

Mr. Sandeep Sabharwal Vs. M/S M-tech Developers Ltd.

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Court : Delhi

Decided On : May-07-2014

Judge : Vibhu Bakhru

Appellant : Mr. Sandeep Sabharwal

Respondent : M/S M-tech Developers Ltd.

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

07. 05.2014 CO.PET.517/2012 & CA NOS. 2114/2012, 1125/2013 & 617/2013
MR. SANDEEP SABHARWAL Petitioner versus M/S M-TECH DEVELOPERS
LTD. Respondent Advocates who appeared in this case: For the Petitioner : Mr
Chandra Shekhar. For the Respondent : Mr Raman Duggal. CORAM:HONBLE
MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J1 The present petition has been filed by the petitioner under Sections 433(e) & (f), 434 and 439 of the Companies Act, 1956 (hereinafter referred to as Act) inter alia praying for winding up of the respondent company. It is alleged that the respondent company has failed and neglected to pay the amounts due and payable to the petitioner and is, thus, deemed to be unable to pay its debts. Consequently, it is contended that the respondent company is liable to be wound up.

2. Brief relevant facts of the present case are as follows:- 2.1 The respondent is a company engaged in the business of development and construction of real estate and presently constructing and developing multistoried residential flats in a project under the name of Camellia Garden situated at Bhiwadi, Rajasthan. The said project was advertised and bookings were invited from general public by circulation of brochures. 2.2 On the basis of the said advertisements, the petitioner had applied for a Duplex Villa measuring 250 sq. yds. at the said housing project and paid an initial amount of `3,50,000/- to the respondent company by a cheque being cheque no.927939 dated 09.06.2006. The respondent company acknowledged the same and issued a receipt bearing no.2049 dated 20.06.2006 for the said amount. The balance payment was to be made in installments and the respondent company raised a further demand of `3,37,500/- towards first installment on 20.01.2007. The petitioner deposited the said amount by a cheque being cheque no.051129 dated 24.10.2007 and the respondent company acknowledged the same and issued a receipt bearing no.14788 dated 05.12.2007 to this effect. 2.3 Undisputedly, the project was delayed. And, due to delay in the project, the petitioner surrendered the said Duplex Villa, by an application dated 04.05.2009 and applied for refund of the amount paid to the respondent company. Along with the said application, the petitioner also submitted original payment receipts no.2049 and 14788 and other documents as required by the respondent company. The receipt of the documents were acknowledged by the respondent by its letter dated 04.05.2009 and the respondent assured the petitioner that a sum of `3,50,000/- would be refunded by 30.11.2009 and the balance sum of `3,37,500/- would be refunded by 05.12.2009. As the amount was not refunded, the petitioner issued a reminder notice dated 18.12.2009 to the respondent company claiming refund of the amount of `6,87,500/- along with interest at the rate of 24% per annum. On receipt of the said notice, the respondent refunded an amount of `70,000/- to the petitioner by a cheque no.584115 dated 28.01.2010. 2.4 Thereafter, the petitioner issued a legal notice dated 25.09.2010 to the respondent demanding the balance amount of `6,17,500/- along with interest, however, the respondent failed to pay the balance amount. In the given circumstances, the petitioner issued a statutory notice dated 25.08.2012 under Section 434(1)(a) of the Act calling upon the respondent company to pay the balance amount of

₹6,17,500/- along with interest at the rate of 24% per annum. Although, the said notice is stated to have been served on the respondent company, the respondent company neither responded to the said notice nor paid the balance amount. Therefore, the petitioner filed the present winding up petition. 2.5 It is relevant to mention that during the course of proceeding, the respondent company paid a sum of ₹5,00,000/- to the petitioner, as directed by this Court by an order dated 12.07.2013, without prejudice to its rights. The respondent company had also deposited a sum of ₹48,750/- with this court as directed by an order dated 01.08.2013.

3. The counsel for the petitioner has contended that the petitioner had demanded a refund for an amount of ₹6,87,500/- as there was a delay in the construction of the said Housing Project, however, the respondent had only refunded an amount of ₹70,000/- to the petitioner. It is contended that the respondent company had failed and neglected to pay an amount of ₹6,17,500/- due and payable by the respondent despite receiving statutory notice under Section 434(1)(a) of the Act. It is further contended that the respondent has used the funds of the petitioner without performing its obligations and, therefore, the respondent company is liable to pay the sum of ₹6,17,500/- along with interest to the petitioner. Therefore, in these circumstances, the present petition needs to be admitted.

4. The respondent company, while refuting the claim of the petitioner, had stated in its reply to the winding up petition that the amount in question was paid to the respondent in the year 2006 & 2007 and since more than three years had elapsed, therefore, the claim of the petitioner is barred by limitation. However, during the course of present proceeding, the learned counsel for the respondent conceded that the present proceedings were not barred by the limitation in view of Section 19 of the Limitation Act, 1963.

