THE HON'BLE SRI JUSTICE S.V. BHATT

COMPANY PETITION No.90 OF 2015

ORDER:

The petitioner prays for winding up of 1st respondent Company under Sections 433, 434 and 439(1)(b) of the Companies Act, 1956 (for short, 'the Act').

The petitioner and the 1st respondent are Companies incorporated under the Act. The petitioner is engaged in the business of importing, storing, bottling, re-filling, marketing LPG and LPG appliances for industrial, commercial and domestic uses.

The respondent is doing business in development of infrastructure and engineering work on build, operate and transfer basis under contracts of Central/State Government, Government departments etc. The present winding up petition is filed complaining that the respondent is indebted to petitioner a sum of Rs.15,88,237/-, the same being an admitted debt and the respondent failed and neglected to pay the outstanding. The case of petitioner is that it has been supplying materials to respondent Company and accordingly supplied lubricants to it and raised the following invoices:

a. Invoice No.122800132 dated 11.2.2012 for the amount of Rs.3,51,977.56
b. Invoice No.122800285 dated 20.3.2012 for the amount of Rs.4,67,099.02
c. Invoice No.122800507 dated 28.4.2012 for the amount of Rs.7,69,161.32

It is stated that supply of material was admitted but the respondent Company failed and neglected to pay Rs.15,88,237/-. The petitioner in good faith waited for considerable time in anticipation of respondent clearing the above outstanding amount. The efforts of representatives of petitioner Company did not yield any payment. On 20.05.2014, the petitioner issued statutory notice to respondent Company. Hence, the company petition.

Before adverting to the reply of the respondent, for better appreciation, the basis of petitioner's case is precisely re-stated. The petitioner between 11.02.2012 and 28.04.2012 under three invoices referred to above claims to have supplied lubricants to respondents. On account of such supply of lubricants, there is liability of Rs.15,88,237/-. The amount is admitted and the respondent neglected and failed to pay its debts and thus a case for ordering winding up under Section 433 of the Act is made out.

The respondent opposes each and every one of the averments made by the petitioner. The respondent states that the petitioner has not supplied any goods mentioned under three invoices dated 11.02.2012, 20.03.2012 and 28.04.2012. The respondent has not placed any purchase order either orally or in writing to petitioner to supply the lubricants covered by invoices referred above. There is no binding contract between the petitioner and the respondent. According to respondent, the respondent has purchased oils and lubricants from petitioner between September, 2011 and April, 2012 under invoices bearing Nos.936, 937, 2213, 1341, 1342, 1447, 1448, 2817, 1626, 1627, 3101, 3455, 127, 238 for total value of Rs.29,74,943.39 Ps. The respondent paid Rs.29,75,239/-. Therefore, according to respondent, the respondent paid for the goods purchased and received and as a matter of fact excess amount of Rs.295.61 was paid to petitioner Company. It is alleged that the invoices now relied upon by the petitioner are fabricated for wrongful gains. The claim is barred by limitation. The invoices do not bear seal/ signature of respondent Company to infer receipt of the goods covered by the invoices. Unless and until the goods under various invoices are acknowledged, no liability arises. The statutory notice is not received by the respondent. The acknowledgement card does not show the seal of the Company and the signature does not belong to the employees of the respondent Company. It is stated that the respondent is a running Company executing projects in various States in India and for the present, 1500 employees/workers are working. The respondent is a profit making Company. No case for winding up either in fact or in law is made out.

The petitioner filed reply explaining the payment of Rs.29,75,239/- and has categorically contended that the respondent has also received the goods supplied through invoices dated 11.02.2012, 20.03.2012 and 28.04.2012.

Heard Mr.K.Vasudeva Reddy for petitioner and Mr.B.Chandrasen Reddy for respondent.

The counsel has substantially reiterated the averments made in the petition, counter and reply.

Now, the short point for consideration is – whether the petitioner has made out a case for admitting the company petition or not?

The case of petitioner is that through the invoices referred above, the petitioner has supplied lubricants to respondent and the respondent is under legal obligation to pay the amount covered by the said invoices. The petition does not state that the respondent, in fact, received the goods/lubricants covered by the subject invoices. The respondent in clear and categorical terms denied placing any purchase order for supply of lubricants covered by the subject invoices. The respondent further contended that it has not received the lubricants covered by the subject invoices. Thirdly, it is stated that unless and until the acknowledgement of goods is pleaded and proved by the petitioner, no liability between the seller and purchaser arises. Thereafter, the petitioner filed reply and has stated that the goods were, in fact, received by the respondent. Therefore, the burden is on petitioner to *prima facie* show for the limited purpose of considering whether the transaction, which is the basis for filing the company petition, on fact, is made out or not. Therefore, the petitioner has to prove the purchase order, if any, placed by respondent for supply of goods referred in the subject invoices or the basis for raising invoices. The raising of invoices by itself cannot be treated as completing the sale transaction between the petitioner and the respondent. The petitioner has to prove the sequence of events from raising invoices, purchase order, despatching goods by transport or otherwise, acknowledgment of goods by respondent and reminder, if any between the date of raising the last invoice till the statutory notice dated 20.05.2014. The petitioner, no doubt, attempted to show that the respondent received goods covered by these invoices.

