IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

COMPANY PETITION No.73 of 2010

M/s.AEBIAR Associates,
rep. by its Partner,
K.Ummer Naushad,
No.4, Owlia Sahib Street,
Ellis Road, Mount Road,
Chennai 600 002. ... Petitioner

vs.

Sri Krishna Smelters Pvt. Ltd.,
by Managing Director,
R.Duraisamy
S.F.No.110/1-E, Iveli Village,
Akkamapet Post, Sankagiri Durg,
Salem – 637 301. ... Respondent

Company Petition filed under Sections 433(e) and (f), 434 (I)(a) and 439(I)(B) of the Companies Act, 1956 for winding up.

For Petitioner : Mr.AR.L.Sundaresan, Senior Counsel for Mr.T.K.S.Gandhi

For Respondent : Mr.N.Baaskaran

O R D E R

This Petition is filed seeking to wind up the Respondent-Company on the ground of inability to pay the admitted liability and for appointment of the Official Liquidator as the Provisional Liquidator to take over the assets of the Respondent-

Company.

2. Notice was ordered to the Registrar of Companies on 17.06.2011. The notice was also served on the Registrar of Companies.

3. It is pleaded by the Petitioner that a sum of Rs.1 crore in terms of the Agreement dated 20.12.2005 was paid to the Respondent through cheques, which were duly encashed by the Respondent-Company. The amount advanced was agreed to be repaid within one year. The Respondent had further agreed to pay the commission of Rs.200/- per ton on the total production or Rs.1 lakh per month, whichever is higher, and the commission was payable on or before 7th of the succeeding month. On the failure of the Respondent to pay the amount within the stipulated period, another Agreement was executed on 20.12.2006, wherein, the Respondent agreed to pay the amount within one year from the date of execution of the second Agreement. It was also agreed in the second Agreement that the monthly commission would be payable regularly and any delay of payment of commission would carry interest at 24% per annum.

4. On failure, the Petitioner issued legal notice to the Respondent, calling upon them to pay the amount, but, in spite of notice, the Respondent failed to pay

the amount to the Petitioner. The Petitioner, therefore, issued statutory notice on 11.12.2009 calling upon the Respondent to clear the amount within the statutory period. However, in spite of statutory notice, no amount has been paid by the Respondent. Hence, the Petitioner has come up with the above Petition for winding up of the Respondent Company.

5. Learned Senior Counsel appearing for the Petitioner submitted that when not even a penny has been paid by a party towards outstanding dues, in terms of Section 434 of the Companies Act, the defaulting Company will have to be wound up. He pointed out that there was no response to the statutory notice dated 11.12.2009 sent by the Petitioner to the Respondent. According to the learned Senior Counsel, as there was no reply from the Respondent, even having waited for 21 days, the Petitioner has filed the present Petition for winding up and he prayed that the Petition has to be allowed, as the Respondent is unable to pay the dues.

6. In reply, learned counsel appearing for the Respondent contended that the claim of the Petitioner is barred by limitation. He stated that initially, there was an Agreement between the Petitioner and the Respondent on 20.12.2005 and the same was renewed on 20.12.2006. It is his case that as cause of action arose as early as on 20.12.2005, the Petitioner ought to have invoked the jurisdiction of this Court within a period of three years from that date and the same is without

prejudice to the contention that as there is an Arbitration clause, which has been invoked by the Petitioner, which has not been proceeded with, the Petitioner is not entitled to any relief. Learned counsel stated that the Original Petition was filed only in the year 2010, after which the present Company Petition was filed and in such view of the fact, the present Petition seeking winding up of the Respondent-Company is not at all maintainable.

7. It is further contended by the learned counsel appearing for the Respondent that in terms of Article 21 of the Limitation Act, the period of limitation would commence from the date of Agreement and not from the date of expiry of the Agreement. When on demand, the amount has not been paid, the Petitioner ought to have approached this Court within a period of three years from the date of the original Agreement and the said contention is without prejudice to the right that the only remedy of the Petitioner is before the Arbitrator in terms of clause 15 of the Agreement dated 20.12.2006, but the same has not been invoked and proceeded with.

