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Court : Karnataka

Decided On : Nov-11-2009

Reported in : [2010]97SCL126(Kar)

Judge : Ram Mohan Reddy, J.

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

Appeal No. : Company Petition No. 86 of 2009

Appellant : Trs Forms and Services (P.) Ltd.

Respondent : Eduquity Technologies (P.) Ltd.

Advocate for Def. : Ramesh Iyer, Adv.

Advocate for Pet/Ap. : S. Sriranga, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Ram Mohan Reddy, J.

1. The petitioner having raised an invoice Annexure-DI for Rs. 11,07,418.25, on the respondent - a company incorporated under the [Companies Act, 1956](#) (for short the 'Act') and having its registered office at the address shown in the cause title,

after allegedly carried out its contractual obligations, when payment was not forthcoming despite E-mails Annexures-E series, Annexure-F and correspondence Annexures-G, H, J and K, issued a notice dated 17-7-2008 Annexure-P through legal counsel calling upon the respondent to pay Rs. 17,17,968 being the amounts due with interest calculated at the rate of 24 per cent per annum from the date of invoice. That notice when acknowledged was responded by a reply dated 18-8-2008 Annexure-Q, inter alia, contending that, due to the negligence in performance of the contract by the petitioner, the same was set right by the respondent by hiring data entry personnel and deploying software engineers, including transportation of materials and damages for loss of reputation, totally valued at Rs. 17,02,000 and called upon the petitioner to pay Rs. 6 lakhs. The petitioner alleging that there are several creditors of the respondent-company to whom huge amounts are due and that the respondent-company is insolvent, unable to pay its debts, and not being economically viable, has presented this petition for winding up of the respondent-company invoking Section 433(e) and (f) of the Act.

2. Petition is opposed by filing statement of objections, inter alia, contending that there were several defects in the work carried out by the petitioner, not as per the requirements and specifications, a few of which are as set out in paragraph 16(a) to (h), called for rectification involving, deployment of men and material. In addition, it is contended that the irresponsible conduct of the petitioner occasioned loss of respondent's reputation. At paragraph 23 of the statement of objections, the respondent has quantified the expenses incurred, damages and loss of reputation, totally valued at Rs. 17,02,000. In paragraph 27, the respondent denies that it is due and payable to the petitioner Rs. 17,17,968 towards services rendered. In addition, the respondent denies that it is commercially insolvent. Lastly, it is contended that the petitioner having not made out a case of a legally enforceable debt, the petition is not maintainable.

3. Heard the learned Counsel for the parties, perused the pleadings. The question for decision making is, whether the petitioner has made out a case of a determined, ascertained, definite and undisputed debt, which the respondent-company has failed to pay so as to invoke the extraordinary jurisdiction of this

Court, for winding up the respondent-company

4. The respondent-company having entered into a time bound contract with Karnataka School Quality Assessment Organisation (KSQAO) undertook the job of electronic scanning of data from OMR Sheets by use of a scanner enabled to read the data and store it in an electronic format, in a computer. The petitioner claiming to have the necessary experience and expertise in the matter agreed to fulfil the said assignment. The petitioner claims to have completed the work entrusted from time to time as acknowledged by the respondent in its various letters and correspondence, followed by the invoices Annexures-D and EI. The reimbursement of travelling expenses of Rs. 17,604 claimed in the invoice Annexure-D while the work of handing over the data in the required format, is valued at Rs. 11,07,418.25 as indicated in the invoice Annexure-DI. The E-mail messages Annexure-E series, point out to correction of data by the petitioner, as also certain practical problems encountered in the process of delivery of data. By the letter dated 18-8-2007, Annexure-G, the petitioner brought to the notice of the respondent that KSQAO having made payment of the contractual sum, as acknowledged, after accepting satisfactory completion of the assignment, the failure to pay the petitioner, the amounts claimed in the invoices, carries interest at the rate of 24 per cent from a month after the date of invoice. Annexure-H letter of the petitioner states that the respondent's representative by name Ramesh Iyer caused certain difficulties, thus spoiling the relationship between the companies, though KSQAO accepted satisfactory completion of the job, while pointing out to the imaginary allegations of Ramesh Iyer after expiry of six months of completion of the contract.