5. It is further contended that the respondent duly informed the petitioner, by a letter dated 18.02.2009, regarding completion of the Floor of Villa and demanded a further installment for a sum of ₹4,37,500/- due and payable by the petitioner as per the construction linked plan. Since, the petitioner failed to pay the said installment within a period of 15 days from the date of demand, the respondent by

its letter dated 03.04.2009 imposed a penalty for a sum of `68,750/- i.e. penal interest at the rate of 20% of the demanded installment. It is contended that the petitioner had unilaterally revoked the arrangement and had failed to pay the installment and the amount towards penal interest as demanded and, therefore, the respondent had forfeited the initial deposit. Therefore, according to the respondent nothing was due and payable by the respondent company to the petitioner.

6. It is contended by the respondent that there was no stipulation or agreement with regard to payment of interest, therefore, the same cannot be considered as a debt under Section 433(e) of the Act. In support of this contention, the counsel for the respondent has relied upon *Jyothi Limited v. Boving Fouress Limited*:

2001. (106) Comp Cas 380 (Kar), *V.K. Jain v. Richa Laboratories (P.) Ltd.*: (1993) 50 DLT378 and *Bhajan Singh Samra v. Wimpy International Ltd.*: Company Appeal No.42/2012 decided on 18.05.2012.

7. I have heard the learned counsel for the parties.

8. In the present case, it is an admitted fact that the petitioner had paid an amount of `6,87,500/- to the respondent towards the booking of the Duplex Villa in the year 2006 & 2007. It is not disputed that there was a delay in construction of the project as the respondent had informed the petitioner regarding completion of the Floor of Villa on 18.02.2009 i.e. after almost 2 years from the date of the last installment paid. It is also not disputed that the petitioner surrendered the said Villa on 04.05.2009 and the respondent, on 28.01.2010, refunded a sum of `70,000/- i.e. part of the amount due to the petitioner.

9. Considering the above facts, the issue to be considered in the present case is whether the defence raised by the respondent towards the amount admitted by the respondent is substantial and bona fide. It is the contention of the respondent that no amount is due and payable to the petitioner as the amount paid by the petitioner had been forfeited since the petitioner has failed to pay the further installment and also the penalty imposed. Apparently, the said contention or defence of the respondent appears to be a sham and is not tenable in view of the

letter dated 04.05.2009 issued by the respondent whereby the respondent admitted that the petitioner was entitled to the full refund of the amount paid by the petitioner and assured the petitioner that the amount paid would be refunded to it by two demand drafts. The relevant portion of the said letter is extracted as under:

You have submitted original of surrender paper with all documents and your receipt No.2049, 14788 dated 20.06.2006 & 05.12.2007. We hereby assure you that we will issue demand draft Rs.3,50,000 on 30.11.2009 and 3,37,500 on 05.12.2009 against surrender of the booking M-Tech Project (CG-I).

10. It is relevant to mention here that there was no further communication on the part of the respondent whereby the respondent disputed its liability towards the petitioner. In fact, on 28.01.2010, the respondent made a part payment for an amount of `70,000/- to the petitioner. Further, the statutory notice issued under section 434(1)(a) of the Act to the respondent also elicited no response from the respondent. Therefore, by virtue of section 434(1)(a) of the Act, the respondent is deemed to be unable to pay its debts. In the given circumstances, the present petition is liable to be admitted.

11. The respondent had refunded an amount of `70,000/- to the petitioner in 2010 and paid a further sum of `5,00,000/- during the course of the present proceedings. Therefore, the respondent is, undisputedly, liable to refund the balance sum of `1,17,500/- to the petitioner. The respondent has deposited a sum of `48,750/- with this court which is liable to be made over to the petitioner. And, the respondent is liable to pay the balance sum of `68,750/- to the petitioner.

12. The next question that is required to be considered is whether the respondent would also be liable to pay interest on the amount claimed by the petitioner. It is an admitted position that the amount claimed by the petitioner was, admittedly, due and payable by the respondent. Besides the said amount, the petitioner would also be entitled to a reasonable interest as the sums paid by the petitioner have been utilised by the respondent. The respondent had itself demanded interest at the rate of 20% in the event the demanded installment of `4,37,500/- was not paid within a period of 15 days from the date of the demand.

