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Court : Mumbai

Decided On : Oct-21-2013

Judge : The Honourable Dr. Justice D.Y. Chandrachud & M.S. Sonak

Appeal No. : Appeal No.181 of 2013 In Company Petition No.198 of 2012

Appellant : Tata Advanced Materials Ltd.

Respondent : M/S. Tooltech Global Engineering Pvt. Ltd.

Judgement :

M.S. Sonak, J.

1. Admit. With the consent of the learned Counsel, the appeal is taken up for hearing and final disposal.
2. The Appellant (original Petitioner) appeals against the judgment and order dated 17 October 2012, by which the learned Company Judge has dismissed the petition for winding up of the Respondent company.
3. The Appellant instituted Company Petition No.198 of 2012 seeking winding up of the Respondent company on the ground that the company is 'unable to pay its debts' towards the Appellant quantified at Rs.99,74,784/-.
4. The case of the Appellant as set out in the company petition is as follows:

- (a) During the period 2007 to 2009, the Respondent company placed purchase orders in respect of some engineering items upon the Appellant;
- (b) The Appellant thereupon supplied the items and from time to time raised invoices aggregating to Rs.2,16,64,437/- upon the Respondent company;
- (c) The Respondent company made payments to the extent of Rs.1,31,44,778/- upto July 2009; on 29 July 2009, the Respondent company executed a writing acknowledging and undertaking to pay the balance amount of Rs.81,94,426/- then due and payable to the Appellant. The undertaking provided for a payment schedule within which the Respondent company agreed and undertook to make payments to the Appellant;
- (d) As there was no compliance, the Appellant by Lawyer's notices dated 6 July 2010 and 12 October 2010, called upon the Respondent company to pay the amount of Rs.85,40,220/- as undertaken by the Respondent company;
- (e) Despite receipt of the notices, the Respondent Company neither furnished any response, nor paid the amounts as demanded;
- (f) On 20 April 2011, the Respondent company addressed an E-mail promising to pay Rs.25 Lakhs and expressing difficulties in payment of the balance. There was no dispute raised with regard to payments of the balance amounts in the said E-mail;
- (g) An amount of Rs.25 Lakhs was infact paid by the Respondent company to the Appellant in the month of April 2011;
- (h) On 25 March 2010 and 7 March 2011 the Respondent company, in response to balance confirmation letters, confirmed to the Appellant that an amount of Rs.85,40,219.80 was receivable by the Appellant as on 28 February 2010 and 28 February 2011 respectively;
- (i) As no further payments were forthcoming, the Appellant after adjustment of Rs.25 Lakhs sent a statutory notice dated 25 January 2012, calling upon the Respondent company to pay an amount of Rs.60,40,220/- alongwith interest

thereon within 21 days from the receipt of the notice;

(j) The Respondent company replied to the statutory notice (undated). Although there was no outright denial of debt, the Respondent company contended that the undertaking dated 29 July 2009 was subject to 'reconciliation'; That payment of Rs.25 Lakhs effected in April 2011 was in 'full and final settlement'; and that the contract between the parties stipulated that the Respondent company shall pay the Appellant only after receipt of payments from HAL, for whom the Appellant was executing engineering contracts and the items purchased by the Respondent company from the Appellant, were for the purposes of such contract;

(k) The Appellant thereupon instituted Company Petition No.198 of 2012 seeking winding up of the Respondent company under Section 433 (e) and Section 434 of the Companies Act,1956; and

(l) The Respondent company filed a reply reiterating substantially the defences raised in its reply.

5. The learned Company Judge vide judgment and order dated 17 October 2012 has dismissed the petition. In dismissing the company petition, the learned Company Judge has held as under:

(i) The defence that amount of Rs.25 Lakhs was paid in 'full and final settlement' is contradictory, inconsistent, without any basis and cannot be accepted.

(ii) The undertaking dated 29 July 2009 furnished by the Respondent company was subject to 'reconciliation of invoice amount' and further subject to receipt of corresponding payments from HAL. As such the debt was not yet due and the petition as filed was premature.