This Court in **KRISHNA KILARU v. MAYTAS PROPERTIES LTD**[1] has considered the scope of enquiry under Section 433 of the Act and held thus:

> "While elaborate submissions have been made, and several contentions urged on the merits of the case by Counsel on either side, it must be borne in mind that the winding up petitions, in this batch, have not even been admitted. It is, therefore, necessary at the outset to examine the scope of an enquiry by a Company Court in deciding whether or not these company petitions should be admitted.
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> It is for the Court to decide as to whether a strong prima facie case on facts is made out for admission of a winding up petition. (ICDS Limited v. Kamar Trading Co. (P) Ltd ((2005) 125 CC 849 (MP))). In appropriate cases the Company Judge may, before a petition is admitted and advertised, hold a summary enquiry to ascertain whether a prima facie case is made out by the petitioning creditor.
> At the stage of summary enquiry the Court is called upon to satisfy itself that it is a case for admission and advertisement and nothing more. Before admitting and advertising a petition for winding-up the Company Court, in a summary enquiry, after hearing the petitioning-creditor and the Company, should record its prima facie findings on (i) Whether the petitioning-creditor is a creditor to whom the Company owes an ascertained sum of money or substantially ascertained sum of money; (ii) Whether the said debt is within limitation; (iii) Whether the defence of the Company is valid and bonafide or whether it is a mere moonshine; (iv) whether, from the material on record, a presumption arises that the Company is unable to pay its debts as contemplated under S. 434 (1) (a) or (b) as the case may be; or (v) Whether, from the material on record, the Court is prima facie satisfied that the Company is commercially insolvent as contemplated under S. 434 (1) (c). The Court takes only the prima facie view. (Goetze India Ltd. v. Pure Drinks (New Delhi) Ltd ((1994) 80 Comp Cas 340; Reliance Infocomm Ltd. v. Sheetal Refineries Pvt. Ltd (2008) 142 Comp.Cas.170; Airwings (P). Ltd. v. Viktoria Air Cargo Gmbh Langer Kornweg (AIR 1995 Kar 69; American Express Bank Ltd. v. Core Health Care Ltd MANU/GJ/0009/1997:(1999) 96 Comp Cas 841 (Guj)). When the grounds on which a winding up order can be refused, while considering the petition after admission, appear to exist from the material already before the court, it would be a sound exercise of discretion not to admit the

petition. (American Express Bank Ltd. MANU/GJ/0009/1997: (1999) 96 Comp Cas 841 (Guj); Rishi Enterprises, In re MANU/GJ/0009/1990: [1992] 73 Comp Cas 271 (Guj)).

The analogy derived from the principles underlying Order 37 of CPC is apposite and is an acceptable test which ought to be employed in winding up proceedings. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction, it would have granted unconditional leave to defend, it must dismiss the winding up petition. (Major N. Radhakrishnan (Retd.) v. ACME D,cor India Pvt. Limited (2005) 123 CC 127 (Del); German Homeopathic Distributors Pvt. Ltd. v. Deutsche Homeopathic Union DHU (2009) 161 DLT 703; MANU/GJ/1271/2010:
S.M. Patel Iron Traders Private Limited v. Sugam Construction Private Ltd MANU/GJ/1271/2010: (2011) 162 Comp Cas 298 (Guj)). If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend. If the defendant has no defence, or if the defence is a sham or is illusory or is practically a moonshine, the defendant is not entitled to leave to defend. (Sunil Enterprises v. SBI Commercial and International Bank Ltd., MANU/SC/0334/1998: (1998) 5 SCC 354); Santosh Kumar v. Bhai Mool Singh MANU/SC/0013/1958: (AIR 1958 SC 321) Milkhiram (India) (P) Ltd. v. Chamanlal Bros. MANU/SC/0376/1965: (AIR 1965 SC 1698) and Mechelec Engineers and Manufacturers v. Basic Equipment Corpn MANU/SC/0043/1976: AIR 1977 SC 577). Summary judgments under Order 37 should not be granted where there is a serious conflict as to a matter of fact or where any difficulty on issues as to law arises. (Raj Duggal v. Ramesh Kumar Bansal MANU/SC/0393/1990: (1991 Supp (1) SCC 191))."

Juxtaposing the averments of the case on hand with the ratio laid down in the above decision, it can be concluded that the petitioner has not made out *prima facie* case. Further, the case on hand requires full-fledged trial to arrive at a finding that the
subject transaction, in fact, is legal, valid and binding between
the parties, and in fact, with the completion of obligation by petitioner, acceptance of goods by respondent, liability has arisen.
The dispute raised by respondent viz., existence of contract of sale and non-receipt of goods, is *bona fide*. This Court is of the view that no case is made out for admitting the company petition. The case for the limited purpose of Section 433 of the Act is not made out. If the petitioner has any other remedy, it can work out the same in accordance with law.

The company petition fails and is, accordingly, dismissed.

S.V.BHATT, J

Date:14.06.2016
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[1] (2013)2 Comp LJ 322(AP)