

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Sep-17-2014

Judge : Dipankar Datta

Appellant : Appellant

Respondent : Respondent

Judgement :

CP No.17 of 2012 IN THE HIGH COURT AT CALCUTTA ORIGINAL JURISDICTION IN THE MATTER OF: ARC INSULATION & INSULATORS PVT. LTD. -AND- GYARSI LAL SHAH (HUF) PETITIONER For the Petitioning creditor : Mr Sandipto Bose, Adv., For the Company Ms. Manju Bhutoria, Adv., : Hearing concluded on: July 11, 2014. BEFORE DIPANKAR DATTA, Judge Date: September 17, 2014. DIPANKAR DATTA, J.

: - 1. By presenting this company petition under Sections 433, 434 and 439 of the Companies Act, 1956 (hereafter the Act), the petitioning creditor seeks an order for winding up of M/s. ARC Insulation & Insulators Private Limited (hereafter the company) under the provisions of the Act and a direction on the Official Liquidator to take possession of the assets, properties, books and accounts of the company. The claim is founded on the allegation that the company failed and neglected to pay to the petitioning creditor Rs.35,66,203.00 (Rs.1,19,826.00 on account of license fee and maintenance charges, Rs.26,96,319.00 on account of penalty and Rs.7,50,058.00 on account of interest @ 18% p.a. from July 7, 2010 to December

31, 2011) together with further interest @ 18% p.a. thereon till actual payment.

2. By an order dated April 12, 2012, Honble Sanjib Banerjee, J.

while recording that the company was not represented even at the second call and no affidavit-in-opposition had been filed, admitted the company petition. It was observed that if the company pays off Rs.28,16,145.00 together with interest thereon @ 8% p.a. from the date of the statutory notice till the date of payment within a fortnight from date, the company petition would remain permanently stayed; in default, the company petition would be advertised in two daily newspapers with the indication of enlistment thereof as per such order. The company petition, post-advertisement, came up for consideration on October 12, 2012 before His Lordship. The company was again not represented even at the second call. His Lordship perceived the company not to be interested in the matter and, accordingly, passed a direction for it to be wound up. The Official Liquidator was directed to take possession of all books, records, assets and documents of the company now in liquidation and to take charge of all its transactions. Liberty was granted to the petitioning creditor to advertise a gist of the order.

3. Immediately thereafter, the company applied for recall of the orders of admission and winding up (C.A. No.749 of 2012) on the ground that it had not been served at either stage. His Lordship was prima facie not inclined to believe the stand of the company and, accordingly, passed on December 7, 2012 the following order: Subject to the company depositing the entire amount as per the order of admission dated April 12, 2012, the official liquidator will not take any steps in the matter. There will be an unconditional stay of the order of winding-up till December 12, 2012. In default of the amount being deposited in the manner indicated by December 12, 2012, the official liquidator will proceed to take possession of the assets of the company (in liquidation). The deposit has to be made with the Registrar, Original Side who will invest the same by way of a fixed deposit in any nationalised bank and retain the same free from all lien and encumbrances and subject to any further order that may be passed in the application. Affidavit-inopposition be filed by December 14, 2012; reply thereto, if any, may be filed before the matter is taken up on December 18, 2012. Since the

company was not represented earlier, once the deposit is made the company will be heard on the merits of the petitioning creditors claim.

4. The said order requiring the deposit of the entire amount having been complied with, a further order dated December 19, 2012 was passed by His Lordship ordering that the deposit having been made, the application for recall stands disposed of and the order of winding up dated October 12, 2012 is permanently stayed.

5. Since by the same order the company petition was released from the list by His Lordship on personal ground, the same was assigned to this bench by the Honble the Chief Justice.

6. The parties were heard at length and I propose to dispose of the company petition by this judgment and order.

7. Reference to the earlier orders passed by His Lordship had to be made because of a point taken by Mr. Bose, learned advocate for the petitioning creditor, to the effect that the claim had been thoroughly scrutinized by His Lordship and only upon recording a satisfaction in that behalf that the company petition was admitted following which the company was also ordered to be wound up. His Lordship did not record any finding that the petitioning creditor was claiming damages in disguise and the amount claimed being an ascertained sum on the basis of the agreement reached by and between the parties, there is no question of the company petition being disposed of by relegating the petitioning creditor to a suit on the basis of the authorities cited on behalf of the company. I shall deal with this part of the submission of Mr. Bose at a later part of this judgment.

8. The facts relevant for a decision on this company petition are these. On January 1, 2010, the parties executed three separate agreements for leave and license in respect of a portion of the premises in question (godowns and a factory shed) for a period of three months and it is undisputed that the amount the company was liable to pay in terms of such agreements for its occupation of the premises in

question for three months was duly paid. The dispute between the parties arose because of occupation of the said premises by the company beyond March 31, 2010. While it is the claim of the petitioning creditor that the company overstayed without authority of law and is, therefore, liable to bear penalty in terms of the relevant clauses in the three separate agreements, the claim of the company is completely at variance. According to the company, the petitioning creditor was approached on March 25, 2010 for executing three fresh agreements to be operative from April 1, 2010; that the company was informed by the petitioning creditor of there being no requirement for execution of fresh agreements and that oral agreements could be entered into on the same terms and conditions as agreed upon and provided for in the three agreements dated January 1, 2010, for a period of three to four months; and that rent would be paid for such period the company would use the godowns and the factory shed. It was also agreed that the security amount of Rs.3,14,200.00 lying with the petitioning creditor would be adjusted with the rents.