(iii) The Appellant has failed to establish that the Respondent company has deliberately and intentionally neglected to pay the amount due. Merely because, in the present case, the amount is due and payable and/or though acknowledged is not paid, that by itself is not a sufficient ground to wind up the Respondent company.

6. Mr. Pankaj Vijayan, learned Counsel appearing for the Appellant questioned the impugned judgment and order on the ground that the learned Company Judge had failed to apply the correct principles in determining whether the case had been made out for winding up of the Respondent company. In this regard, Mr. Vijayan made the following submissions:

(i) The undertaking dated 29 July 2009, not only clearly and unambiguously records acknowledgment of debt, but further records a promise on the part of the Respondent company to pay an amount of Rs.81,84,426/- stated therein as per the schedule of installments. The undertaking records that in case of default, the Appellant shall be entitled to initiate legal proceeding, including but not restricted to a petition for winding up of the company under Section 433 and 434 of the Companies Act, 1956;

(ii) There is a clear and unambiguous acknowledgment of debt/liability in the balance confirmation letters dated 25 March 2010 and 7 March 2011. When it recorded to endorsement upon such letters, the Respondent company neither contended that the amounts were subject to 'reconciliation' nor that the amounts were payable subject to proportionate receipts from HAL;

(iii) The defence that the payment of Rs.25 Lakhs was made in 'full and final settlement' has already been found by the learned Company Judge to be baseless. In such circumstances, the learned Company Judge ought to have accepted the Appellant's contention that the defences raised by the Respondent Company are neither substantial, nor bona fide;

(iv) Even otherwise, the defences raised by the Respondent Company are neither substantial nor bona fide. The debt is virtually admitted. No payments are forthcoming. Clearly, therefore, the Respondent company is unable to pay its debts.

For all the aforesaid reasons, it was submitted that a case has been made out for admission of the petition for winding up of the company.

7. Mr. Ajit Kulkarni appearing on behalf of the Respondent company defended the impugned judgment and order by reiterating and elaborating upon the grounds/defences raised in the reply to the statutory notice and reply filed in response to the company petition.

8. Before, we advert to the rival contentions, reference can be usefully made to the judgment of the Supreme Court in case of M/s. Madhusudan Gordhandas and Co. Vs. Madhu Woollen Industries Pvt. Ltd (1971 (3) Supreme Court Cases 632) which lays down the principle to be applied in entertaining the petitions for winding up of companies. In paragraphs 20 and 21, the Supreme Court has observed as follows:

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 Corporations (1874) LR 19 Eq 444). 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 properly done was not allowed. See Re. Brighton Club and Horfold Hotel Co. Ltd (1865) 35 Beav 204).

21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt, See Re. A Company (94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely see Re. Tweeds Garages Ltd (1962 Ch 406). The principles which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

9. Applying aforesaid principles to the facts and circumstances of the present case, we have to determine whether the debt is bona fide disputed and whether

the defence is a substantial one.

10. The undertaking executed by the Respondent company on 29 July 2009 and the unequivocal endorsement made upon the balance confirmation letters dated 25 March 2010 and 7 March 2011 establishes that the dispute regarding the debt payable by the Respondent company to the Appellant is neither bona fide, nor substantial. There is no dispute that the Respondent company placed purchase orders upon the Appellant and the Appellant supplied goods in pursuance of the same. There is no dispute that the Appellant raised invoices from time to time aggregating to Rs.2,16,64,437/- out of which an amount of Rs.1,31,49,778/- was paid by the Respondent company to the Appellant without any demur. Even with regard to the balance, there was never any serious demur. In these circumstances, we are of the opinion that the dispute as regards the debt, belatedly raised is an afterthought and is neither bona fide, nor substantial.

11. Mr. Kulkarni, however, submitted that the undertaking dated 29 July 2009 itself states that the amount stated therein is subject to reconciliation. Therefore, he submitted that the undertaking cannot be relied upon to establish any debt. We are unable to accept this contention for the following reasons:

(i) The undertaking, which otherwise, clearly and unequivocally acknowledges the liability and assures payments as per stipulated schedule, very vaguely states:

this amount due includes certain invoices which are under reconciliation for material cost.

(ii) In the schedule of repayment contained in the undertaking, as against the amount of Rs.41,84,426/- repayable by 15 September 2009, there is the following endorsement:

due after material cost reconciliation.

