Road Builder (M) Sdn Bhd Vs. Tantia Constructions Limited

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SooperKanoon Citation : sooperkanoon.com/52841

Court : Kolkata

Decided On : Jun-04-2015

Judge : Girish Chandra Gupta

Appellant : Road Builder (M) Sdn Bhd

Respondent : Tantia Constructions Limited

Judgement :

ORDER
SHEET APO NO.118 OF 2012 CP NO.366 OF 2011 IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORIGINAL SIDE ROAD BUILDER (M) SDN BHD Versus TANTIA CONSTRUCTIONS LIMITED BEFORE: The Hon'ble JUSTICE GIRISH CHANDRA GUPTA The Hon'ble JUSTICE ARINDAM SINHA Date : 4th June, 2015.

MR.UTPAL BOSE, SR.ADVOCATE, MR.MAINAK BOSE, Mr.U S.

MENON, MR.ABHIRUP CHAKRABORTY,ADVOCATES FOR APPELLANT MR.RANJAN BACHAWAT, SR.ADVOCATE, MS.IPSITA BANERJEE, MR.SUBHASISH SENGUPTA, MR.SANJAY KR.BAID, ADVOCATES FOR RESPONDENT The Court : The appeal is directed against a judgment and order dated 22nd February, 2012 by which the learned Company Court disposed of the winding up petition by relegating the petitioning creditor to a suit subject to security being furnished by the company.

To be precise, the order is as follows;- In view of my above findings, I am of the opinion that the company has been unable to disclose any bona fide defence to the claim of the petitioning creditor.

However, using my discretion as permitted by the case of M/S.Mechalee Engineers & Manufacturers versus M/S.Basic Equipment Corporation reported in AIR 1977 SC577I give an opportunity to the company to prove its defence.

I relegate the petitioning creditor to a suit to recover the claimed sum, but, upon the company furnishing security.

I direct the company to furnish within four weeks from date a bank guarantee in favour of the petitioning creditor by a nationalised bank for a sum of Rs.2,92,01,970.41 and to keep it renewed until contrary orders are passed by any court.

The petitioning creditor will file a suit claiming the sum claimed in the winding up application within four weeks of furnishing of the above security by the company.

In default of the company furnishing security, the petitioning creditor may apply to this court for admission of the winding up application.

In that event, no further prima facie case need be established by the petitioning creditor.

Only proof of default has to be established.

Aggrieved by the order, the petitioning creditor preferred an appeal contending that the winding up petition should have been admitted.

The Appellate Court did not interfere, inter alia, on the ground that: I n a case where a litigant invokes the discretionary power of the learned Judge and the learned Judge uses such power in one way the litigant cannot complain that it should have been other way round unless such exercise was so perveRs.that it would require correction by the Court of Appeal.

Right to claim winding up as statutorily provided, is a discretionary remedy.

Learned Single Judge exercised discretion in one way.

If we independently consider the controveRs.we might exercise our discretion contrary to what was observed by the learned Single Judge.

Being a Court of Appeal we are not competent to do so.

The duty of the Court of Appeal is to see whether discretion is properly and judiciously exercised by the Learned Judge.

If the result of the test is positive interference is not warranted.

We cannot substitute our independent views on the controveRs.sitting in a Court of Appeal.

It is nobodys case that the discretion was used perversely or de hors the Statute.

The petitioning creditor preferred a special leave petition challenging the Appellate Courts order, which was allowed by the Apex Court and the matter was remanded for re-hearing.

The order passed by the Apex Court is as follows as far as the same is material for our purpose: T hough the Division Bench of the High Court agreed with the learned Single Judge that the defence of the respondent lacked credibility and was not bona fide, it declined to interfere with the order of the learned Single Judge on a wholly erroneous premise that while hearing an appeal against the order of the Company Judge, the Division Bench of the High Court does not have the jurisdiction to interfere with the discretion exercised by the Company Judge even though the same may be contrary to the law laid down by this Court.

Like the learned Single Judge, the Division Bench also applied the principle laid down by this Court for exercise of power under Order XXXVIII C.P.C.and held that the interest of the appellant can adequately be protected by asking the respondent to furnish bank guarantee. In our view, the reasons recorded by the learned Single Judge and the Division Bench for dismissing the winding up petition filed by the appellant are legally unsustainable and the impugned order is liable to be set aside. The appeal has been ably argued on either side at great length by the learned senior advocates appearing for the parties.

