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HIGH COURT OF CHHATTISGARH, BILASPUR

Company Petition No.02 of 2011

M/s Finlay Insulations India Pvt. Ltd. a company duly registered under the relevant provisions of the Indian Companies Act, 1932, having its registered office at B-17, Flat No.103, H-Road, Mahanagar Extension-Lucknow -6 (UP).

---- Petitioner

Versus

M/s Shivalik Powers & Steel Pvt. Ltd. a company duly incorporated under the relevant provisions of the Companies Act, 1956 having its registered office at C-33 (3rd Floor) Ashoka Millennium, Ring Road No.1, Rajendra Nagar Chowk Raipur (CG).

---- Respondents

For Petitioner	:	Shri BP Sharma and Shri Sameer Uraon, Advocates.
For respondent	:	Shri KR Nair and Ms. Veena Nair, Advocates.

SB: Hon'ble Shri Justice P. Sam Koshy

Judgment

Delivered on 18/05/2018

1. The petitioner has preferred the present writ petition under Section 437 read with Section 433(a)&(f) and Section 434 of the Companies Act, 1956, seeking winding up of the respondent company M/s Shivalik Power & Steel Pvt. Ltd. on account of its alleged inability to repay the debts owed to the petitioner company.

2. It is the contention of the petitioner that they had made certain supplies on demand being made by the respondent and against the said supply, seven bills were raised total amounting to Rs.7,98,779/-. On presentation of bills, periodical part payment were made and in all the respondent paid an amount of Rs.3 Lakhs on different dates and

there was a balance of Rs.4,98,779/- due and payable to the petitioner. According to petitioner, this transaction between the parties is not in dispute and therefore it becomes an admitted commercial transaction and the respondent is duty bound to repay the petitioner the balance payment.

3. The petitioner submits that the transaction of sale and purchase also stands established from C-Form issued by the respondent under Central Sales Tax Act which could also establish the liability of the respondent upon the petitioner. It was also contended that in spite of repeated efforts and correspondences being made to the respondent, the petitioner did not fetch any results. The petitioners were hence forced to issue a legal notice on 14.07.2009 and demanded for the balance payment with interest cautioning the respondent in case if the legal notice is not honoured, it would be presumed that the respondent company is unable to pay their debts. It was also brought to the notice of the respondent to treat this legal notice to be notice one under Section 434 of the Companies Act.

4. According to the petitioner, they have come to know that the respondent company is undergoing financial crisis and they are indebted to various banks and financial institutions and also private creditors and are on the brink of commercial insolvency. It is for these reasons that the respondents are evading or avoiding the payment due to the petitioner. According to him, the very issuance of C-Form by the respondent, receipt of legal notice and it not being replied in spite of repeated reminders being sent and the respondent not

paying heed for repayment of the money, all establishes the debt owed to the petitioner by the respondent.

5. Per contra, the counsel appearing for the respondent opposing the petition, in addition to the preliminary objection of the petition being barred by limitation, have also questioned the maintainability of the company petition on the ground of all the contentions put forth by the petitioner being highly disputed and controverted. It is a case where the petitioner company was issued with supply order in respect of some insulation work and the petitioner company as per the agreement were supposed to supply and complete insulation work within a stipulated period. The petitioner failed to perform his part of contract inasmuch as firstly the material supplied were all inferior quality, the workmanship was extremely poor, the site Engineers had left the site much before the work could be completed and for all these reasons, the respondents did not release the further payment to the petitioner. According to respondent, these disputed facts cannot be under any circumstances brought within the ambit of an admitted payable dues nor can the respondent be said to be indebted to the petitioner.

6. The respondents relied upon a document Annexure R/2 issued by the respondents on 23.10.2006 whereby it was categorically intimated to the petitioner that insulation materials supplied by the petitioner did not bear the required thickness as was sought for while issuing the purchase order. That, it was requested to replace the inferior quality insulation materials. Similar letters were also issued by the

respondent to the petitioner on 05.01.2007 and again on 29.03.2007. The correspondence all of which have been brought before this court as annexures to the reply filed by the respondents. For all the aforesaid reasons, the stand of the respondents was that since there was a dispute arisen between the parties so far as the purchase order made by the respondent and the supply made by the petitioner and also for the reason of non completion of work entrusted to the petitioner, the petition as such would not be maintainable under the provisions of Section 437 read with Section 433 (a)&(f) and Section 434 of the Companies Act.

