Appellant Vs. Respondent

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Court : Kolkata

Decided On : Feb-22-2012

Judge : I. P. Mukerji

Appellant : Appellant

Respondent : Respondent

Judgement :

1 C.P.No.366 of 2011 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction In the matter of: TANTIA CONSTRUCTIONS LIMITED -And ROAD BUILDIER (M) SDN BHD ..Petitioner For the Petitioning Creditor : Mr.Mr.Mr.Mr.Mainak Bose, Advocate with U.S.Menon, Saunak Sengupta, S.

Sultana, Advocates For the Company : Mr.Ranjan Bachawat, Advocate with Mr.Saikat Sen, Ms.Ipsita Banerjee, Mr.S.Sengupta, Advocates Heard on :

13. 02.2012 Judgment on :

22. d February, 2012 I.P.MUKERJI, J.

This is an application for the winding up of Tantia Constructions LTD.(hereinafter the company.).It is made by a Malaysian company by the name of Road Builder (M) Sdn Bhd, (hereinafter the petitioning creditor.).These two companies entered into a joint venture agreement on 14th July, 2003 for setting up a project in the State of Mizoram.

After sometime, the company pulled out of it.

They entered into a different relationship.

The petitioning creditor agreed, on 15th December, 2007, to sell to the company plant, machinery and vehicles at a total consideration of Rs.2,75,73,614.41/-.

There were 47 items of plant and equipment and 18 vehicles, all described in the schedule II to this agreement.

The consideration had to be paid in 15 instalments in this manner.

At the time of signing of the agreement the company had to pay Rs.5,00,000/which was to be treated as the fiRs.instalment.

Further amounts had to be paid in monthly instalments of Rs.20,00,000/- for thirteen months commencing from 15th April, 2008.

The next and last instalment was to be of Rs.10,73,614.41/-.

Each instalment was to be payable before the 15th of the month failing which the company was entitled to pay interest @ 12% per annum.

Now, it not in dispute that only three instalments were paid by the company.

The fiRs.instalment of Rs.5,00,000/- was paid on 24th December, 2007.

The second and the third instalments were paid on 15th April, 2008 and 29th May, 2008 respectively.

Thereafter only a sum of Rs.3,00,000/- was paid on 12th September, 2008.

Altogether Rs.48,00,000/- were paid.

According to the petitioning creditor the principal due is Rs.2,27,73,614.41/-.

In addition to that, they have an interest claim of Rs.64,28,359/- up to 31st March, 2011.

The total sum claimed is Rs.2,92,01,973.41/- as on 31st March, 2011.

The learned Counsel for the petitioning creditor Mr.Mainak Bose submits that the claim is admitted by the company.

He places an email dated 29th July, 2008 of one A.K.Surana on behalf of the company.

It is stated there, that the company was unable to release payments of instalments up to October, 2008 and that they would be paying the instalments from November, 2008 onwards on time.

I will read the relevant part of the communication: In this connection I am to inform you that we are facing acute cash flow crunch due to the monsoon and few other probleMs.We are unable to release payment of instalments up to Oct08.

However, we shall be paying the instalments from November08 onwards and hopefully pay all the due instalments by the schedule month for payment of last instalment.

We are sorry for the inconvenience but would request you to please bear with us.

You must appreciate that all your BGs against security and mobilization advance stands cleared (the last BD for Rs.25,35,500/- is expected to be released in this week).

Then he refers to another email of 29th March, 2009 sent by I.P.Tantia on behalf of the company.

This is what was stated therein: Regarding the instalment payment, I regret that there is a delay as Mizoram Project is facing lot of problem and the desired billing is not achieved.

In the meantime, our Company also had some bad time and hence, the delay.

I would request you to kindly bear with us for some more time.

He submits after showing me the above correspondence that the company does not have any defence to the claim of the petitioning creditor and that I should admit the winding up application.

