Shahi Exports Pvt. Ltd. and Another Vs. Cmd Buildtech Pvt. Ltd.

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Court : Delhi

Decided On : Sep-18-2013

Judge : R.V. Easwar

Appellant : Shahi Exports Pvt. Ltd. and Another

Respondent : Cmd Buildtech Pvt. Ltd.

Advocate for Def. : Mr. Sanjay Chhabra

Advocate for Pet/Ap. : Mr. Parag P. Tripathi, Ms. Neelima Tripathi

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

12. h September, 2013 Date of Decision:

18. h September, 2013 % + CO. PET. 468/2011 SHAHI EXPORTS PVT. LTD. & ANOTHER ..... Petitioner Through: Mr. Parag P. Tripathi, Sr.Advocate, with Ms. Neelima Tripathi. versus CMD BUILDTECH PVT. LTD. ..... Respondent Through: Mr. Sanjay Chhabra with Mr.Vaibhav Jairaj, Advocate CORAM: MR. JUSTICE R.V. EASWAR

JUDGMENT
R.V. EASWAR, J.:

1. By order dated 10.07.2013 the preliminary objections raised by the respondent to the maintainability of the company petition were rejected and the company petition was admitted.

2. The learned counsel for the petitioner submits that in view of the order passed by this Court on 10.07.2013, it is evident that the respondent is unable to pay its debts. He, therefore, contends that this is a fit case for appointment of provisional liquidator and for winding-up of the company. Reliance is placed on the judgment of this Court in Niti International Ltd. vs. Shree Sagarmatha Distributors Pvt. Ltd., (2013) 1 Comp. L.J.

335. On the other hand the learned counsel for the respondent has argued that the petition is merely used as a tool to exert pressure upon the respondent-company. It is contended that there is no urgency to appoint a provisional liquidator. It is pointed out that the respondent is building a residential housing project at Kundli in collaboration with Ansal, a reputed builder, and a part of the project land belongs to it. It is further pointed out that the flats constructed in the project have been allotted to hundreds of customers who have invested their hard earned money and are awaiting possession and their expectations and hopes will be dashed if a provisional liquidator is appointed and the winding-up proceedings are ordered.

3. On merits it is submitted that the respondent has not availed of any loan from the petitioner and that it had borrowed monies only from Sarla Fabrics Pvt. Ltd. There was no notice of the amalgamation of Sarla Fabrics Pvt. Ltd. with the present petitioner. It is further contended that the advance of `2 crores made by Ms. Surabhi Sindhu as share application money was appropriated towards the shares subsequently and at any rate the two causes of action - the advancing of monies by the petitioner and Ms. Surabhi Sindhu - cannot be clubbed in the present petition. It is submitted that the amount acknowledged in the balance sheet is only `4 crores and the respondent is agreeable to repay this amount with interest as directed by this Court within four months to Sarla Fabrics Pvt. Ltd. from whom the money was borrowed. It is contended that at any rate, the defence raised by the respondent is substantial and, therefore, the petitioner should be relegated to the civil court. The appointment of provisional liquidator is vehemently

opposed.

4. I have carefully considered the rival contentions and the written submissions filed by both the sides. I do not see any force in the submissions of the respondent. The submissions on merits have all been considered in my order dated 10.07.2013. The question whether the present petitioner can seek to recover the amount advanced by Sarla Fabrics has been considered therein. It was found that there was an amalgamation of Sarla Fabrics Pvt. Ltd. with Shahi Exports Pvt. Ltd. and, therefore, the latter is competent to initiate proceedings for the winding up of the respondent. The question of limitation was also considered in the aforesaid order and held against the respondent and so was the question as to whether the share application money could be considered to be a debt. CO. PET. 468/2011 aforesaid order, as rightly pointed out on behalf of the petitioner, it is not necessary for me to traverse those issues all over again.

5. As to whether the appointment of a provisional liquidator would be justified, I am satisfied that it is, having regard to the conduct of the respondent-company. Initially, after notice was issued to the respondent by this Court, some efforts were made at mediation and there were 9 hearings between 14.03.2012 and 04.09.2012 but nothing fructified. On 08.11.2012 the respondent stated before this Court that it will be able to arrange funds by the sale of property at Solan, Himachal Pradesh and prayed for 3 months time to make an initial payment of `3 crores. Time was granted, but no payment was made. When the matter was taken up again on 22.02.2013 the respondent submitted another proposal under which it would transfer 3 immoveable properties in Solan and Yamuna Nagar in favour of the petitioners, which was not acceptable to the petitioners. Time was taken to submit a more concrete proposal. When nothing was forthcoming a restraint order was passed by this Court. Thereafter the respondent was allowed an adjournment subject to payment of costs. When the matter was taken up on 05.07.2013 again an adjournment was sought by the respondent which was opposed by the petitioner. This Court did not allow the request and the matter was heard.

6. It is thus seen that right from November, 2007 when the amount was advanced to the respondent for a period of 3 months, there has been no attempt by the

respondent to make any repayment except making assurances which were not honoured. On 05.07.2013 two preliminary objections were raised by the respondent to the maintainability of the company petition one was on the ground that the loan was not given by the present petitioner but was given by Sarla Fabrics Pvt. Ltd. This Court rejected the objection on the ground that the Sarla Fabrics Pvt. Ltd. got amalgamated with the present petitioner and the amalgamation was also sanctioned by this Court. The other objection on the ground that the debt was barred by limitation was also held against the respondent. This Court also noticed that the point of limitation was never raised at any earlier point of time. It was held that the plea of limitation was an act of despair and frivolous and was taken only to delay the proceedings. This Court in the aforesaid order also found that the legal contention taken by the respondent on the basis of the judgment of a Single Judge of this Court in Diwan Chand Kapoor vs. New Rialto Cinema Pvt. Ltd., 28 (1985) DLT 31.cannot be given effect to since it was noticed by the Court that the judgment of the learned Single Judge was later reversed by a Division Bench of this Court reported in Diwan Chand Kapoor vs. New Rialto Cinema (P) Ltd., 1986 (60) Company Cases 276.

7. All the aforesaid facts, considered cumulatively, show that the respondent is unable to pay its debts and, therefore, is taking frivolous objections and consequently it is necessary to appoint a provisional liquidator. The respondent has not made any payment so far to the petitioner. All objections to the effect that there was no subsisting debt were rejected. A copy of this petition be served on the Official Liquidator (OL) attached to this Court within five days.

8. The OL attached to this Court is appointed as the Provisional Liquidator (PL) of the Respondent. The OL is directed to take over all the assets, books of accounts and records of the Respondent forthwith. The OL shall also prepare a complete inventory of all the assets of the Respondent before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

9. Publication of the citation of the petition be effected in the Delhi Gazette, The Statesman (English) and Veer Arjun (Hindi) in terms of Rule 24 of the Companies

(Court) Rules, 1959 (Rules), by the Petitioner. The petitioner is also directed to furnish a complete set of petition to the official liquidator.

10. The Directors of the Respondent are directed to strictly comply with the requirements of Section 454 of the Companies Act, 1956 and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from today. They will also file affidavits in this Court, with advance copies to the OL, within four weeks setting out the details of all the assets, both movable and immovable, of the Respondent company and enclose therewith the balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years. The respondent is also directed to furnish the names, address and telephone number etc. of its directors including the Managing Director, Chairman, if any, to the official liquidator along with the statement of affairs. A report be filed by the OL before the next date of hearing. List the matter again on 15.01.2014. (R.V. EASWAR) JUDGE SEPTEMBER 18 2013 hs