

Pennar Industries Ltd. Vs. Dynamic Logistics (P.) Ltd.

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Court : Mumbai

Decided On : Mar-21-2001

Reported in : 2001(4)ALLMR757; 2001(3)BomCR735

Judge : D.Y. Chandrachud, J.

Acts : [Companies Act, 1956](#) - Sections 433

Appeal No. : Company Petition No. 246 of 2000

Appellant : Pennar Industries Ltd.

Respondent : Dynamic Logistics (P.) Ltd.

Advocate for Def. : M.J. Jamdar, Adv.

Advocate for Pet/Ap. : S.H. Parikh and ;V.V. Tulzapurkar, Adv.

Judgement :

Chandrachud, J.

1. In pursuance of purchase orders by the respondent, a contract was entered into between the petitioner and the respondent for the construction of warehouses. The details of the 16 purchase orders have been annexed to the rejoinder filed on behalf of the petitioner. There were amounts due and owing by the respondent to the petitioner. On 29-1-1998, the company citing its financial difficulties sought

some time to pay the dues of the petitioner. The company stated that it was expecting the disbursement of funds from the financial institutions including amongst them ICICI and IDBI upon which the dues of the petitioner would be cleared. The company had issued three cheques in the amount of Rs. 1.47 crores, Rs. 98 lakhs and Rs. 49 lakhs amounting to Rs. 2.94 crores to the petitioner. These cheques were returned on 28-9-1996 by the bankers of the petitioner on the ground of an insufficiency of funds. On 9-10-1998, the petitioner adverted to the return of the cheques called upon the company to pay the outstanding dues in the amount of Rs. 2.45 crores or else face proceedings under section 138 of the Negotiable Instruments Act, 1881. In its letter dated 8-12-1998--the company stated that in lieu of the cheque for Rs. 1.47 crores which was dishonoured, it had issued two demand drafts in the amounts respectively of Rs. 98 lakhs and Rs. 49 lakhs to the petitioner. Similarly, in lieu partly of the cheque of Rs. 98 lakhs, which was dishonoured, the company had issued a demand draft in the amount of Rs. 49 lakhs to the petitioner. In the circumstances, it would be more than apparent that of the cheques that were dishonoured, the company had issued full payment in respect of the cheque of Rs. 1.47 crores and only part payment to the extent of one half in respect of Rs. 98 lakhs. The company had cited its financial difficulties in the several letters written by it which have been adverted to earlier. In reply to the statutory notice of winding up dated 19-8-1999, the company by its letter dated 16-9-1999 stated that there was a difference between the actual bill of the petitioner and the 'statement [of] billing amount'. The company contended that the work which had been carried out by the petitioner was not satisfactory and aluminium sheets which had been imported by the petitioner did not fulfil the specification laid down by the company in the purchase orders.

2. According to the company, the specifications for the aluminium sheets which were to be imported by the petitioner were laid down in the purchase order dated 12-11-1997 (Exh. 1 to the affidavit in reply, dated 31 -8-2000). The case of the company is that if the invoice of the petitioner which is annexed at Exh. 24 of the rejoinder is compared with the purchase order, it would be apparent that the aluminium sheets which have been imported by the petitioner do not meet the specifications of the company. According to the petitioner, on the other hand, the aluminium sheets were required for the purposes of roofing material, and the only

dispute which has been sought to be raised by the company is in regard to the colour of the sheets. There is admittedly no dispute which has been raised in the quality of the aluminium sheets or in the quality thereof. By its letter dated 22-9-1997 (affidavit dated 12-2-2001 Exh. 1)--the company had intimated that it required four shades of aluminium sheets from dark blue (P5CO88D) blending to blue light in equal proportion, on 50 per cent of the area. According to the petitioner, what has been imported by the petitioner is exactly in conformity with these specifications. In any event, it was sought to be submitted that the dispute which has been raised in regard to the colour of the aluminium sheets is only a ruse to get over the inability of the company to meet the outstanding dues of the petitioner.

