

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMPANY PETITION NO.864 OF 2014

Premier Road Carriers LimitedPetitioner

V/s.

Siemens LimitedRespondent

Mr.Pravin Samdani Sr. Advocate a/w Mr.Paritosh Jaiswal,
Mr.N.Mehta, Mr.Parag Sharma i/by Udwadia & Co. for the petitioner.

Mr.Venkatesh Dhond, Sr.Advocate and Mr.Shyam Kapadia a/w
Mr.Gaurav Shah, Ms.Smruti Kanade and Ms.Heena Daulat i/by
M/s.Negandhi Shah & Himayatullah for the respondent.

CORAM : K.R.SHRIRAM,J

DATE : 8.12.2015

P.C.:-

1 The petitioner has approached this court alleging that the company is indebted to the petitioner a sum of Rs.4,69,42,986/- on account of outstanding dues payable for services provided by the petitioner for transportation of the company's equipments from one place to another in India. Since 2006 the company has been availing the petitioners' services for the purpose of transportation of its equipments and in this regard from time to time entered into several contracts with the petitioner. The claim relates to 770 invoices which are unpaid. Admittedly, 67 invoices equivalent to principal amount of Rs.33,44,185/- is time barred though it is the case of the company that 97 invoices are time barred.

2 It is the case of the petitioner that they repeatedly called upon the company to make the payment including by sending a statutory notice to the company but the company failed and neglected to pay the outstanding amount. The petitioner states that the company vide its e-mail dated 2.9.2014 acknowledged and confirmed that invoices listed therein for an aggregate amount of Rs.1,42,84,471/- were outstanding. The petitioner therefore, has alleged that the company is unable to pay its debts in the normal and ordinary course of its business and hence is liable to be wound up.

3 The company's defence is that the petition is filed as a counter-blast to the respondents' claim in arbitration where the respondent had claimed a sum of Rs.5,55,62,526.30 along with interest @ 18% from 19.12.2010 until payment and/or realization. The facts leading to the arbitration is that one of the consignment that the petitioner carried on 19.12.2010 met with an accident and the cargo got damaged resulting in loss amounting to Rs.5,55,62,526/-. The respondents' insurance claim was rejected and hence the respondent demanded the amount from the petitioner which was not paid. The company therefore had to commence arbitration. The petitioner fearing the outcome of the arbitration and apprehending

that it will suffer an award against it, filed this petition belatedly as a pressure tactic to try and force the respondent not to pursue the claim in arbitration.

At this stage, it is necessary to note that the notice invoking arbitration was sent by the company to the petitioner on 21.11.2013, whereas the first statutory notice was sent only on 25.6.2014. It is necessary also to note that the petitioner has chosen not to disclose the fact that the company had already commenced arbitration and there was a dispute between the petitioner and the company for which the company was making a claim for an amount much more than what the petitioner's claim was. The status of this arbitration is, there is an award against the petitioner wherein the petitioner has been directed to pay to the company a sum of Rs.3,61,83,472/- plus interests and cost of Rs.30,00,000/-.

4 The counsel for the company submitted that in view of this, the defence of the company that they have to recover monies from the petitioner is a bonafide defence and on this ground alone the petition shall stand dismissed.

5 The counsel for the company also submitted that even assuming for the sake of argument that they have admitted, as

alleged by the counsel for the petitioner, that the amounts claimed as invoice charges are payable to the petitioner still this cannot be used as a forum to recover amounts and it is not a case requiring winding up of the company.

6 The company also took a defence that the statutory notice is defective in as much as the notice issued states that the petitioner would take action against the company under Section 271 of the Companies Act 2013 and not under Sections 433 & 434 of the Companies Act 1956. The counsel also submitted that the Corrigendum sent by the company to the statutory notice vide their Advocate's letter dated 4.8.2014 again was defective in as much as it was addressed to the company's Advocate and not to the company at their registered office.

7 The Apex court in ¹IBA Health (India) Private Limited Vs. Info-Drive Systems Sdn. Bhd., has analyzed the provisions of Sections 433 and 434. The Apex court has held that if there is a substantial dispute as to liability, the creditor cannot prefer an application for winding up for discharge of that liability. The court has to first examine whether the company has a genuine dispute to the claimed debt. A dispute would be substantial and genuine if it is

1 2010 (10) SCC 553

bonafide and not spurious, speculative, illusory or mis-conceived. It is also stated that the company court is not expected to hold a full trial of the matter. It must decide whether the grounds appeared to be substantial. Certainly the court would also consider whether the grounds of dispute is a clever mask invented to deprive the creditor of a just and honest entitlement. Therefore, if the creditors' debt is bonafide disputed on substantial ground, the court should dismiss the petition and leave the creditor first to establish its claim in action, less there is danger of abuse of winding up procedure.