(iii) Pitted against such vague endorsements are clear and unambiguous acknowledgements of debt and undertaking to pay total amount of Rs.81,84,426/- to the Appellant.

(iv) The Respondent company, neither in its reply to the statutory notice, nor in its reply to the petition for winding up has placed any material on record to suggest that any reconciliation was in fact carried out and that upon such reconciliation any amount was found as not due and payable to the Appellant.

(v) Much after the execution of the undertaking dated 29 July 2009, the Respondent company has made endorsements upon the balance confirmation letters dated 25 March 2010 and 7 March 2011 confirming that the Appellant is to receive from the Respondent company an amount of Rs.85,41,219.80 as on 28 February 2010 and 28 February 2011.

12. Mr. Kulkarni, then contended that as per the agreement between the parties, payments were to be effected by the Respondent company within 3 to 5 working days on receipt of payment from Hindustan Aeronautical Limited (HAL) on a back to back basis. In this regard, Mr. Kulkarni referred to Clause 5.2 of the purchase order dated 17 July 2009, which reads as follows:

5.2 Tooltech shall release to TAML all payments due to them (and provide all Reasonable documentation as proof, if required), within 3 to 5 working days on receipt of their (Tooltech's) payment from HAL on a back to back basis. However, Tooltech would do the best possible to release the payment within 45 days from the date of receipt of certified bills from TAML.

The first part of the Clause 5.2 of the purchase order does make reference to payment within 3 to 5 working days from the company receiving payment from HAL on back to back basis. However, the second part provides that the Respondent company would do the best possible to release the payment within 45 days from the date of receipt of certified bills from the Appellant. The use of the word however makes it clear that though the Respondent company was bound to effect the payments within 3 to 5 working days upon receipt of payments from HAL, nevertheless if such payments were not forthcoming from HAL, the Respondent company would do the best possible to release payments within 45 days from the date of receipt of certified bills from the Appellant. The payments of amounts to the Appellant was therefore not dependant upon the Respondent company receiving payments from HAL. Further this is not a case where there was

any form of tripartite agreement between the Appellant, Respondent company and HAL. In fact, there was no privity of contract between the Appellant and HAL. Such defence was never raised by the Respondent company either at the stage of executing the undertaking dated 29 July 2009 or at the stage of acknowledging the amount due in pursuance of the balance confirmation letters dated 25 March 2010 and 7 March 2011. In the circumstances, we find that the defence raised is neither a bona fide nor a substantial one.

13. The third defence that an amount of Rs.25 Lakhs was paid in full and final settlement by the Respondent company has not been accepted by the learned Company Judge. Even otherwise the same is not at all borne from the records. The E-mail communication does not support any such conclusion.

14. Mr. Kulkarni, finally submitted that the purchase orders which constitute a contract between the parties contained an arbitration clause and in view of the existence of such a clause a petition for winding up was not maintainable or in any case was rightly not entertained. This does not appear to be a defence raised by the Respondent company before the learned Company Judge.

15. In any case, as observed by the Supreme Court in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd (1999) 5 Supreme Court Cases 688), a claim in a petition for winding up is not for money. The petition filed under the Companies Act in a matter like this, is to the effect, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the Court. An Arbitrator, notwithstanding, any agreement between the parties, would have no jurisdiction to order winding up of a company.

16. In the aforesaid circumstances, the objections as to maintainability of a petition for winding up on the ground that the contract between the parties contains an arbitration clause is liable to be rejected.

17. In our judgment, therefore, the Appellant has made out a case for admission of Company Petition No.198 of 2012.

18. Accordingly, the impugned judgment and order dated 17 October 2012 passed by the learned Company Judge, dismissing Company Petition No.198 of 2012 is set aside. The Company Petition No.198 of 2012 shall stand admitted and is required to be advertised in usual terms. The Appellant shall deposit costs, charges and expenses of the Company Registrar for the purpose of advertisements. Company Petition NO.198 of 2012 is made returnable after 12 weeks before the learned Company Judge.

19. The Appeal is allowed in the aforesaid terms. However, there shall be no order as to costs.

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