3. The company does not deny the fact that it had addressed several letters to the petitioner acknowledging the dues of the petitioner and seeking some time to pay the outstandings in view of its financial difficulties. In para 12 of the affidavit-in-reply, it has been sought to be suggested that the said fax message[s] have been sent as certain payments were due at that time and the order regarding Korean sheets was also given.

4. In the present case, it would also be necessary to have regard to an additional affidavit dated 17-2-2001 which has been filed on behalf of the company. In the said affidavit, the company has given a statement of the value of the order as also the deductions which have been made by the company under various heads. One of the heads under which a deduction has been made is in respect of the aluminium sheets imported by the petitioner on which there is a deduction to the extent of Rs. 2.96 crores. Significantly, even after all the deductions have been carried out by the company, an amount of Rs. 1,00,79,853 has been computed as the total amount payable to the petitioner. In these circumstances, there is a clear admission on the part of the respondent that the aforesaid amount is in any event due and payable to the petitioner. This amount is over and above the amount of Rs. 49 lakhs which has [been] stated earlier, has not been paid to the petitioner after the cheque in the amount of Rs. 98 lakhs had been dishonoured. There is, in the circumstances, a debt due and outstanding to the petitioner based on the admission of liability by the respondent-company.

5. The petitioner has instituted a suit being Special Civil Suit No. 325 of 1999 in the Court of the learned Civil Judge, Senior Division, Pune against the respondent for the recovery of its dues. The learned counsel appearing on behalf of the respondent submitted that though the amount of about rupees one crore has been stated to be due and payable to the petitioner in the chart as aforesaid annexed to an affidavit of the respondent, the respondent would be entitled to prefer a counter claim for damages in the suit which has been instituted by the petitioner. Now, it is well-settled that a claim for damages does not constitute a liquidated sum or a debt due and payable since it is only upon an adjudication by the Court that the claim for damages is crystallised. Be that as it may, it would be more than apparent from a perusal of the written statement in the pending suit that no claim has, in fact, been preferred by the respondent-company before the trial Court at Pune, and no court fees have been paid on any counter claim. A counter claim would now be barred by limitation. Having regard to the facts and circumstances of the present case, particularly, the letters of the respondent dated 29-11-1998, as also the chart annexed to the affidavit in reply dated 17-2-2001, it would be proper, in my view, to direct that the respondent furnish security to the satisfaction of the trial Court at Pune at least to the extent of the claim which is admittedly due as stated in the charge at Exh. 6 to the aforesaid affidavit in reply.

6. In the circumstances, the learned counsel appearing on behalf of the respondent has stated that the respondent-company is ready and willing to furnish a bank guarantee of a nationalised bank in the amount of rupees one crore to the satisfaction of the learned Civil Judge, S.D. Pune. The amount of the bank guarantee shall lie to the credit of the Special Civil Suit No. 325 of 1999 which has been filed by the petitioner. The aforesaid bank guarantee shall be furnished within a period of six weeks from today and be kept alive during the pendency of the suit and for eight weeks thereafter.

7. The company petition shall stand dismissed on the respondent company furnishing the bank guarantee as aforesaid. Due intimation shall be given to the company registrar by the respondent. The company petition shall stand admitted without any further reference to this Court, in the event of the company not furnishing bank guarantee in the amount as aforesaid within the period

stipulated. In that event, the company petition to be advertised in Free Press Journal, Janmabhoomi and Maharashtra Government Gazette. The petitioner to deposit a sum of Rs. 2,000 with the Prothonotary and Senior Master within a period of four weeks from the date of default.

8. On the request of the learned counsel appearing on behalf of the respondent, it is clarified that the furnishing of the bank guarantee shall be without prejudice to the rights, and contention of the parties in the special civil suit before the trial Court, which is pending. The bank guarantee shall be kept alive during the pendency of the suit before the trial Court and for a period of eight weeks after the judgment and order in the suit. The learned trial Judge, it is needless to add, shall hear and dispose of the pending suit on merits uninfluenced by the observations contained in this order.

9. Certified copy expedited.'

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