Before we examine the submissions on law, the questions of fact which requires examination is whether the debt allegedly due by the company to the petitioning creditor is disputed bona fide.

If answer to the question is in the negative, the further question which has to be considered is whether the order directing security is sustainable.

The claim of the petitioning creditor is based on a written contract dated 15th December, 2007,wherein the petitioning creditor has been described as the seller and the company has been described as the buyer.

The recitals to the aforesaid contract disclose the following undisputed facts:- A.

The Seller is the absolute owner of the vehicles, plant and equipment more particularly described in Schedule II (Equipment).B.The Equipments are at present lying in Mizoram project sites.C.The Seller is desirous of selling the Equipment and the Buyer is desirous of purchasing the same.

The Parties are therefore entering into this Agreement to record the terms and conditions of the sale by the Seller and the purchase by the Buyer of the Equipment. The agreed consideration appearing from Clause 3 of the contract is a sum of Rs.2,75,73,614.14p which was agreed to be paid in instalments appearing in Schedule III to the contract from which it appears that the agreed consideration was payable in fifteen monthly instalments during the period between 15th December, 2007 and 15th May, 2009.

The buyer, it appears from Clause 3.3 of the contract, is also liable to pay the sales tax and to issue Form-C in accordance with the Central Sales Tax Act, 1956 which, it is not in dispute, has duly been furnished by the buyer to the seller.

It is also not in dispute that the company succeeded in making payment of the instalments due on 15th December, 2007, 15th April, 2008 and 15th May, 2008.

The instalment due on 15th June, 2008 was paid in part.

Thus an aggregate sum of Rs.48 lakhs were paid leaving thereby a balance sum of Rs.2,27,73,616.41.

Clause 5.3 of the contract provides for payment of interest @ 12% p.a.if the installments are not paid on or before the 15th day of the month in which they fell due.

Since the company failed to pay the installment when they became due, naturally demands were made.

One of which was replied to by the company requesting the petitioning creditor to give them some more time.

The company in its letter dated 29th July, 2008 addressed to the petitioning creditor stated as follows: T his has reference to your mail to Mr.I.P.

Tantia with regards to payment of installments payable to RMB during the month of June, 08 & July 08.

In this connection I am to inform you that we are facing acute cash flow crunch due to the monsoon and few other probleMs.We are unable to release payment of installments up to Oct 08.

However, we shall be paying the installments from November 08 onwards and hopefully pay all the due installments by the schedule month for payment of last installment.

We are sorry for the inconvenience but would request you to please bear with us.

You must appreciate that all your BGs against security and mobilization advance stands cleared (the last BG for Rs.25,35,5000/- is expected to be released in this week).I also take this opportunity to inform you that the issue of one tipper from RBM - PATI for which the papers has not been received, will be sorted out very shortly.

However, I request you to please advise the concerned person for papers of a few equipments from RBM, the list of which was forwarded to you.

No one has contacted me in this regards.

Regards. By the aforesaid letter the company proposed to commence further payment from November 2008.

Nothing was however paid.

By its letter dated 26th March, 2009 the company wrote to the petitioning creditor as follows: T his refers your Mail of March 25, 2009.

I have asked our Mr.A K Surana to send the aforesaid, as desired by you.

Regarding the installment payment, I regret that there is a delay as Mizoram Project is facing lot of problem and the desired billing is not achieved.

In the meantime, our Company also had some bad time and hence, the delay.

I would request you to kindly bear with us for some more time.

I am quite hopeful that we should be able to make some payment in the month of May 2009.

When the company could not pay or did not pay, a winding up notice dated 14th April, 2011, that is to say, nearly three years after the agreed time to make payment had expired, was issued.

Thereafter, the winding up petition was presented on or about 21st June, 2011.

Mr.Bachawat, learned senior advocate appearing for the company, drew our attention to the clauses of the contract dealing with the obligation of the seller.

Those obligations are in clause 4 of the contract and it would be proper to notice the clause in its entirety, which is quoted hereinbelow: 4 .