5. The respondent while not disputing the fact that the petitioner carried out the job entrusted though not to the satisfaction, did point out to certain infirmities in the performance of the contract, requiring rectification. In fact, in the reply to the E-mails annexed to the Statement of objections, points out to the performance guarantee issued by the respondent the delay in the completion of the assignment, and the differences in the large amount of data processed, affecting the image of the respondent. In Annexure-H2, a reply to one of the E-mails, it was pointed out that the parties ought to work as a team to complete the project in time and to the

satisfaction of the KSQAO. The respondent undoubtedly pointed out to certain editing errors of huge quantity of data for which an explanation was sought from the petitioner. The retrieving of balance data was also a subject-matter, as noticed in the reply E-mails. The respondent in its letter dated 3-10-2007, Annexure-K of the respondent by way of a reply to the claim for overdue and delayed payment in the letter dated 17-4-2007, the respondent pointed out to the infirmities in the work requiring expenditure towards deploying men and materials to set right the mistakes committed by the petitioner, and the summoning of Mr. Ramesh Iyer, the respondent's representative, by the personnel of the Minister's office, who threatened criminal action, leading to loss of reputation and, hence, the claim for damages.

6. The parties having set out facts as regards the transaction, in great elaboration, undoubtedly appear to have no dispute over the value of the work entrusted by the respondent, i.e., Rs. 11,07,418.25 indicated in the invoice Annexure-DI though the respondent has made a counter-claim of Rs. 17,02,000 towards expenses incurred and damages for loss of reputation, as in the reply notice dated 18-8-2008 Annexure-Q and demands payment of Rs. 6 lakhs from the petitioner. I say so because there is no explanation forthcoming either in the statement of objections or the correspondence between the parties as to why the respondent after quantifying its claim of Rs. 17,02,000 in the reply notice, towards expenses and loss of reputation, called upon the petitioner to pay Rs. 6 lakhs. In my opinion, the only plausible view that can be taken is that as against the petitioner's claim for Rs. 11,07,418.25 in the invoice Annexure-DI, the respondent sought a set off Rs. 17,02,000 and claimed payment of the balance Rs. 6 lakhs from the petitioner.

7. Be that as it may, the controversy between the parties lies in the discharge of the petitioner's obligations in the assignment entrusted not to the satisfaction and specification of the respondent. This aspect of the matter is dealt with by the parties in their E-mails and correspondence and at paragraph 16(a) to (h) of the statement of objections, clearly indicating error in data processing which required rectification by the respondent engaging and deploying data entry personnel and software engineers as also material. The material on record clearly indicates that the respondent had executed a performance guarantee, as time was the essence

of the contract with KSQAO, and failure to perform occasioned loss of reputation to the respondent.

8. Having regard to the facts though there can be no dispute that the respondent was due to the petitioner Rs. 11,07,418.25 in terms of the invoice Annexure-DI, nevertheless the claim of the respondent to have had to rectify the mistakes committed by the petitioner occasioning expenses to complete the assignment to the satisfaction of KSQAO, it cannot but be said that the defence offered by the respondent, is in good faith and one of substance as opposed to a moonshine defence.

9. Except for the petitioner asserting that the respondent is commercially insolvent and incapable of paying its debts, there is not a trite of evidence to substantiate the fact that the respondent has abandoned the objects of its business or that the substratum of the company is gone. Therefore, it is not possible for this Court to accept the contention that the respondent-company is unable to meet its outstandings.

10. In *Divya Export Enterprises v. Production (P.) Ltd.* : ILR 1990 Kar. 1610, this Court held that the discretion exercisable under the Act is like any other judicial discretion and that a mere assertion of a debt payable is not sufficient to attract the discretion of this Court. In the facts and circumstances of this case, the petitioner has only asserted a debt payable by the respondent which is insufficient to attract the exercise of discretion under the Act.

11. The observation of the Apex Court in *Pradeshia Industrial & Investment Corporation of U.P. v. North India Petro Chemicals Ltd.* : [1994] 3 SCC 348, in the circumstances is apposite:

An order under Section 433(e) is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under the section must be a determined or a definite sum of money payable immediately or at a future date. The inability referred to in the expression 'unable to pay its dues', in Section 433(e) should be taken in the commercial sense. In that, it is unable to meet current demands. 'It is plainly and commercially insolvent - i.e., to say, that its assets are

such, and its existing liabilities are such, as to make it reasonably certain as to make the Court feel satisfied that the existing and probable assets would be insufficient to meet its existing liabilities'....(p. 348)

12. The machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company.

The petition is, accordingly, rejected.

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