2010 to 25.10.2011 and raised invoices for the same.

4. It is stated by the petitioner that the respondent failed to make the payment towards the invoices and as on 31.03.2011, a sum of ₹8,45,89,296/- was outstanding and payable by the respondent to the petitioner. It is submitted that the respondent issued seven cheques of ₹1,00,00,000/- each drawn on Axis Bank Ltd., bearing Cheque Nos.104668, 104669, 104670, 104671, 104672, 104673 and 104674 dated 31.03.2011 towards part payment of the aforementioned liability of ₹8,45,89,296/-. The learned counsel for the petitioner has drawn my attention to a letter dated 14.04.2011 sent by the petitioner to the respondent confirming the receipt of the said cheques towards part of outstanding amount. It is pointed out that the said letter was countersigned by the authorized representative of the respondent company. It is submitted that the said letter mentioned that the petitioner intended to present the

cheques on 18.04.2011, however, the said date was scored off and replaced with the date of 24.04.2011, under the signatures of the authorised representative of the respondent company. It is submitted by the petitioner that the same clearly indicated that the respondent desired and was agreeable that the said cheques be presented on 24.04.2011 instead of 18.04.2011.

5. It is pointed out by the petitioner that a Positive Receivable and Confirmation Request dated 15.04.2011 was also signed on behalf of the respondent company whereby it was acknowledged by the respondent that a sum of ₹8,45,89,296/- was due and payable by the respondent company to the petitioner, as on 31.03.2011. Thereafter, the respondent issued another cheque for a sum of ₹1,00,00,000/- being Cheque No.104692 dated 31.03.2011 drawn on Axis Bank Ltd. It is stated that the petitioner sent a letter dated 05.05.2011 to the respondent confirming the receipt of the said cheque and the said letter was also acknowledged by the respondent.

6. It is submitted by the petitioner that the cheques issued by the respondent were dishonoured and the petitioner initiated proceedings under Section 138 of the Negotiable Instrument Act, 1881. It is submitted that the statutory notices for initiating such proceedings were sent by the petitioner to the respondent on 21.07.2011 and 05.09.2011. Subsequently, the petitioner issued a statutory notice dated 08.12.2011 under Section 434(1)(a) of the Act, however, the same elicited no response from the respondent.

7. It is contented by the learned counsel for the petitioner that the respondent has failed to pay the amount of ₹8,45,89,296/- alongwith interest, despite service of the statutory notice under Section 434(1)(a) of the Act. The learned counsel for the petitioner also relied upon the Positive Receivable and Confirmation Request dated 15.04.2011 in support of his contention that the amount of ₹8,45,89,296/- was admitted by the respondent to be due and payable to the petitioner.

8. In response to the winding up petition, the respondent has filed its reply disputing that the amounts claimed by the petitioner were due and payable by the respondent. It is stated by the respondent that even after 31.03.2011, the respondent continued accepting goods supplied by the petitioner and also made payment towards the same. It is submitted that from period between 01.04.2011 to 25.10.2011, the respondent purchased and took delivery of goods for consideration aggregating ₹2,30,95,275.59 and also made a payment of ₹4,01,51,900.26 to the petitioner. The respondent has stated that the balance amount outstanding is ₹6,56,51,469.97. The respondent has also filed a statement of accounts indicating the above. It is contended that even after receiving further payment, the petitioner did not return the two cheques (towards the amounts already paid), issued as a security and to this effect, the respondent also sent a mail dated 23.11.2011 to the petitioner. The petitioner also accepts that a principal sum of ₹6,67,75,450/- was outstanding as on date since the petitioner had received certain amounts after 31.03.2011.

9. It is contended by the respondent that the petitioner had charged the currency premium on the goods supplied and hence had been raising bills in

excess of the amount payable for the goods supplied by the petitioner. It is stated that the said premium was included in the invoices raised by the petitioner to cover the possible fluctuation in foreign exchange. It is contended that in this manner the petitioner had overcharged by adding certain amounts on account of foreign exchange premium and if charges on account of the said premium were excluded, the respondent would have no difficulty in making payment of the amount that may be found due and payable to the petitioner. The learned counsel for the respondent has also drawn my attention to clause 8 of the Agreement between parties, which specifically provides that in case the contract has been agreed in US Dollars, "the dollar value is freezed and payment would be received with premium upto the date of payment". It is admitted by the respondent that the payment for the goods would be payable at the prevailing foreign exchange rate prevailing at the time of making payment. It is also stated that as the amounts were payable after four months.