8 Let us examine the petition. In the petition there is not even a whisper that the company had raised the issue of damage to cargo and denied their liability to pay the invoices. There is not a whisper that the company had already initiated arbitration on 25.11.2013, that is almost 11 months prior to filing the present petition. In fact, in the reply to the notice dated 25.6.2014 the respondent had made it clear that the petition was merely a counter blast to the pending arbitration proceedings.

9 A party coming to the court should come with clean hands and it was the bounden duty of the petitioner to disclose all facts relating to damage to cargo and the arbitration proceedings pending

between the parties. The petitioner chose not to disclose perhaps because they felt that might be construed as bona fide defence. The non-disclosure was deliberate. On this very ground of non-disclosure of these important facts, the petition requires to be dismissed.

10 In any event, the admitted position is that there is an award in favour of the company. The counsel for the petitioner stated that they have lodged a petition challenging the award and if the award is set aside, there will be no amount payable to the company and the entire amount claimed herein would become payable. The counsel wanted this court to club the present petition with the arbitration petition and wanted both the matters to be heard together. In my opinion, this request of the petitioner has to be rejected. The arbitration proceedings has nothing to do with the present company petition. This company petition is not a forum for the petitioner to recover its amount. It is the case of the petitioner that the company has failed and neglected to pay the amounts claimed and hence the company requires to be wound up. The parameters to be considered while hearing a company petition is totally different from the parameters while hearing an arbitration petition challenging an award. Therefore, I was not inclined to tag this petition along with the arbitration petition but decided to proceed with hearing of this

petition.

11 Moreover, the pendency of the arbitration petition is irrelevant to examine whether the company is unable to pay its debts or not. In ²Federal Chemical Works Ltd., decided by a single Judge of the Allahabad High Court, the company had opposed the petition pleading that there were bonafide dispute with regard to the claims of the petitioner. The stand taken was that the amounts claimed by the petitioner as due to them would get cancelled out because the company had counter claims in excess of the claims of the petitioner. The court concluded that the counter claim set up by the company was prima facie valid and the company has raised bonafide dispute regarding its liability to pay the debts claimed by the petitioner and hence cannot be deemed unable to pay its debts on account of any legal presumption arising under Section 434. The relevant passages from the judgment are quoted as under :-

“It is well settled that in order to raise the presumption under section 434(I) as to a company's inability to pay its debts, it is not sufficient to show merely that the company has omitted to pay the debt due to the petitioner despite service of the statutory notice : it must be shown that the company has omitted to pay without reasonable excuse. The existence of valid counter claims would clearly constitute reasonable excuse for non-payment. What has to be seen in the present case therefore is whether the counter-claims set up by the company are prima facie valid and bona fide.

2 1964 Company Cases Vol-xxxiv 963

.....

.....

I am satisfied that the company has a bona fide counter-claim against petitioner No. 1 for rent (or damages for use and occupation) of the premises which he continues to occupy in spite of a notice to quit. If the company were to take legal proceedings for his eviction, some years would presumably elapse before possession could be obtained and by that time the accumulated rent would be equal to the entire amount standing to his credit in the books of the company. In such circumstances, it seems to me that the company has a reasonable excuse for not paying anything to petitioner No.1 unless he agrees to vacate the premises."

12 In this case also the respondent has set up a very reasonable excuse for non payment. In fact reason for non payment has been justified by the award given by the learned Arbitrator. The Bombay High Court in the matter of ³C.A. Galiakotwala & Co. Pvt. Ltd. has held that merely because an appeal was pending and perhaps the award might be set aside, it was not a good reason for the court to hold, as on the date of disposal of the petition, that the dispute raised by the company was not a bonafide dispute. The court concluded that it must be held that the company had a reasonable excuse for not making payment of the decree to the petitioners and that the company was not negligent. The court held that the word "neglected" used in Section 434 (1) (a) would mean that if there is a refusal to pay without any reasonable cause then it could

3 1984 Company Cases Vol-55 746

be said that the company had neglected to pay the amount. Mere omission to pay is not a neglect to pay and if the company bona fide disputes its liability to pay the amount, even though the amount may be a decretal amount, then in that case it cannot be said that the company has neglected to pay within the meaning of Section 434(1) (a). If there is a genuine cross-claim then it amounts to this that the claim of the petitioner is a disputed claim. The disputed claim would never be a good subject matter of a winding up petition. The following passages from C.A.Galiakotwala (supra) will be useful.

