

Joti Prasad Bala Prasad Vs. A.C.T. Developers (P.) Ltd.

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Court : Delhi

Decided On : Jul-03-1989

Reported in : [1990]68CompCas601(Delhi)

Judge : B.N. Kirpal and; C.L. Chaudhry, JJ.

Acts : [Companies Act, 1956](#) - Sections 433 and 434;

Appellant : Joti Prasad Bala Prasad

Respondent : A.C.T. Developers (P.) Ltd.

Advocate for Def. : Kirti Uppal, Adv.

Advocate for Pet/Ap. : R. Vasudevan, Adv

Judgement :

B.N. Kirpal, J.

1. This is an appeal filed against the order of the company judge who, while issuing some directions, dismissed the petition for winding up which had been filed by the appellant/petitioner.

2. Briefly stated, the facts are that by a letter dated june 16, 1982, the respondent-company placed an order on the appellant for the supply of various quantities of red polished stones of different sizes. A sum of Rs.36,000 was paid as advance by

the respondent to the appellant. The case of the appellant is that between August 12, 1982, and November 21, 1982, it sent various consignments of the aforesaid material to the respondent. Delivery of these consignments was taken and the value of the goods which were supplied came to Rs.2,14,091.20. After adjusting the advance of Rs.36,000, a sum of Rs.1,78,091.20 became due and payable. According to the appellant, the respondent is also liable to pay a further sum of Rs.14,986.40 by way of sales tax.

3. A statutory notice of demand was issued by the appellant, but no payment was made. Thereafter, a petition under section 433 of the Companies Act was filed for winding up the respondent-company on the ground that it was deemed to be unable to pay its debts. In response to the show-cause notice, a reply was filed by the respondent raising various contentions. It was, inter alia, submitted that the quality of the goods which were supplied was not of the requisite standard and there was also delay in dispatch of the goods. A further submission of the respondent was that it had suffered loss because the full quantity which had been contracted to be purchased had not been supplied by the appellant. It may here be noted that it is the admitted case of the parties that only about 50% of the goods for which the order had been placed were supplied. According to the appellant, the rest of the goods were not supplied because the respondent had intimated to the appellant that further supplies should be stopped. It appears that some of the goods which had been supplied by the appellant to the respondent were still lying with the transporters at the time when the winding up petition was filed. The respondent denied its liability to the appellant.

4. The appellant filed its rejoinder and, thereafter, the company judge ordered the evidence to be filed by affidavits. Cross-examination of the deponents was allowed. The learned single judge, vide his judgment dated September 19, 1985, after setting out the facts, referred to the submissions of the respondent. It was noted that the claim of the appellant was being disputed by the respondent on three counts, namely, the rate, the quality and the delay in the supply of the material leading to the cancellation of the contract. The learned single judge found that there was never any contract. The learned single judge found that there was never any controversy raised by the respondent with regard to the rate which was

to be charged. Similarly, he came to the conclusion that the respondent has never raised any objection with regard to the quality of the goods which were supplied. It was noted that the respondent has been taking delivery of the goods without raising any objection and in fact some of those goods were even exported from India by the respondent. The learned judge came to the conclusion that the dispute sought to be raised with regard to the quality did not appear to be bona fide or of any substance. Even with regard to the question of delay, it was noticed that, notwithstanding the appellant not conforming to the time schedule, the respondent had nevertheless taken delivery of the consignments without any demur and the last consignment was accepted even within the period of the letter of credit. The learned company judge observed that though part of the goods were not supplied by the appellant, the counter-claim of the respondent for about Rs.4 lakhs was vague, indefinite and was made on a doubtful basis. The respondent-company had also sought to rely on two letters dated November 18, 1982. The learned judge came to the conclusion, accepting the contention of the appellant, that these letters had been procured or fabricated subsequently and that the said letters were in fact never sent to the appellant by the respondent. It was also noted that non-supply of the balance material to the respondent was attributable to the respondent itself having intimated to the appellant not to dispatch the balance quantity.

5 The learned single judge had referred to the position in law and came to the conclusion that if the defense which is taken is not bona fide, then the company court would be entitled to exercise its jurisdiction under section 433 of the Companies Act. Curiously enough, having found that the defense which was sought to be raised by the respondent to the claim of the appellant was without any basis, the company judge dismissed the petition while, at the same time, inter alia, directing the respondent to deposit a sum of Rs.25,000 within a period of four weeks, which could be withdrawn by the appellant on furnishing security. It is, however, important to note that a further direction which was issued was that if the respondent company made a default in making the deposit or furnishing security for Rs.50,000 then the winding up petition would stand resorted and admitted but would be tried without citation.

6. From the judgment of the learned single judge, we do not find any reason as to why the petition should have been dismissed. The learned judge, came to the conclusion that not only was there no merit or substance in the contentions sought to be raised by the respondent but that even some of the documents on which the respondent had relied had in fact been fabricated, clearly showed the non-inclination or inability of the respondent to pay the amount which was due to the appellant. It has been contended by learned counsel for the respondent that, in addition to Rs.25,000, which were ordered to be paid, a further sum of Rs.50,000 has been paid by the respondent to the appellant. This further strengthens the ground for coming to the conclusion that the defense which was sought to be raised by the respondent to the winding up petition was not bona fide. It is not as if the respondent had paid to the appellant the undisputed amount and was not willing to pay the sum of money for which a bona fide dispute had been raised. The lack of bona fides on the part of the respondent is evident from the fact that it sought to raise a counter-claim of Rs.4 lakhs which has, rightly, been rejected by the learned single judge with the observation that there is absolutely no merit in that claim. Learned counsel for the appellant informs us that, in a suit which had been filed by the appellant for the recovery of the amount due to it, the respondent has not, in its written statement in the suit, raised any such counter-claim for Rs.4 lakhs. The absence of such claim shows that the respondent has been taking such pleas in response to the winding up petition which would enable it to try and show that there was a bona fide dispute to the claim of the appellant. The respondent has, however, been unable to show that the contentions so raised by it had any basis. We are in complete agreement with the company judge that the defense raised by the respondent had no merit but we fail to understand as to why the petition should have been dismissed. In our opinion, prima facie, the only conclusion which could be arrived at was that the respondent was unable to pay its debt and that it was necessary to admit the petition.

7. We, accordingly, allow the appeal and order that the winding up petition filed by the appellant is admitted. This leaves the question as to whether the petition should be advertised or not. The question as to whether the citation should issue will be determined by the learned company judge who will also decide the question as to whether the citation should issue will be determined by the learned company

judge who will also decide the question as to whether a provisional liquidator should be appointed at this stage. It may perhaps be helpful for the learned company judge to summon all the directors in court for recording of their statements while passing further orders. There will be no order as to costs.

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