Mr.Ranjan Bachawat, learned counsel for the company tried his best to prove that the company had a substantial defence to the claim of the petitioning creditor.

He submitted that a substantial number of equipments were imported by the petitioning creditor.

After importation they were sold to the company but the ownership of these equipments remained with the vendor, i.e., the petitioning creditor.

According to the relevant laws of India, these equipments belonging to a foreign owner and imported into India could not be transferred to an Indian party for a certain period.

That is why various dates were indicated in the last column of schedule II to the agreement to signify the dates on which the respective equipments could be transferred.

He says that Clause 4.1 of the agreement cast a duty upon the seller petitioning creditor to hand over to the company the necessary documents regarding the equipments, like invoices, no due certificates, release of charge and so on.

According to him those documents were not furnished.

He submitted that the payment which was actually made, i.e., Rs.48,00,000/- was for those equipments and vehicles for which satisfactory papers had been submitted by the petitioning creditor.

In the alleged email of admission dated 29th July, 2008, this point was taken in the following manner: I also take this opportunity to inform you that the issue of one tipper from RBM - PATI for which the papers has not been received, will be sorted out very shortly.

However, I request you to please advise the concerned person for papers of a few equipments from RBM, the list of which was forwarded to you.

No one has contacted me in this regards.

Regards.

A.K.Surana.

Mr.Bachawat showed me paragraphs 11 and 12 of another letter of the company dated 7th December, 2010.

Paragraphs 11 and 12 of that letter are important and are inserted below: 11.

Your client was, therefore, not only required to wait till the dates specified in the 4th column of Schedule II for transferring the Plant/Equipments/Vehicles, but also obtain/procure from statutory authorities clearance certificates/not to effect transfer of ownership thereof; and also make over copies thereof to my client, which were/are essentially required by my client.

Till date no such evidence has been provided to my client.

12. Your client was further required to submit to my client along with invoices no due certificates and documents evidencing release of any charge over each item of equipment procured by your client under finance or otherwise.

NO such evidence has been received by my client till date.

Then he shows me the statutory notice dated 14th April, 2011, the reply of the company by their letter dated 16th May, 2011 and the counter reply of the petitioning creditor dated 8th June, 2011.

It appears that in response to the statutory notice the company had asked the petitioning creditor to hand over the invoices of the original manufacturer of the equipments along with no due certificates, release of charge and so on.

The petitioning creditor on 8th June, 2011 affirmed that invoices, no objection certificates were handed over to the Company.

It was also argued at the time of the hearing of this application that the no objection certificates for three vehicles had not been procured by the petitioning creditor.

I was shown pages 80 and 83 of the petition by Mr.Mainak Bose for the petitioning creditor to show that these no objection certificates were duly furnished.

I will discuss the cases cited a little later.

FINDINGS AND CONCLUSIONS: It is absolutely plain that the company had the fullest use of all the equipments and vehicles described in Schedule II to the agreement dated 15th December, 2007.

They have paid Rs.48,00,000/- for it and not the rest of the consideration.

In their email of 29th July, 2008 the company wanted accommodation till November 2008.

There was no disputation about liability.

There was a request to the petitioning creditor to provide some papers.The email of 26th March, 2009 did not even mention that.

The admission was absolutely unconditional.

The company simply said I would request you to kindly bear with us for some more time.

I am quite hopeful that we should be able to make some payment in the month of May 2009.The combined effect of the two emails dated 29th July, 2008 and 26th March, 2008, in my opinion, is that till the end of the time for payment of the 13th out of the 15 instalments which was 15th March, 2009, the company had unconditionally admitted its liability to pay the amounts payable under the instalments.

Furthermore, this so called defence by the company that because of the alleged absence of the papers they were not required to pay the balance amount, came

only after a letter of demand was written to them by the petitioning creditor on 13th November, 2010.

I have every reason to believe that by the time they sent their second email on 26th March, 2009 the required documents were received by the company, because, if they had not, they would not have admitted their liability, so unconditionally.

