

Orbit Towers Private Limited Vs. Simplex Projects Limited

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Court : Kolkata

Decided On : Sep-03-2012

Judge : Banerjee

Appellant : Orbit Towers Private Limited

Respondent : Simplex Projects Limited

Judgement :

ORDER

SHEET APO No.386 of 2011 With CP No.128 of 2011 IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORBIT TOWERS PRIVATE LIMITED Versus SIMPLEX PROJECTS LIMITED BEFORE: The Hon'ble JUSTICE BANERJEE The Hon'ble JUSTICE SHUKLA KABIR (SINHA) Date :

3. d September, 2012.

Mr.Jishnu Saha, Mr.Raja Basu Chowdhury, Mr.Partha Mukherjee for the appellant.

Mr.Ratnanko Banerjee, Mr.Dhruba Ghose, Ms.Lopita Banerjee for the respondent.

The Court : This appeal and the cross-objection would relate to judgment and order of the learned Single Judge declining to admit the winding up petition coupled with a direction upon the company to secure the claim of the petitioning creditor.

The facts would depict, Simplex Projects Limited, a well known company in the field of construction, filed a winding up petition before the learned Single Judge inter alia claiming that they had invested a sum of Rs.20 lakhs in Orbit Towers Private Limited, a private limited company having its network in the State, as and by way of inter-corporate deposit.

Simplex claimed that money was paid as inter-corporate deposit repayable with interest at the rate of 13% per annum although we do not find any mention about November 17, such 2009 interest sending component the cheque.

in their Simplex letter did not dated demand either the principal or the interest for about one year or so.

The fiRs.demand was made on October 5, 2010.

Orbit reacted to the same by expressing their wonder as according to them the said money was not an inter-corporate deposit but was paid as and by way of earnest money in a transaction of an immovable property entered into by Orbit on the one hand and one Mr.B.K.

Mundra on the other personnel hand.

of It was Simplex claimed Projects that Mr.Mundra was having 55% shareholding the key either through himself or his family membeRs.Orbit claimed Rs.431 lakhs together with interest at the rate of 18% per annum being the balance consideration for the said transaction.

Simplex denied the assertion of Orbit and once again demanded the money back followed by an Advocate notice of demand that was replied to by Orbit through their Advocate on January 15, 2011.

Simplex filed the winding up petition in March, 2011.

Orbit filed affidavit-in- opposition.

They disclosed a document appearing at page 75 of the paper book to show that there was some transaction in between Mundra and Orbit wherein Rs.451 lakhs

was the agreed compensation and earnest money was fixed for Rs.21 lakhs.

Orbit wants to relate this document with the subject matter of the present appeal.

According to Orbit, instead of Rs.21 lakhs they got Rs.20 lakhs from Mr.Mundra through Simplex.

Simplex filed affidavit-in-reply.

They did not categorically deny the document at page 75.

They say, it is irrelevant.

The learned Single Judge considered the defence of the company.

The learned Single Judge also expressed doubt about the case made out by the petitioner because of some inconsistency as highlighted by His Lordship.

To strike a balance His Lordship stayed the winding up petition permanently coupled with a direction upon the company to deposit the sum of Rs.20 lakhs and relegated the parties to suit.

Hence this appeal by the company and cross-objection by the petitioning creditor.

We have heard Mr.Jishnu Saha, learned Counsel for the appellant and Mr.Ratnanko Banerjee, learned Counsel appearing for the respondent.

While arguing Mr.Banerjee relied upon an unreported decision of this Court in the case of M/S.Dhariwal Steel Private Limited -vs.- M/S.Bengal Rolling Shutters & Engineering Works wherein the Division Bench of this Court dealt with an identical issue as to the nature of defence that would warrant an unconditional stay of the winding up proceeding.

Mr.Banerjee has also relied upon the Apex Court decision in the case of M/S.Mechalac Engineers & Manufacturers -vs.- M/S.Basic Equipment Corporation reported in AIR 197.SC 577.

In the said decision, the decision of a Single Bench of this Court in the case of Sm.

Kiranmoyee Dassi -vs.- Dr.J.Chatterjee reported in 49 Calcutta Weekly Notes 246 was followed.

Citing the said two decisions Mr.Banerjee contends that the defence so put forward by Orbit could not be said to be a legal defence that could have an order of stay of the winding up and as a consequence he would be entitled to an order of admission.

In our view, the Single Bench in the case of Kiranmoyee Dassi (supra) considered all possible pleas that would be taken to resist a summary proceeding under Order 37, principle of which is also applicable in case of admission of a winding up proceeding.

Sub-paragraph (e) being relevant herein is quoted below : (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.

From the facts discussed above, we would find, the case would squarely come within the paragraph quoted supra and the learned Judge was right in directing the company to deposit the said sum to test the bona fide.

Mr.Saha has drawn our attention to the balance sheet of Simplex to show that Mundra was the key person.

He was, in fact, the Chairman-cum-Managing Director although Mr.Banerjee in couRs.of his submission casually mentioned that Mundra might be one of the Directors.

having shareholding of little more than 3%.

From the balance sheet as shown to us by Mr.Saha we find the company did not refer to this amount as inter-corporate deposit.

This transaction did not surface at all in the balance sheet.

The learned Judge doubted how a company of the stature of Simplex would make an inter-corporate deposit in a local private company.

We do not wish to make any comment on the same as it might be a commercial wisdom that would hardly be available for judicial scrutiny.

We are, however, in agreement with His Lordship that it was a fit and proper case where parties should be relegated to suit coupled with a direction upon the company to deposit the entire amount to show their bona fide.

When the appeal was being admitted the Division Bench asked the company to set apart the said sum.

Mr.Saha, on instruction, submits that money has already been set apart.

We would direct the company to deposit the sum in any nationalised bank of their choice by investing the same in a suitable interest bearing fixed deposit until the controversy is resolved in a civil action to be initiated by the parties as per liberty granted by His Lordship.

We thus dispose of the appeal by directing the appellant to deposit the money in a fixed deposit as directed above, within a period of two weeks from date.

We also grant liberty to the company to withdraw the said sum in case no civil action is brought by the respondent within six weeks from date.

In case the suit and/or any other civil action is brought for the purpose, the said fixed deposit would be kept renewed from time to time until such action is disposed of.

Upon such deposit being made the appellant company would keep a xerox copy of the fixed deposit certificate with the Registrar, Original Side of this Court with a copy to the learned Advocate for the respondent and would keep both of them informed about the renewal from time to time.

In case of default in making deposit of the said sum, this appeal would stand dismissed and the order of the learned Single Judge would stand revived and the consequence would follow.

With these directions the appeal as well as the crossobjection are disposed of without any order as to costs.

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

(BANERJEE, J.) (SHUKLA KABIR (SINHA).J.)

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