10. It is also contended that in the year 2010 & 2011 (during the festival of Diwali), the petitioner released the stocks very late and as the petitioner was charging the currency premium for lifting the stocks, therefore, the respondent had to purchase the material from local market. It is contended that, due to the default and breach on the part of the petitioner, the respondent has suffered losses, which the respondent was entitled to adjust/recover from the petitioner. The counsel for the respondent has also relied upon letters dated 21.11.2011, 08.12.2011 and 12.12.2011 whereby disputes relating to non-lifting of goods in the Diwali season and charging of premium have been alluded to. According to the learned counsel for the

respondent, the said documents indicate that there was a dispute regarding the payment of the amounts claimed by the petitioner and thus, the present petition would not be maintainable.

11. It is contended by the learned counsel for the respondent that there is a bona fide dispute with respect to the amount claimed by the petitioner and the same cannot be adjudicated in proceedings under Section 433(e) of the Act. In support of this contention, the learned counsel for the respondent has relied upon the decisions of this Court in ***RPG Cables Ltd. v. Logic Eastern India Pvt. Ltd.***: **2011 (176) DLT 641** and ***Tata Capital Financial Services Ltd. v. Clutch Auto Ltd.***: **2014 (2) AD (Delhi) 163**.

12. It is contended by the respondent that the respondent had been tricked into providing the balance confirmation on account of a representation made by one of the employee of the petitioner company.

13. It is further contended by the counsel for the respondent that, on account of the facts as stated above, a dispute has arisen and as per the calculation of the respondent (after giving and adjusting the currency premium charged, the worth of the balance stock sold in open market, further payments made, interest etc.), the amount left to be paid by the respondent to the petitioner would not be significant and the present petition is, thus, not maintainable.

14. I have heard the learned counsel for the parties.

15. The short question that requires to be determined in the present proceedings is whether the defence raised by the respondent is a bonafide

defence. It is well settled that in cases where there is a bonafide dispute, the proceedings under Section 433(e) would not lie. It is settled law that proceedings under Section 433(e) cannot be used to pressurize a company to make payment of disputed debts. It is also settled that where a claim is disputed, there cannot be an admitted debt and the omission to pay the same cannot be construed as inability on the part of a company to pay its debts. However, it is equally well settled that a sham and a moonshine defence will not be permitted to negate the right of the creditor to maintain a petition under Section 433(e) of the Companies Act, 1956. An illusory and a speculative defence raised only for the purpose of avoiding payments to a petitioner cannot be construed as a substantial or a bonafide defence to a petition under Section 433(e) of the Companies Act, 1956. The Supreme Court in the case of ***IBA Health (India) Pvt. Ltd. v. Info Drive Systems SDN. BHD*****: (2010) 10 SCC 553** has explained the above principle as under:-

> "20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and

> leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt."

16. In the present case, it is not disputed that the goods in question were supplied to the respondent. It is also not disputed that invoices relied upon by the petitioner were received by the respondent at the material time. The letter dated 14.04.2011 clearly indicates that the respondent had agreed that the cheques aggregating to ₹7 crores be deposited by the petitioner by 24.04.2011 against part discharge of the outstanding amount. It is not disputed that the said letter has been signed by an authorised representative of the respondent company. The petitioner states that the said signatory was a Director of the respondent company at the material time. This is not accepted by the respondent and it is pointed out that the signatory is the husband or one of the Directors'. Be that is it may, it is not disputed by the respondent that he was authorised to sign on behalf of the respondent company. It is also apparent that authorised signatory was closely connected with the business and could not have been expected to sign acknowledgements which were not correct. The contention that the respondent was induced to sign the balance confirmation is ex facie not credible.

17. Further, in addition to the letter dated 14.04.2011, the balances as appearing in the books of accounts had also been confirmed. Admittedly, at this stage, there were no disputes between the parties and the attention of this Court has not been drawn to any correspondence which indicates even

a whisper of dissention between the parties at the material time. The letter dated 05.05.2011 acknowledges that the petitioner had received a cheque for a sum of ₹1 crore from the respondent. The said letter also bears the signatures of the authorised representative of the respondent. Even if, it is assumed that the balance confirmation as also the cheques had been obtained by the petitioner, in April 2011, by making certain false oral representations, it is obvious that by May 2011, the respondent would have become wiser and would have raised the disputes, in the event the same existed. However, the correspondence between the parties clearly indicates that there were no disputes between the parties at that stage.