13. The learned counsel for the respondent has submitted that in cases where interest is payable in terms of a contract between parties, a failure on the part of a company to pay the same would attract the provisions of section 433(e) of the Act and a winding up court can consider the same as failure to pay an admitted debt. However, he contended that in cases where the contract between the parties did not contain any stipulation for payment of interest, it would not be within the jurisdiction of a winding up court to either award interest on admitted amounts or even construe the failure to pay the same as inability on the part of a company to pay its debts. I am unable to accept this contention as it is now well settled that in the winding up proceedings where the debt is admitted by the respondent company, the company court would have the jurisdiction to consider the question of interest payable on the said admitted amount irrespective of whether the same is payable on account of any contract between the parties or by way of restitution. In the case of *Vijay Industries v. NATL Technologies Ltd.*: (2009) 3 SCC527 the Supreme Court has held as under:

34. Section 433 of the Companies Act does not state that the debt must be precisely a definite sum. It has not been disputed before us that failure to pay the agreed interest or the statutory interest would come within the purview of the word debt. It is one thing to say that the amount of debt is not definite or ascertainable because of the bona fide dispute raised thereabout or there exists a dispute as regards quantity or quality of supply or such other defences which are available to the purchaser; but it is another thing to say that although the dues as regards the principal amount resulting from the quantity or quality of supply of the goods stands admitted but a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not. In the latter case, in our opinion, the application for winding up cannot be dismissed.

14. Recently, a Division Bench of this Court in respondents own case, in *M/s M-Tech Developers Ltd. v. Swapna Bhattacharya*: Co. App. No.22/2014, decided on 21.04.2014 relying upon the decision of the Supreme Court in the case of *Vijay Industries* (Supra) has also held that in the winding up proceedings, the Company Judge is empowered to determine the question of interest and the rate thereof on

applying the principle of the restitution. The court held as under:

13. We accordingly affirm the findings of the learned Company Judge on the aspect of interest payable to the Respondent and reject the contention of the Appellant that the question of interest should be left to be determined by a Civil Court. The Supreme Court in the case of Vijay Industries (supra) has unequivocally clarified that it is well within the domain of the Company Judge seized of a winding up petition to enter into the question of interest and the rate thereof the application for winding up cannot be dismissed; interest is payable by way of restitution. The ratio of this judgment has been followed by this Court in Bhajan Singh Samra (supra), wherein reliance has also been placed on the judgment of a learned Single Judge of this Court in Devendra Kumar Jain (supra).

14. The amount of interest awarded by the learned Company Judge at the rate of 12% per annum also appears to us to be reasonable and proper and we see no reason to interfere therewith.

15. The Division Bench also considered the cases relied upon by the respondent in the present case, and rejected the contention of the respondent that question of interest should be left to be determined by a civil court. Further, a Single Judge of this Court in the case of Devendra Kumar Jain v. Polar Forgings & Tools Ltd.:

49. (1993) DLT552 has held as under:

the creditor need not be forced to initiate separate litigation for recovery of the interest amount and the interest amount can be determined by the Company Judge in the winding up proceedings and on failure of the company to pay that amount the Company can be ordered to be wound up on the ground that it is unable to pay its debts.

16. In the present case, it is indisputable that the respondent was liable to refund the amount of `6,87,500/- to the petitioner. In view of the fact that the project in question had been delayed, the petitioner would, prima facie, be entitled to a refund of the amount paid from the date of payment. However, there can be no dispute that the petitioner would be entitled to interest on `3,50,000/- from

30.11.2009 and on `3,37,500/- from 05.12.2009 i.e. the dates on which the respondent promised to refund the said amounts to the petitioner.

17. In the present case, it is undisputable that the respondent has failed to pay its debts despite a notice under Section 434(1)(a) of the Act. Thus, the present petition is liable to be admitted. However, in view of the fact that the respondent has paid substantial amount of debt (`5,00,000/-) to the petitioner during the course of the present proceedings and has further deposited a sum of `48,750/- with this Court, I deem it appropriate to give an opportunity to the respondent to pay the balance amount to avoid any adverse order. The respondent shall also pay interest at the rate of 12% on the amount payable to the petitioner w.e.f. 30.11.2009 on `3,50,000/- and w.e.f. 05.12.2009 on `3,37,500/-. The amount already paid by the respondent to the petitioner would be adjusted from the principal outstanding. The respondent shall pay the amount as directed within four weeks from today.

18. The Registry is directed to make over the amount of `48,750/- deposited by the respondent with this Court within a period of one week from today.

19. In the event that the respondent fails to pay the amount as directed (alongwith interest) within a period of four weeks from today, the petition would stand admitted and necessary orders would follow.

20. List for compliance on 09.07.2014. CA Nos. 2114/2012 & 1125/2013 21. In view of the above, the restraint order dated 30.05.2013 is directed to continue till the disposal of the present petition and the order dated 01.08.2013 is vacated. Accordingly, CA No.2114/2012 stands disposed of and CA No.1125/2013 is dismissed. CA No.617/2013 Renotify on 09.07.2014. VIBHU BAKHRU, J MAY7 2014 RK

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