SELLERS OBLIGATIONS41The Seller shall hand over copies of the invoices for the purchase of each item of the Equipment to the Buyer, along with the no dues certificates and documents evidencing the release of any charge over each item of the Equipment procured by the Seller under finance or otherwise.

4.2 The Seller shall obtain a no objection certificate from the registering authority for the transfer of each item of the Equipment requiring registration and/or execute the necessary documents as are necessary for the transfer and registration of each item of the Equipment in the name of Buyer in the State of Mizoram.

4.3 The Seller shall hand over the entire Equipment along with spares, etc.brought to Mizoram on an as is where is basis.

4.4 The Seller shall raise an invoice to the Buyer in the name of Tantia Construction LTD.Aizawl, Mizoram for each item of the Equipment at the sale price as set out in Schedule II plus sales tax as applicable with the issuance of Form C.

4.5 The Seller shall execute the necessary documents as are necessary for the transfer of ownership and registration of the Equipment in the name of the Buyer in the state of Mizoram upon the expiry of the period referred to in paragraph 6.1(d) below for each item of the Equipment.

Upon receipt of the payment of each instalment set out in Schedule III, the Seller shall hand over the necessary documents for the transfer of the ownership and registration of all those items of Equipment as is specified in Schedule II and which at that time had not been transferred and registered in the name of the Buyer.

He contended that the seller was obliged to execute the necessary documents for transfer of the ownership and registration of the equipments in the name of the buyer, which the seller did not discharge.

He developed his submission by referring to Schedule II of the contract, which contains a table having 5 columns.

The last column indicates the date of transfer of the ownership.

He contended that the articles were claimed to have been sold to the company were not saleable on the date of contract.

According to him, there was a legal bar operating against sale of such articles and the bar was to continue till the date indicated in the last column of the Schedule II.

He contended that therefore, with respect to the items which were not saleable the petitioning creditor could not have insisted upon payment and the payment with regard to the rest of the articles has duly been made.

Therefore, it cannot be said that any amount was due by the company to the petitioning creditor.

The second submission advanced by Mr.Bachawat is that the documents including No Objection Certificate which the seller was obliged to execute in favour of the company were not promptly done.

The petitioning creditor did not discharge his obligation which will further be evident from the letter dated 29th July, 2008 quoted above.

He also drew our attention to a letter dated 7th December, 2010 addressed by the advocates of the company raising various contentions including the fact that the seller had failed to discharge his obligation.

But the petitioning creditor did not care to reply thereto nor as a matter of fact, he contended, is there any denial with regard thereto.

Therefore, he submitted that the fact that the petitioning creditor has failed to discharge his obligation is self-evident and this Court has to come to a finding that either there was no debt due when the winding up notice was issued on 14th April, 2011 or that the alleged debt was highly disputed.

Mr.Basu, learned senior advocate appearing for the petitioning creditor submitted that Mr.Bachawat has attempted to create a smoke screen to hide the reality.

He submitted that No Objection Certificates required under Clause-4, particularly, appearing from Clause 4.5 is subject to the condition that the company shall go on making payment as per the agreed schedule which is set out in Schedule-3 of the contract.

Schedule-3 contemplates fiRs.payment on 15th December, 2007.

Thereafter, there is a holiday for four months and the second instalment begins from 15th April, 2008.

It is not in dispute, he contended, that besides making payment of the first, second, third and fourth instalment in part, no further or other payment was made.

There has thus been a total failure on the part of the company to carry out its obligations.

Clause 4.5 provides, inter alia, that upon receipt of payment of each instalment set out in Schedule-III, the seller shall hand over necessary documents.

He submitted that the petitioning creditor was never lacking in bona fide nor did he, in fact, withhold issuance of No Objection Certificates in spite of the fact that the company miserably failed to discharge its obligations appearing from Schedule III.

He drew our attention to the reply of the company to the statutory notice and read out the following paragraph: A ccording to the clause 4.2 of the sale agreement your client was supposed to obtain a no objection certificate from the Registering Authority for the transfer of each item of the equipments requiring registration.

Your client has failed to hand over the No Objection Certificates of item No.1 of Plant and Equipment and item Nos.1, 2, 3 of Vehicles of the Schedule II of the said agreement.

Due to non-delivery of the said No Objection Certificate my client could not register the said vehicle with the RTO .