9. Who between the petitioning creditor and the company is truthful and whose version condign acceptance?. That would really be dependent on evidence that is led by the parties. This bench cannot, however, overlook a letter dated April 2, 2010 written by the company, appearing at page 15 of its affidavit-inopposition. The letter is reproduced hereinbelow: G.L. Shah (HUF) 1, Sardar Sankar Road Kolkata - 700 026. Kind Attn. : MR. Rajeev Shah. Dear Sir: Sub. Vacating of our shed at the premises No.5, Buroshivtala Main Road, Kolkata - 700 038. Ref.: Our rented Godown/Factory Shed marked as W,X,Y,Z.. As per verbal discussion over telephone regarding further agreement for short period w.e.f. 01/4/2010 to 31/7/10 for above mentioned rented Godown/Factory Shed as W, X, Y & Z which is rented from your Company w.e.f. 01/01/2010. We will ready our new factory shed at South 24 prgs. As early as possible on/or before 15/7/2010. Also we will be shifted our factory to that place on/or before 31st July, 2010. You are agreed with us that further agreement is not required for short period i.e. 01.04.2010 to 31/7/10. You will issue us bill time to time and adjusted our Security Deposit amount, when you will feel that our liabilities arise after the adjustment our security deposit amount that time please you intimate us by letter or fax. If we will leave/vacate before the required period which is mentioned herewith and if our security deposit money not

adjusted with the rent please give us refund. Please you co-operate with us and oblige. Thanking you, Yours faithfully, For: ARC Insulation & Insulators Pvt. Ltd.

. (bold font, wherever used, in original) 10. The receipt of the aforesaid letter by the petitioning creditor has not been denied. It is equally undeniable that the said letter had not been disclosed by the petitioning creditor in its company petition. Although in its reply affidavit the petitioning creditor has denied the contents of the letter dated April 2, 2010, in the considered view of this bench non-disclosure thereof has to be regarded as fatal and renders the claim of the petitioning creditor vulnerable.

11. Adverting attention to the contention of Mr. Bose now, which has been referred to earlier, it cannot be gainsaid that His Lordship did not have the benefit of looking into the contents of the letter dated April 2, 2010, for, neither was the same disclosed in the company petition nor had the affidavit in opposition of the company surfaced when His Lordship was in seisin of the company petition at the pre-advertisement stage. If at all the said letter did not reflect the actual state of affairs, nothing prevented the petitioning creditor from challenging its contents by sending an adequate response. The orders of admission and winding up had been obtained by the petitioning creditor keeping His Lordship in the dark about the existence of such a letter which, in the further opinion of this bench, clinches the issue for the company and against the petitioning creditor insofar as the merits of the company petition are concerned.

12. The decisions cited by Ms. Bhutoria, learned advocate for the company reported in [2013]. 176 Comp. Cases 1 (S.C) : Raju Jhurami v. Germinda P. Ltd., [2010]. 153 Comp. Cases 326 (Bom.) : E-City Media P. Ltd. v. Sadhrta Retail Ltd., [2001]. 106 Comp. Cases 391 : Greenhills Exports (P) Ltd. v. Coffee Board, [2001]. 103 Comp. Cases 992 : Gleason Works v. Punjab Tractors Ltd., and the unreported decisions of His Lordship dated February 7, 2007 and March 29, 2012, are authorities for the proposition that a case based on a claim for unascertained damages cannot be equated with debt and that a petition for winding up of a company is not maintainable where the amount claimed is not a debt but damages. In the circumstances, the proper course is to relegate the petitioning

creditor to a suit.

13. Mr. Bose referred to the decision of His Lordship reported in [2011]. 164 Comp. Cases 364 (Cal) : ITC Ltd. v. Oberoi Mall (P.) Ltd., also cited by Ms. Bhutoria, for arguing that there is no statutory bar to entertain a claim in damages by way of a creditors winding up petition. It would appear from the decision that the aforesaid proposition was conditioned with a rider that a claim may not be declined if the foundation of the claim is established and the quantum agreed upon. It was also held therein that the company court will not proceed any further if a triable issue is perceived to have been raised which calls for a delayed scrutiny.

14. Having regard to disclosure of the letter dated April 2, 2010, it is held that the company has not created an illusion of a defence but a bona fide dispute requiring detailed investigation into the facts; a dispute, which cannot be adjudicated in a summary proceeding of the present nature.

15. In the result, the company petition is permanently stayed. The Registrar, Original Side is requested to make over the amount of Rs. 28,16,145.00 with accrued interest to the company within 7 (seven) days.

16. This order shall not preclude the petitioning creditor to pursue its remedy before the appropriate forum in accordance with law and if an approach is made, the proceeding shall be taken to its logical conclusion without being influenced by any observation made hereinabove. Urgent certified copy of this judgment and order, if applied for, may be furnished to the applicant at an early date.
(DIPANKAR DATTA, J.)

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