7. In addition, it was also the contention of the respondent that the allegation of weak financial condition of the respondent company is incorrect, false and malice. There is no evidence whatsoever brought on record by the petitioner to substantiate this allegation, and therefore, the same cannot be taken note of. Lastly it was contended that there has been no admission whatsoever made by the respondent at any point of time to the petitioner's claim of Rs.4,98,779/- is concerned. The entire transaction against which claim has been made for, itself has entered into an arena of a disputed contract.

8. I have heard the counsel appearing for the parties and perused the records.

9. So far as the issue of limitation is concerned, this court is of the opinion that considering the correspondence that have been made on either side and also taking note of the dates, the legal notice having

been issued to which the correspondence have been made, would prima facie show that the petition is not one which could be said to be barred by limitation and the preliminary objection of the respondent thus stands negated.

10. However, what is evident from the records is that there has been correspondence made by the respondent to the petitioner in respect of the inferior quality of work, workmanship being extreme poor and dispute also has crept in the execution of the work by the petitioner at the site of the respondent. Thus, there is apparent dispute which has been raised by the respondent.

11. It is settled position of law that when a company raises a dispute in respect of transaction, the company from whom the payment is sought for, cannot be regarded as a creditor for the purpose of initiating a winding up position. It is also a settled that when a court is satisfied that a debt upon which the petition is founded is contested debt and also doubtful, the court should not entertain a winding up petition.

12. Under such circumstances, it would be relevant at this juncture to refer to the judgment of Supreme Court in case of IBA Health (India) Pvt. Ltd. Vs. Info Drives Systems SDN. BHD., 2010(10)SCC 553 wherein in paragraph 20 and 23 dealing on the issue of substantial dispute vis-a-vis liability, it has been held 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.

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."

Further, in paragraph 31 it has been held as under:

"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."

13. Under Section 433 of the Companies Act, the contingency under which a winding up petition could be entertained are-

(a) if the company has, by special resolution, resolved that the company may be wound up by the court;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two and

(e) if the company is unable to pay its debts.

14. Now, if the aforesaid contingencies are taken into consideration, the the claim of the petitioner is to be considered under the 5th contingency that of the respondent's company being unable to pay its debts.

15. Now what has to be seen is as to whether it is a case where the company is unable to pay its debt or it is a case where the respondent has refused to pay the balance of payment owed to the petitioner due to some differences.

16. Taking note of the contention of the respondent as also the documents enclosed with their reply, it is a case where the respondent infact has raised various disputes in respect of execution of work done by the petitioner inasmuch as they have alleged the work to be of inferior quality, the material supplied also being substandard quality and the non completion of the work assigned. Thus, since there is a dispute raised by the respondents which has been brought to notice of the authorities of the petitioner company, thereafter it would be difficult for the petitioner to state that respondent is indebted to them for an amount of Rs.4,98,779/-. It would also be difficult to bring the alleged transaction to be one within

the term “debt” as there appears to be a genuine grievance/dispute raised by the respondent. Thus, where there is a doubt/dispute with regard to the amount owed and with regard to the rights and liabilities of the parties, the winding up petition would not be sustainable and the only recourse available for the petitioner would be to approach the competent civil court.

17. At this juncture, it would be relevant to refer paragraph 20 of the judgment of Supreme Court in case of M/s Madhusudan Gordhandas & Co.Vs. Madhu Woolen Industries Pvt. Ltd., 1971 (3) SCC 632 which reads as under:

> “20. 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. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon. and the sum demanded by the, creditor was unreasonable (See London and Paris Banking Corporation (1). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company When the company contended that the work had not been done properly was not allowed. (See Re. Brighton Club and Norfold Hotel Co. Ltd................”

18. From reading of aforesaid judgment in case of Madhusudan (Supra), what is revealed is that the Supreme Court has reiterated the rule as to when winding up should not be ordered by the court.

19. Considering the aforesaid facts and circumstances of the case, this court is of the opinion that winding up petition is not a substitution to the suit for recovery merely on the plea that there exit a debt and debt has not been paid. The machinery for winding up proceedings cannot be instituted and should not be entertained as a means for

releasing the debt. If the company has raised a bonafide dispute in respect of the transaction, it no longer remains an admitted debt. A winding up proceeding is a discretionary power conferred upon the court dealing with the subject and such discretion is to be exercised considering the entire facts and circumstances of the case. Since the respondent, as has been discussed in the preceding paragraphs, have raised serious disputes between the parties with regard to their rights and liabilities, this court is of the opinion that winding up proceedings is not the proper remedy for settling the dispute between the parties and the present petition so filed by the petitioner thus is not sustainable.

20. The company petition therefore deserves to be and is hereby dismissed.

Sd/-
(P. Sam Koshy)
Judge

inder