He submitted that the alleged omission on the part of the petitioning creditor is with respect, even according to the company, to Item No.1 of the plant and equipment, which is worth Rs.18.42 lacs approximately and Item Nos.1, 2 and 3 of the vehicles narrated in Schedule-II which together are worth for a little above a sum of Rs.64000/-.

Therefore, the alleged failure, if any, is restricted to a sum less than Rs.20 lacs.

He submitted that even this alleged failure was made good by submitting appropriate No Objection Certificates.

He, in that regard, drew our attention to Page-81 of the Paper Book to show that such No Objection Certificates in favour of the company were duly executed.

He also drew our attention to Page-84 of the Paper Book, which is a letter dated 5th July, 2008 by which necessary documents were duly made over to the company, which are in respect of the vehicles being Item Nos.1, 2 and 3 of Schedule-II of the contract.

He submitted that in respect to the Item Nos.1, 2 and 3 of Schedule-II, the petitioning creditor had performed its part of the obligation by letter dated 5th July, 2008 and with respect to Item no.1 of Schedule-II, the petitioning creditor had performed its obligation on 16th January, 2009.

He submitted that the company in its reply to the statutory notice was, in fact, referring to alleged earlier lapses which had duly been made good in the meantime.

He contended that they cannot be called lapses because they were obviously dependent upon payment which the petitioning creditor has been awaiting till date.

We have considered the rival submissions.

The transaction essentially was for sale of movables, therefore, is governed by the provisions of the Sale of Goods Act.

Section 4 of the Sale of Goods Act provides as follows:- 4 .

Sale and agreement to sell.-(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

It would appear that the important question is whether the contract between the parties amounted to a sale or an agreement to sell.

Whether the transaction is a sale outright or is an agreement to sell would depend on the question as to whether the property in the goods was transferred.

As we see the contract, we are of the opinion that the articles appearing from Schedule II to the contract were sold on the date of the contract except those which were intended to be transferred on the day indicated in the last column.

Therefore, the intention of the parties was that with regard to those items the property in the goods shall stand transferred to the company on the dates specified therein and with respect to the rest of the goods, the property in the goods stood transferred on the day of the contract which will further be evident from the definition appearing from Schedule-I of the contract which provides that effective date means the date of execution of the agreement.

From the recital to the contract already quoted above, it appears that the goods were lying at the project site.

From Clause-3 of the contract, it appears that the parties agreed to buy and sell the goods on as is where is basis.

The Company has admittedly issued the C-Form, that means, all necessary formalities of sale were complied with and the sale was complete.

Possession was already given to the company.

The company, under the contract, was liable for insurance etc.from the effective date.

For the aforesaid reasons, we are of the opinion that the goods were sold by the petitioning creditor to the company on the date of the agreement except for the items which are specifically mentioned in the last column of Schedule II indicating the date when property in those goods would be transferred to the company.

The company entered into the bargain knowing fully well that property in part of the goods would be transferred on a later date indicated therein.

Therefore, the submission that the company was not liable to make any payment with respect of the goods property in which was to be transferred on the specified day appearing in the last column of Schedule II is not correct.

The company was liable to pay according to the agreed schedule which the company failed to discharge.

The petitioning creditor was an unpaid seller on the date of the contract with respect to the goods, property in which, stood transferred on the date of the contract itself.

With respect to the goods, property in which was transferred on the specified dates, the petitioning creditor became an unpaid seller on those days.

The petitioning creditor became an unpaid seller on 29th January, 2009 when property in all the goods stood transferred to the company.

Therefore, the submission that either there was no money payable on 14th April, 2011 when the statutory notice was issued or that the alleged debt allegedly due was highly disputed, according to us, is altogether erroneous.

For the aforesaid reasons, we are also of the opinion that the company was indebted to the petitioning creditor on 14th April, 2011 in the balance sum of Rs.2,27,73,614.41p., together with interest at the agreed rate appearing from Clause 5.3 of the Contract.

The company has obviously failed to pay the said sum.

The money was due to the petitioning creditor from 15th June, 2008 itself.

The instalment payable on 15th June, 2008 was paid in part and thereafter no payment was made.

The instalments thereafter fell due on 15th July, 2008, 15th August, 2008, 15th September, 2008, 15th October, 2008, 15th November, 2008, 15th December, 2008, 15th January, 2009, 15th February, 2009, 15th March, 2009, 15th April, 2009 and 15th May, 2009.