"In the present case, I have been saved the trouble of going through the materials to find out whether the claim is a bona fide claim. The reason is that it is an admitted fact that there is already an award in favour of the company and against the petitioners for Rs.55,000. Both these awards on the different contracts were made and published on one and the same day, viz., November 30, 1978. The arbitrators to the two awards were the same arbitrators, Mr.Shah and Mr.Tejkumar Sethi. Ordinarily, what the arbitrators would have done would be to set off the amount found to be due and owing by the company to the petitioner as against the larger amount found to be due and owing by the petitioners to the company and after deducting that amount an award in favour of the company would have been passed. But, it appears that, since there were two separate references, the arbitrators found it difficult to adopt this procedure and, therefore, these two awards have been passed. Undoubtedly, in the present case, there is an award decree in favour of the petitioning creditor. That award decree has not been challenged and it has become final. Even before me in this winding up petition, the company has not challenged that there is a decree for Rs.26,083.83 in favour of the petitioners, but what the company states is that the company has an award against the petitioners for a much larger amount, and that is of Rs.55,000. Therefore, it cannot be said that

the company has not a bona fide claim against the petitioners. What is required to be seen is whether the company is liable to pay and in considering the liability to pay, the court must also necessarily consider the liability of the petitioners to pay to the company. It is after all a question of liability of the one to the other and in considering the bona fide dispute to a winding-up petition on the basis of the liability of the company to pay to the petitioners, the court cannot shut its eyes to the fact that the petitioners also are liable to pay to the company, a much larger amount than the amount of the decree they hold. Merely because an appeal is pending and perhaps the award may be set aside, it is not a good reason for me not to hold today that the dispute raised by the company is not a bona fide dispute to the liability of the company. Since it is an admitted fact that there is already an award in favour of the company, the dispute must be held to be a bona fide dispute and, consequently, it must be held that the company had a reasonable cause for not making payment of the decree to the petitioners and further that the company was not negligent within the meaning of s.434(1)(a) of the Companies Act, 1956, in not making payment of the amount on receipt of statutory notice.

(emphasis supplied)

13 The Delhi High Court in ⁴Jubilant Organosys Ltd. Vs. DCM Shriram Industries Ltd. has held that where there are claims and cross claims between a creditor seeking the winding up and a company sought to be wound up, the debt can be said to be bona fide disputed and the court will not order the winding up of the company. It is for the petitioner to show that the company has omitted to pay without a reasonable excuse and winding up proceedings are not intended to exploit as a normal alternative to the

4 (2004) 114 DLT 52

ordinary mode of debt realization. Paras-7, 9, 12 & 13 are read as under :-

"7 On the basis of aforesaid admitted position, the question that falls for consideration is as to whether the respondent can raise counter-claim on the basis of the Award ? To put it differently, whether such a counterclaim would be a legitimate ground to deny the petitioner payment which the respondent is to make in respect of the transaction on the basis of which present petition is filed.

8.....

9 The second judgment cited by learned counsel for the respondent is the Division Bench judgment of Calcutta High Court in the case of J.N.Roy Chowdhury (Traders) P.Ltd. v. Jainti Enterprises, 1987 (61) Company Cases 504. In that case the court after taking note of number of judgments held that where there are claims and cross-claims between a creditor seeking the winding up and a company sought to be wound up, the debt can be said to be bona fide disputed and the court will not order the winding up of the company. Winding up proceedings are not intended to be exploited as a normal alternative to the ordinary mode of debt realisation. It would be worthwhile to mention that the counter claim set up in the said case was not an admitted amount. However, such a claim, prima facie, was found to be bona fide and could not be treated as frivolous and mala fide. The court therefore, held that once there was a prima facie case for the cross claim the winding up proceedings were not appropriate....."

10.....

11.....

