

Metalogic Systems Private Limited Vs. Ultimate Digital Solutions Private Limited

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Court : Kolkata

Decided On : Mar-13-2014

Judge : Banerjee

Appellant : Metalogic Systems Private Limited

Respondent : Ultimate Digital Solutions Private Limited

Judgement :

ssForm No.J.(2) IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction
Original Side Present : The Honble Mr.Justice Ashim Kumar Banerjee And The
Honble Mr.Justice Arijit Banerjee A.C.O.No.175 of 2013 A.P.O.No.23 of 2014
C.P.324 of 2013 Metalogic Systems Private Limited -Vs.Ultimate Digital Solutions
Private Limited For the Appellant : Mr.Anindya Mitra, Senior Advocate,
Mr.Nirmalya Mohan Bhattacharya, Advocate For the Respondent : Mr.Moloy
Ghosh, Advocate, Mr.Aniruddha Mitra, Advocate Mr.Gobinda Chowdhury,
Advocate Heard On : January 6, 7,17,27,28, and February 20, 21, 2014 Judgment
On : March 13, 2014 ASHIM KUMAR BANERJEE, J.

FACTS: The Life Insurance Corporation of India entrusted a project to Hewlett
Packard Limited an IT company for appropriate software programme to be
uploaded at all LIC locations within the country.

Hewlett Packard in turn entrusted the job to Metalogic Systems Private Limited.

Metalogic in turn entrusted a part of it to Ultimate Solutions an unregistered partnership firm.

Accordingly, Ultimate Solutions executed the work.

Since it was an ongoing process, they time to time raised bills on Metalogic and Metalogic also paid bills to Ultimate Solutions, leaving a balance sum of Rs.4511691 when the subject dispute arose.

Metalogic claimed, a sum of Rs.1 lac and odd only would be due and payable, the balance part would not be payable in absence of appropriate supporting documents including appropriate certificate of performance from the ultimate users which are called UAT and ATP certificates that Ultimate failed to obtain from Hewlett Packard.

There was one more hurdle in getting the issue resolved.

In course of time, the partners of Ultimate Solutions incorporated a corporate entity being Ultimate Digital Solutions Private Limited the respondent above named.

The Memorandum and Articles of Association would suggest, all the three partners of Ultimate Solutions were the promoter directors having majority of the shareholding taking the fourth director who admittedly did not have any connection with the partnership firm.

The new company issued a statutory notice of demand followed by a petition for winding up against Metalogic.

The learned Judge vide judgment and order dated July 6, 2012 declined to admit the winding up petition.

The relevant extracts are quoted below: There is an arguable case made out by the company that the petitioner may not be entitled to make the claim.

In view of such stand taken by the company, the merits of the matter have not been gone into.

The petitioning creditor claims that services were rendered by a partnership firm to the company and bills raised by such firm on the company.

According to the petitioning creditor, the partnership firm was thereafter acquired as a going concern by a company.

Alternatively, it is suggested on behalf of the petitioning creditor that a company was incorporated to take over the business, assets and goodwill of the partnership firm as a going concern.

The company has disclosed two sets of memorandum of association apparently of the petitioning creditor.

In the fiRs.memorandum of association, appearing as Annexure-D to the companys affidavit, the fiRs.principal object of such company is as follows: To take over/acquire the business, trade name and goodwill of the partnership firm Ultimate Solutions situated at Sahebbagan, Samabay Pally, Bally, Howrah-711205. In the second memorandum of association of the same company, the fiRs.principal object reads otherwise: To take over trade name and goodwill of the partnership firm Ultimate Solutions situated at Sahebbagan, Samabay Pally, Bally, Howrah-711205. The petitioning creditor cannot explain why a company has two memoranda of association or as to why the contents of the two memoranda are different.

On the basis of the second memorandum of association, it does not appear that the business of the partnership firm was taken over by the petitioning creditor company.

Though the petitioning creditor relies on an agreement for such purpose, it is evident that there is considerable doubt as to the petitioning creditors right to claim the amount on behalf of the partnership firm.

Since the dispute cannot be conveniently assessed on affidavit of evidence in summary proceedings, CP No.114 of 2012 is permanently stayed with liberty to the petitioning creditor to pursue the claim by way of a regular action. From the judgment and order quoted supra we would find, His Lordship categorically made it clear at the outset, Merits of the matter have not been gone into.

His Lordship recorded the facts however, did not go into the merits, as observed above.

His Lordship was confused as Ultimate Digital annexed two sets of Memorandum of Association, one would suggest, it would take over the business of Ultimate Solutions while the other would suggest, it would take over the trade name and goodwill of the partnership.

His Lordship was confused as one corporate entity could not have two different Memorandums. This prompted His Lordship to permanently stay the winding up petition however, His Lordship observed, since the dispute could not be conveniently assessed on affidavit of evidence in summary proceedings, the winding up petition would remain permanently stayed with liberty to the petitioning creditor to initiate a regular action.

Ultimate Digital preferred an appeal.

The appellant contended, as we find from the judgment and order dated October 11, 2012, since the learned Judge did not go into the merits, the liberty granted by His Lordship should also be extended to filing of a fresh winding up petition with the correct Memorandum of Association.

The learned Counsel informed the Court of appeal, out of two Memoranda filed earlier, the first was correct whereas second one was mistakenly filed along with Form No.5 submitted by Ultimate Digital informing the Registrar of Companies about increase of share capital.