None of which was paid.

The word insolvent defined in Section 2(8) of The Sale of Goods Act, 1930 reads as follows:a person is said to be insolvent who has ceased to pay his debts in the ordinary couRs.of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.

It would appear from the aforesaid definition of the word insolvent that the company was insolvent because it had ceased to pay its dues in the ordinary couRs.of business as they became due.

The next question to be considered is whether in the facts of the case the Learned Company Court was justified in relegating the petitioning creditor to a suit upon furnishing security.

In the case of M/S.Mechale Engineers & Manufacturers versus M/s.Basic Equipment Corporation reported in AIR 1977 SC577 Their Lordships quoted with approval from the judgment in the case of S.Kiranmoyee Dassi v.

Dr.J.Chatterjee reported in (1945) 49 Cal WN253which reads as follows: I n S.

Kiranmoyee Dassi v.Dr.J.Chatterjee, (1945) 49 Cal WN246at p.253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37,C.P.C.in the form of the following propositions (at p.253). (a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b)If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the palintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence. In the aforesaid judgment the question for consideration was when would leave to defend be granted to the defendant in a suit instituted under Order 37 of the Code of Civil Procedure.

Dealing with that question the answers were given by the judgment in the case of S.Kiranmoyee Dassi which Their Lordships quoted with approval.

Even going by that judgment the petitioning creditor would have been entitled to leave to sign the judgment if it were a suit in the facts and circumstances of the case.

Section 433(e) of the Companies Act provides that a company may be wound up if the company is unable to pay its debts.

From the conclusion drawn by us it follows that the requirement of section 433(e) has been fulfilled.

Section 434 provides for the cases when the company can be deemed to be unable to pay its debts.

But we need not go into that section.

A large number of authorities were cited before us of which the sheet anchor of Mr.Bachawat is the judgement of the Supreme Court in the case of Pradeshiya Industrial & Investment Corporation of U.P.v.

North India Petrochemicals Ltd & Anr.

reported in 1994 (3) SCC348 In the aforesaid judgement Their Lordships relied on the judgement in the case of Madhusudan Gordhandas v.

Madhu Woolen Industries PVT.Ltd reported in (1971) 3 SCC632wherein the Apex Court had opined that: W here the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt.

Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely.

The principles on which the court acts are fiRs.that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends. Therefore, going by the views expressed in the case of Madhusudan Gordhandas (supra) we can say that the petitioning creditor did make out a case for a winding up order.

Paragraph-29 of the judgement in the case of Pradeshiya Industrial & Investment Corporation of UP relied on by Mr.Bachawat reads as follows: 2 9.It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company.

In Amalgamated Commercial Traders (P) Ltd.v.A.C.K.Krishnaswami this Court quoted with approval the following passage from Buckley on the Companies Acts (13th Edn,p.451). I t is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company.

A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court.

Even in the aforesaid judgment existence of a bona fide dispute was insisted upon before turning down a winding up petition.

In Pradeshiya Industrial & Investment Corporation of UP (supra) the debt was highly disputed.

The Apex Court in paragraph 30 recorded that the defence was substantial rather than moonshine whereas before us we already have recorded our conclusion that the petitioning creditor is an unpaid seller and the company has not been able to raise any dispute with respect to any part of the claim of the petitioning creditor.

The other judgements cited by Mr.Bachawat are as follows:- 1.

(1952) 22 Company Cases 62 (Bharat Vegetable Products Ltd., In re.).2.

(1999) 96 Company Cases 723 (Smt.Vijayalakshmi v.

Hari Hara Ginning And Pressing).3.

(2003) 117 Company Cases 327 (Madhya Pradesh Iron And Steel Co.v.G.B.Springs(P)Ltd.; 4.

(2005) 7 SCC42(Mediquip Systems (P) Ltd.v.Proxima Medical System GMBH).5.

(2008) 143 Company Cases 39 (Gujarat Industrial Investment Corporation Ltd.v.Sterling Holiday Resorts (India) LTD.; 6.

2012 (5) CHN182(AI Champdany Industries Limited v.

Duncan International (I) Limited.

In the cases of Bharat Vegetable Products LTD.(supra).Smt.

Vijaya