8. Heard the learned Senior Counsel appearing for the Petitioner and the learned counsel appearing for the Respondent and also gone through the records.

9. It is not in dispute that there were two Agreements between the Petitioner and the Respondent-Company. Initially, an Agreement was made between them on 20.12.2005 and later, the same was renewed on 20.12.2006. Clause 14 of the Agreement dated 20.12.2005 reads that *"In the event of the Company not being able to repay the advance amount of Rupees One Crore only on the date of expiry of this Agreement, the Agent is at liberty to seize the stock, receivables, take possession of the assets including the assets given as collateral security to the Agent."*

10. Clause 15 of the Agreement dated 20.12.2005 reads that *"Any dispute or difference arising out of or in relation to this Agreement be referred to Arbitrators. The Company shall appoint one Arbitrator on its behalf, so also the Agent will appoint another Arbitrator on his behalf. The Arbitrators so appointed shall appoint an umpire on mutual consent. The provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification thereof so far as it is consistent herewith shall be deemed to be incorporated herein and all the provisions of the said Act shall apply to any reference contemplated under this Agreement."*

11. A careful reading of the aforesaid clauses would show that they are independent of each other. With regard to non-payment of commission, it may be true that the cause of action may commence immediately. Admittedly, non-payment of commission as agreed, could not be barred by limitation and the present Petition has been filed within a period of three years. That apart, the Respondent has to advance a sum of Rs.1 crore within one year from the date of Agreement, dated 20.12.2005. The time limit of one year has been granted and hence, the limitation would start only after the expiry of the time mentioned in the Agreement.

12. As the amount advanced by the Petitioner was not paid by the Respondent in terms of the Agreement dated 20.12.2006, limitation would start from 20.12.2007 only and that the Company Petition has been filed within three years. The contention of the Respondent that time limit would start only from the date of signing of the Agreement, cannot be accepted.

13. It has to be noted that Winding up proceedings and Arbitration proceedings are independent of each other. Arbitration proceedings are initiated for the money due and it can be decreed and executed in terms of the provisions of

the Civil Procedure Code. The provisions of Civil Procedure Code may not be applicable to Arbitration proceedings in terms of Section 17, but, after passing of orders by the Arbitrator, the provisions of Civil Procedure Code would be made applicable for the purpose of recovery. Such recovery proceedings cannot be done in the case of winding up. When the Company is wound up, the secured creditors would be entitled to money and pari passu with others in terms of Section 529 (A) and other provisions of the Companies Act.

14. In view of the above, there is no delay in the present case on hand, as time limit would commence after the last date of the expiry of the Agreement dated 20.12.2006. I find much force in the contention of the Petitioner and therefore, the contention of the Respondent that the claim is barred by limitation, is rejected.

15. Further, it is seen that paper publications were directed to be effected in one issue of English Daily "The New INDIAN EXPRESS" and in one issue of Tamil Daily "DINAMALAR", having circulation in the locality and accordingly, the same was effected. Therefore, it is evident that the ingredients of Section 433(a) are satisfied and that the Respondent-Company is liable to be wound up. Accordingly, the Respondent-Company in question is ordered to be wound up.

16. **Therefore, the above Company Petition is allowed** and the Respondent-company is ordered to be wound up and the Official Liquidator, High Court, Madras is appointed as the Provisional Liquidator and is directed to take charge of the assets of the Respondent-company.

17. The Ex-Directors of the Respondent-Company are directed to file their Statement of Affairs before the Official Liquidator within a period of 21 days. The Petitioner-Company shall deposit a sum of Rs.10,000/- (Rupees Ten Thousand only) towards initial expenses before the Official Liquidator in this matter.

04.01.2019

Index : Yes/No
Speaking order : Yes/No

(aeb)

S.VAIDYANATHAN,J.

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