The Division Bench allowed the appeal in part.

The relevant observation of the Division Bench is quoted below: The learned Judge declined to receive the winding up petition in the backdrop as discussed above.

The learned Judge, however, observed that parties should approach by initiating regular action.

In our view, since the learned Judge did not go into the merits of the matter, such observation would rather foreclose the right of the lawful claimant to initiate another winding up proceeding.

Such observation is set aside. Armed with the said order dated October 11, 2012 Ultimate Digital Solutions filed a second winding up petition that the learned Single Judge admitted, giving rise to the present appeal.

The learned Single Judge vide judgment and order dated August 6, 2013 admitted the winding up petition by observing, the Court of appeal granted liberty by setting aside the observation of the earlier Single Bench decision hence, the principle of res judicata would not be applicable.

On merit, His Lordship was satisfied, the winding up petition was maintainable.

The company failed to raise any bona fide defence that would lead to admission of the winding up petition.

CONTENTIONS: Mr. Anindya Kumar Mitra learned Senior Counsel while appearing for the appellant, would raise the following issues: i) The learned Judge permanently stayed the fiRs. winding up petition.

The Court of appeal did not set aside the said order of permanent stay hence; the second winding up petition on the selfsame cause would not be maintainable.

ii) The claim, if any, would arise from a commercial transaction between the company Metalogic System on the one hand and the partnership firm Ultimate Solution on the other.

The new company did not have any privity of contract with Metalogic.

Hence, they could not be said to be a creditor of the company making the winding up petition maintainable.

iii) On merit, the claim was disputed barring a sum of Rs.1 lac and odd that too, would be payable to the partnership firm and not the company.

Since the status of the appellant was very much in dispute the winding up petition would not be maintainable.

iv) The balance claim, if any, would not be payable in absence of UAT and ATP certificates.

While elaborating his submissions on the issue raised above, Mr.Mitra would suggest, the Court of appeal specifically set aside the observation but not the Order that would permanently stay the winding up petition.

Hence, the Order of permanent stay would still remain that would preclude the second petition on the selfsame cause to come up for consideration.

Although he did not specifically raise the issue of res judicata in effect he would suggest so.

On the status of the creditor Mr.Mitra would suggest, Ultimate Solution had the privity of contract, there was no evidence as to their dissolution, even if the fiRs.Memorandum would be taken as correct that would suggest takeover of the business of the partnership firm.

Such takeover would require some overt act.

He would refer to the agreement annexed to the petition that would suggest, the partners of the firm agreed to assign the rights and liabilities of the firm to the company.

If the said document could be treated as a Deed of Assignment, it would be hit by the provisions of the Stamp Act in absence of stamp duty being payable on Deed of Assignment.

The Memorandum of Association did not suggest change of the status of the firm that would only suggest takeover of the business.

Such takeover, unless proved to be lawful, would not permit the company to raise the claim.

In any event, the company never denied payment to Ultimate solutions.

A sum of Rs.1 Lac and odd would still be payable by Metalogic that they could not pay in view of the confusion as discussed above.

For the balance claim, he would suggest, unless and until UAT and ATP certificates were submitted Metalogic would not be in a position to process their bill for payment.

He would lastly contend, the transaction was huge, substantial payments were made that would prove the bonafide intention of Metalogic.

On the legal issue Mr.Mitra would cite the decision in the case of Ram Kumar Agarwala and Anr.

versus Buxar Oil and Rice Mills Limited reported in All India Reporter 1960 Calcutta Page-764 to suggest, in absence of any privity of contract, the winding up petition would not be maintainable.

He would also refer to various provisions of the Transfer of Property Act to show, in absence of appropriate Deed of Assignment, the claim could not be pursued by the assignee particularly, without complying with the provisions of Section 130 thereof.

He would rely on the decision in the case of Kalinga Mining Corporation versus Union of India and others reported in 2013 Volume-V Supreme Court Cases Page-252 in this regard.

On the issue of maintainability of winding up petition at the instance of creditor, he would rely on one Apex Court decision and two High Court decisions, one of Calcutta and the other of Andhra Pradesh.

Citations are: 1.

Union of India versus Raman Iron Foundry reported in All India Reporter 1974 Supreme Court Page-1265.

2. Kisen Gopal Bogree versus L.J.Bavin reported in All India Reporter 1926 Calcutta Page-447.

3. Achanta Subbaraju versus Cherukuri Suryanarayana Murthy and Others reported in All India Reporter 1967 Andhra Pradesh Page11.

He would lastly rely on the Apex Court decision in the case of Amalgamated Commercial Traders Private Limited versus A.C.K.Krishnaswami and Another (Volume-35 Company Cases Page-456).He would rely upon the observation of the Apex Court to the extent, once the Court was satisfied that the debt, in respect of which notice was given under Section 434, was bona fide disputed the winding up petition could not be received for admission.

He would pray for setting aside of the judgment and order of admission passed by the learned Single Judge.

Per contra, Mr.Moloy Ghosh learned Counsel appearing for Ultimate Digital would hand over a detailed calculation to show, even on the strength of the dispute raised by Metalogic on the merits of the claim, a sum of Rs.1092168 would still become payable.

He would be prepared to wait for a decision from the Civil Court

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