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

COMPANY PETITION NO.323 OF 2014

TAS Powertek Pvt. Ltd. ....Petitioner
V/s.
Ambik Harmonic Filters Pvt. Ltd. ….Respondent

Mr. Vishal Tambat for the petitioner.
None for the respondent.

CORAM : K.R.SHRIRAM,J
DATE : 22nd December, 2015

P.C.:-

1 The petition is filed on the basis that the company has not paid the principal amount of Rs.11,17,833/- and the company has not been able to discharge its debts. It is also alleged that because of this the company commercially insolvent, defunct and its substratum is lost and is liable to be wound up.

2 The basis of the claim is that the respondent company is engaged in the business of manufacturing electrical switches for which the petitioner supplied raw material. The petitioner was receiving purchase orders from time to time from the company against which supply were made. The petitioner also raised invoices and the company also paid for the invoices from time to time.

3 In paragraph 5 of the petition, the petitioner has listed 39 invoices that were raised on the company, of which first 11 have been paid and the 12th partly paid. It is alleged that invoices from serial nos.13 to 39 remain unpaid.

4 According to the petitioner, the invoices amounting to a total of Rs.11,17,833/- have not been paid. At exhibit 'C' to the petition is a notice sent by the petitioner's advocate claiming this amount together with interest at 18% p.a. The company through their advocate's letter dated 26th August, 2013 has denied the liability. According to the company, the switches that the petitioner supplied were not as per the agreed standard and specifications. The company has also stated that the switches supplied by the petitioner formed integral part of the switches that the company manufactured and due to reasons attributable to the material supplied by the petitioner, the switches supplied by the company to their customers stopped functioning and the company had to suffer loss. The company has listed the various parties to whom these switches were supplied containing the defective part supplied by the petitioner.

5 The counsel appearing for the petitioner in fairness submitted that prior to the notice dated 8th August, 2013, the petitioner and the company have exchanged correspondence via

email where the petitioner demanded payment and the company raised the issue of quality of material supplied.

6 In the course of submission, the counsel for the petitioner also submitted that in the rejoinder it is also stated that it is possible that the switches could have been tampered with or misused with wrong usage and hence the failure of the switches cannot be attributable to the petitioner. But it is also stated in the rejoinder that the petitioner got the goods repaired and serviced. This itself shows that there was a problem with the switches but it cannot be decided in this company petition who was at fault. It requires a full trial.

7 Be that as it may, the issue herein is whether the company has a bonafide defence. It is settled law that where parties raised a bonafide defense or a substantial dispute, a company should not be wound up. In ***IBA Health (India) Private Limited vs. Info-Drive Systems Sdn. Bhd.,***[1] paragraphs 20 to 23 and 31,33 to 35 reads 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*

1. (2010) 10 SCC 553

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, 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 abovementioned decision was later followed by this Court in Madhusudan Gordhandas 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.

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. …........

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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.*

32. ……..

MALICIOUS PROCEEDINGS FOR WINDING UP

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.

PUBLIC POLICY CONSIDERATIONS

34. A creditor's winding up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the Newspaper of the filing of winding up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of public at large.

35. We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. A Company Court, therefore, should be guarded from such vexatious abuse of the process and cannot function as a Debt Collecting Agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere."

8 The respondent has responded to the messages sent by the company wherein they have taken up the defence that the material supplied by the petitioner was defective. The company court at this stage is not expected to hold a full trial of the matter. It is to only consider whether the defence raised appears to be substantial or not.

9 In my view, the defence raised by the company cannot be rejected as spurious, speculative or misconceived.

10 In the circumstances, the petition stands dismissed with no order as to costs.

(K.R.SHRIRAM,J)