18. Essentially, the respondent has raised two disputes: (a) the petitioner has overcharged the respondent on account of currency premium and (b) that the petitioner is liable to compensate the respondent for the alleged losses suffered by the respondent on account of delay in supply of goods for the Diwali season of 2010 and 2011. It is settled law that the stage at which the disputes are raised is a material factor while determining the question whether the disputes are bonafide or not. In the present case, the disputes that are sought to be raised are clearly at a belated stage. The respondent claims to have conducted business with the petitioner for a value of about ₹55 crores in the past. The issue of charging premium had apparently never been raised by the respondent prior to the issuance of notice under NI Act. The same is also indicative of the fact that the disputes sought to be raised by the respondent are an afterthought.

19. It is an admitted case that as per Clause 8 of the Agreement, the petitioner was liable to pay for the goods supplied in the foreign currency at

the rate prevalent on the date of realization. However, the premium charged insulated the respondent from any adverse impact on account of fluctuation in the rate of foreign currency. Apparently, the respondent had accepted the same without any protest. The books of accounts maintained by the respondent also do not reflect any unadjusted amount on this count. In my view, the said dispute is, clearly neither substantial nor bonafide.

20. The claim that the respondent had suffered losses, which are liable to be compensated by the petitioner is also not a bonafide dispute. The respondent had made no protest at the material time i.e. the Diwali season of 2010. This indicates that there was no dispute between the parties on this account. The disputes sought to raised in November, 2011 were after the cheques issued by the respondent had been dishonoured and the petitioner had taken steps for initiation of proceedings under the Negotiable Instrument Act, 1881. In the event that the respondent was aggrieved by any delay in supply of goods, the contemporaneous correspondence in 2010 and even in early part of 2011 would indicate the same. In absence of any dispute at the material time, the contention that the debt claimed by the petitioner is disputed cannot be accepted.

21. The contention of the respondent that certain cheques had been issued to the petitioner as security is also not sustainable. The letters dated 14.04.2011 and 05.05.2011 clearly indicate that the cheques issued by the respondent were in discharge of "part of outstanding amount". The said letters are not disputed and the respondent cannot be permitted to canvass a contention contrary to the plain tenor of the said letters.

22. The learned counsel for the respondent has contended that net worth of the company is approximately 50 lacs and thus, winding up of the respondent company would not assist the petitioner in recovery of its dues. It is settled law that proceedings under Section 433(e) of the Act are not proceedings for recovery of debts. The fact that the net worth of the respondent company is contended to be a fraction of the amount of cheques issued by the respondent (i.e. which had been dishonoured) itself indicates that the respondent company is unable to pay its debts and is liable to be wound up.

23. The judgments referred to by the respondent also do not assist the respondent in any way. In the case of ***RPG Cables Ltd.*** (supra), this court has observed that there had been default of both the parties i.e. petitioner as well as respondent (therein) in complying with the time schedule stipulated in the Agreement and whose default had led to the delay in the execution of the Agreement was a debatable issue, which could not be decided in a summary manner without oral evidence and therefore, in these circumstances, this court refused to admit the said petition. In the case of ***Tata Capital Financial Services Ltd.*** (supra), the winding up petition was already admitted and this court was only considering the question as to whether the petition should be advertised and the Official Liquidator should be appointed as a Provisional Liquidator.

24. In view of the above, the winding up petition is admitted and the petitioner is directed to publish the citations in the 'Statesman' (English) and 'Veer Arjun' (Hindi) for a hearing to be held on 12.08.2014. The Official Liquidator is also appointed as a Provisional Liquidator to take

charge of the assets and the books of accounts of the respondent company. The Directors of the respondent company will file the Statement of Affairs within 21 days of the appointment of the Provisional Liquidator coming into effect.

25. The respondent company is restrained from selling, transferring, encumbering or in any manner alienating any of its assets.

26. However, in order to enable the respondent to make arrangements to discharge its dues and to arrive at an amicable settlement with the petitioner, the directions for publication of citations and for appointing the Official Liquidator as a Provisional Liquidator will not come into effect for a period of four weeks from today. The order admitting the winding up petition is also kept in abeyance for a period of four weeks. In the event, the respondent is able to discharge its debts to the petitioner or arrive at an amicable settlement for repayment of the same within the period of four weeks, the directions as stated above will not come into effect. In the event the parties are unable to arrive at an amicable settlement for discharge of the dues of the petitioner, the counsel for the petitioner shall inform the Official Liquidator, who shall on receipt of such communication proceed to take the necessary steps in accordance with law and in conformity with the directions as issued herein.

27. List on 12.08.2014.

28. In view of the above, CA No. 1209/2012 stands disposed of.

VIBHU BAKHRU, J

APRIL 24, 2014
RK/MK