Furthermore, by that time all the fetters on transfer, referred to above were removed.

In the case of Pradeshiya Industrial & Investment Corporation of U.P.versus North India Petrochemicals LTD.and Another reported in (1994) 3 SCC 34.cited by Mr.Bachawat the company was a financial corporation controlled by the State of Uttar Pradesh.

It was the largest finance corporation in the State as held in paragraph 31 of the judgment.

In the background of this fact the Supreme Court held that the availability of assets of the company to pay its creditors or its solvency was the consideration before passing a winding up order.

Furthermore, it observed that the claim was disputed.

In those circumstances it did not entertain the winding up application.

The case of IBA Health (India) Private Limited versus Info-Drive Systems Sdn.

Bhd.

reported in (2010) 10 SCC 55.cited by Mr.Bose is diametrically opposite.

The company was a limited company in private hands.

The Supreme Court held that solvency of the company was not a ground for it to hold that it was not unable to pay its debts.

There is no dispute that the ratio of the two cases is divergent.

The decision of 1994 was rendered by a two judges bench of the Supreme Court whereas the 2010 decision was rendered by a three judges bench.

I am bound by the three judges bench decision of the Supreme Court which clearly opines that when there is no doubt regarding a debt or that the dispute raised by the Company is illusory or not bona fide, the Court would entertain a winding up application.

In that case the solvency of the company would be no ground to resist its winding up (See paragraphs 20 to 24 of the judgment).The case of M/S.Mechalee Engineers & Manufacturers versus M/S.Basic Equipment Corporation reported in AIR 197.SC 57.has been a source of great guidance to the Courts in dealing with winding up applications founded on an alleged debt.

In that case, the Supreme Court was considering the principles to be followed in granting leave to defend to a defendant in a summary suit.

The judgment by Beg J.

for the Court adopted the dicta of Das J.

in Sm.

Kiranmoyee Dassi versus Dr.J.Chatterjee (1945) 49 CWN.

A part of the principles laid down applied to circumstances when the defendant could be ordered to furnish security for the claim of the plaintiff.

Our Courts in a winding up application often direct the company to furnish security for the claim of the petitioning creditor.

In doing so it follows the principles laid down in paragraph 8 (c).(d) and (e) of the above judgment.

Those parts of the paragraph are quoted below as under: (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is

to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish the action he may be able to establish a defence to the plaintiffs claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign the judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.

(See Dunlop India Limited versus Anamika Udyog reported in 1994 (1) CHN Page 409; Ambala Bus Syndicate P.

Ltd versus Bala Financiers P.

LTD.(In Liquidation) reported in 59 Company Cases 838 at Page

849) In view of my above findings, I am of the opinion that the company has been unable to disclose any bona fide defence to the claim of the petitioning creditor.

However, using my discretion as permitted by the case of M/S.Mechalee Engineers & Manufacturers versus M/S.Basic Equipment Corporation reported in AIR 197.SC 57.I give an opportunity to the company to prove its defence.

I relegate the petitioning creditor to a suit to recover the claimed sum, but, upon the company furnishing security.

I direct the company to furnish within four weeks from date a bank guarantee in favour of the petitioning creditor by a nationalised bank for a sum of Rs.2,92,01,970.41/- and to keep it renewed until contrary orders are passed by any court.

The petitioning creditor will file a suit claiming the sum claimed in the winding up application within four weeks of furnishing of the above security by the company.

In default of the company furnishing security, the petitioning creditor may apply to this court for admission of the winding up application.

In that event, no further prima facie case need be established by the petitioning creditor.

Only proof of default has to be established.

In the event the petitioning creditor does not file the suit within the time stipulated, the company need not renew the bank guarantee.

In case the bank guarantee is furnished, the petitioning creditor will not encash the bank guarantee without the leave of the Court.

This winding up application is disposed of.

No order as to costs.

Urgent certified photocopy of this judgment and order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(I.P.MUKERJI, J.)