

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Dec-02-2014

Judge : Biswanath Somadder

Appellant : Appellant

Respondent : Respondent

Judgement :

CP No.659 of 2013 IN THE HIGH COURT AT CALCUTTA ORIGINAL JURISDICTION IN THE MATTER OF: JAI BALAJ.INDUSTRIES AND SOUTHERN ROAD CARRIERS LTD.BEFORE: The Hon'ble JUSTICE BISWANATH SOMADDER Date : 2nd December, 2014.

Appearance: Mr.Ratnanko Banerji, Sr.Adv.Mr.S.Mitra, Adv..for the petitioning creditor Mr.Abhrajit Mitra, Sr.Adv.Ms.Rajshree Kajaria, Adv.Mr.S.Ghose, Adv.Ms.Sonia Sharma, Adv..for the company The Court : Having heard the learned counsel appearing on behalf of the parties, it appears that the matter now returns to this Court pursuant to the observations contained in the judgment and order dated 16th July, 2014, passed by an Honble Division Bench of this Court.

The learned counsel for the petitioning creditor submits that the company has failed to deposit the balance sum as reflected in the penultimate part of the said judgment and order with the Registrar, Original Side, by 15th September, 2014.

In default of such deposit, the Honble Appeal Court had observed that the balance sum would immediately become due and payable and the appellant (being the petitioning creditor herein) would proceed with the winding up proceeding.

Since there has been a clear case of default by the company, this Court may admit the winding up petition, to the extent as indicated by the Honble Appeal Court.

On the other hand, learned counsel appearing on behalf of the company submits that the winding up petition cannot be admitted in the absence of quantification, which is only possible at the time of final hearing.

He refers to and relies on a judgment of the Supreme Court rendered in the case of Mediquip Systems Private Limited versus Proxima Medical System GMBH, reported in AIR 2005 SC4175 and a judgment of the Punjab and Haryana High Court rendered in the case of Infrastructure Leasing and Financial Services Limited versus S.A.B. Industries, reported in (2010) 155 Comp. Case 159 (P & H). After considering the submissions advanced by the learned counsel appearing for the respective parties, it is necessary for this Court to consider what exactly the Honble Appeal Court had observed in its judgment and order dated 16th July, 2014.

The relevant portion of the said judgment and order is set out hereinbelow: The appeal thus succeeds and is allowed.

The judgment and order of the learned Single Judge is set aside.

The company admitted Rs.1.84 crores.

We permit the company to pay the same in the following manner: i) Rs.50 lacs by August 1, 2014 ii) Rs.50 lacs by September 1, 2014 iii) Balance installments.

Rs.1 crore by ten equal monthly iv) Interest at the rate of 9 per cent per annum on the said sum of Rs.1.84 crores on reducing balance be paid as and by way of thirteenth installment payable on and from October 1, 2014 and thereafter on the first day of each succeeding month.

In case of default of making payment of any of the aforesaid sum, the winding up petition would stand admitted for the said sum of Rs.1.84 crores together with interest @ 9 per cent per annum, in such case, the entire sum of Rs.1.84 crores or any part thereof together with interest thereof as aforesaid, would become due and payable and the winding up petition would stand admitted and be proceeded with accordingly.

For the balance claim the parties are relegated the suit subject to the respondent disposing the balance sum with the Registrar Original Side, by September 15, 2014.

In case the above sum is deposited, the Registrar would invest the said sum in any nationalized Bank of his choice and keep the same renewed till the disposal of the suit.

In default of deposit, the balance sum would immediately become due and payable and the appellant would proceed with the winding up proceeding.

In default of filing any suit by the appellant within six weeks from the date of communication of such deposit, the respondent would be entitled to refund of the same.

The appeal is disposed of accordingly without any order as to costs. A plain reading of the portion of the judgment and order dated 16th July, 2014, as quoted above, reveals that there are three default clauses contained therein.

We are, however, concerned with the fiRs.two.

The fiRs.is in respect of a payment of a sum of Rs.1.84 crores together with interest at the rate of 9% per annum.

It is clearly stated by the Honble Appeal Court that in default of payment of the said sum, in the manner as indicated in the said judgment and order, the winding up petition would stand admitted and proceeded with accordingly.

The second default clause is with regard to the balance claim.

It has been clearly observed by the Honble Appeal Court that in respect of the balance claim, the parties are relegated to a suit subject to the company depositing the balance sum with the Registrar, Original Side, by 15th September, 2014.

The Honble Appeal Court, however, clearly stated that in case of default of such deposit, the balance sum would immediately become due and payable and the appellant (being the petitioning creditor herein) would proceed with the winding up proceeding.

In view of the clear and unambiguous mandate given by the Honble Appeal Court, there cannot remain even an iota of doubt with regard to proceeding with the instant winding up petition in the event of default of deposit of such sum, as required to be deposited with the Registrar, Original Side, by September 15, 2014.

Now the only question which remains for consideration is whether the balance sum remains quantified or not.

The answer is clearly found in the judgment and order of the Honble Appeal Court and does not require further elucidation.

The two judgments, which have been referred to and relied upon by the learned counsel appearing on behalf of the company, are not at all applicable in the facts of the instant case.

Rather, it only reiterates the well- settled principles of law with regard to the Company Courts exercise of jurisdiction while passing orders under section 433(e) of the Companies Act.

There is no doubt that the Company Court, while passing orders in winding up proceedings, is essentially using its discretionary jurisdiction.

It is equally well-settled that there must be a debt due and the company must be unable to pay the same.

Also a debt under section 433 (e) of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date and that the inability

referred to in the expression, unable to pay its dues in section 433(e) of the Companies Act, should be taken in the commercial sense and that the machinery for winding up ought not to be allowed to be utilized merely as a means for realizing debts due from a company.

In the facts of the instant case, as observed earlier, the judgment and order of the Honble Appeal Court dated 16th July, 2014 is clear and unambiguous and requires no further elucidation.

The second default clause has now come into effect and, as such, the petitioning creditor is entitled to an order admitting the winding up petition for a sum of Rs.6.37 crores minus Rs.1.84 crores.

If the company pays off the entire amount within a period of six weeks from date, the instant petition will remain permanently stayed.

In default, the winding up petition will automatically stand revived and will be advertised once in The Statesman and once in Bartaman.

In the advertisements to be published in the said two newspaperRs.it shall be indicated therein that the matter will appear before this Court under the same heading, three weeks from the date of the advertisements.

Publication in the Official Gazette, however, will stand dispensed with.

C.P.No.659 of 2013 is, accordingly, disposed of.

Urgent photostat certified copies of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

(BISWANATH SOMADDER, J.) Bp.

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