12 Here, the respondents claim has already been adjudicated in one forum i.e., before an Arbitrator and has resulted in the Award. It is not merely a claim pending adjudication. May be objections are filed against this Award. But this dispute raised by the petitioner would not make the claim of the respondent lacking in bona fides. Further, the claim before the

Arbitrator was not an after thought but was filed much prior to the present petition filed by the petitioner against the respondent. Moreover the Supreme court has declined to grant any stay to the petitioner in the S.L.P.

13 From the facts of this case, it is thus clear that counter-claim can be entertained in a winding up petition and if it is found, even prima facie, a genuine counter-claim the same can form the basis of bona fide dispute of the petitioner's debt on the basis of which winding up petition is filed. When that is the legal position, application thereof to the facts of this case would not pose any problem. The counter-claim of the respondent is, prima facie, established as the same is founded on an Award made by the learned Arbitrator, which means, the basis of counter-claim is the result of legal proceedings. Even if the SLP is pending that would not render the character of the counter-claim as frivolous. On the contrary till the Award is set-aside, the amount is payable in the said Award by the petitioner to the respondent. This petition is therefore, misconceived and is dismissed."

(emphasis supplied)

14 Facts in the case before us and the facts in C.A.Galiakotwala (supra) and Jubilant Organosys Ltd. (supra) are also similar. Here also the company's claim has already been adjudicated before the arbitrator and has resulted in the award. It is not merely a claim pending adjudication. Further in this case also the claim before the arbitrator was not an offer thought. The reference was filed much before the present petition was filed, for that matter much before the (statutory) notice was even issued. These two cases therefore, squarely apply to the case in hand.

15 It will be useful to quote the following paragraphs-20, 21,
22, 23, 31 & 33 from IBA Health (supra).

"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.

21 In this connection, reference may be made to the judgment of this Court in Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami and another (1965) 35 Company Cases 456 (SC), in which this Court held that "It is well-settled that 'a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

22 The above mentioned decision was later followed by this Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. 1971) 3 SCC 632. The principles laid down in the above mentioned judgment have again been

reiterated by this Court in Mediquip Systems (P) Ltd. v. Proxima Medical Systems (GMBH) (2005) 7 SCC 42, wherein this Court held that the defence raised by the appellant-company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The above mentioned judgments were later followed by this Court in Vijay Industries v. NATL Technologies Ltd. (2009) 3 SCC 527.

23. The principles laid down in the above mentioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

24.....

25.....

26.....

27.....

28.....

29.....

30.....

31 Where the company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the company for the purposes of winding up. "Bona fide dispute" implies the existence of a substantial ground for the dispute raised. Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition. The Company Court is expected to go into the causes of refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain that the company's refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil court.

33. We may notice, so far as this case is concerned, there has been an attempt by the respondent company to force the payment of a debt which the respondent company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding up petition as a means of

enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt. Of late, we have seen several instances, where the jurisdiction of the Company Court is being abused by filing winding up petitions to pressurize the companies to pay the debts which are substantially disputed and the Courts are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. Remember, an action may lie in appropriate Court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds. A creditor's winding up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public."

16 Therefore, where a company has a bona fide dispute the petitioner cannot be regarded as a creditor of the company for the purposes of winding up. Bona fide dispute implies the existence of a substantial ground for the dispute raised. Where a debt upon which a petition is founded is a hotly contested debt and also doubtful, the company court should not entertain such a petition. This court will go into the causes of refusal of the company before coming to the conclusion whether the dispute is bona fide or not. I am satisfied that the dispute raised by the company is a bona fide dispute and not some ingenious mask invented to deprive a creditor. I am also satisfied that the defence is not moonshine.

17 The petitioner chose not to disclose the very important fact

of dispute between the parties and the arbitration proceedings. The petitioner cannot be allowed to use the threat of winding up petition as a means of enforcing a company to pay a bona fide disputed debt. The petitioner chose to reduce this court as a debt collecting agency or means for bringing improper pressure on the company to pay the bona fide debts thereby abusing the jurisdiction of the company court.

18 In the circumstances, the company petition requires to be dismissed with substantial cost. The petitioner to pay to the company, by way of cheque drawn in favour of Advocates on record for the company, a sum of Rs.1,00,000/- as costs.

19 In view of the above, it is not necessary to go into the details of the defence of the company that the statutory notice was defective, though I am satisfied that the notice was valid.

20 Petition stands dismissed accordingly.

(K.R.SHRIRAM,J)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment/Order.**