

Dravya (P) Ltd. Vs. Concast Global Ltd., Aco No.206 of

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Court : Kolkata

Decided On : Dec-14-2016

Judge : Soumen Sen

Appellant : Dravya (P) Ltd.

Respondent : Concast Global Ltd., Aco No.206 of

Judgement :

CP No.304 of 2015 IN THE HIGH COURT AT CALCUTTA ORIGINAL JURISDICTION IN THE MATTER OF: ATC LOGISTICS PVT.LTD.AND RANJIT KUMAR SAHA BEFORE: The Honble Justice SOUMEN SEN Date : 14th December 2016.

Appearance: Mr.Utpal Bose, Senior Advocate Mr.Mainak Bose, Advocate Mr.Prantik Garai, Advocate Mr.Ranjit Kumar Basu, Advocate ...for the petitioner.

Mr.Abhrajit Mitra, Senior Advocate Mr.Samit Sanyal, Advocate ...for the Company.

The petitioner has filed this winding up petition on the ground that the company has failed and neglected to discharge its debt for a sum of Rs.2 crore payable under a loan transaction.

The petitioner has referred to a cheque dated April 16, 2014 drawn on Union Bank of India in favour of the Company for a sum of Rs.2 crore by way of a loan.

In view of alleged failure to pay the aforesaid sum, a statutory notice was issued on 26th February, 2015.

The Company replied to the statutory notice on 17th March, 2015 alleging that the Company had never taken any loan of Rs.2 crore.

The amount was paid in discharge of a legal liability.

The petitioner not being satisfied with the said explanation has filed this application.

Mr.Utpal Bose, the learned Senior Counsel appearing on behalf of the petitioner has referred to the cheque, bank statement, a notice 4th dated February, 2015 and the statutory notice and submits that indisputably the company had failed to discharge its debt.

Mr.Abhrajit Mitra, the learned Senior Counsel appearing on behalf of the Company submits that the said amount was, in fact, paid in entered part into consideration between the of an agreement petitioner and for the sale of company.

land It is submitted that the petitioner has suppressed the fact that the petitioner through his Company, M/S.I.P.Traders PVT.LTD.had acquired a plot of land measuring 2.73 acres situated in R.S.Dag No.270 and renumbered R.S.as Dag Premises No.270/306, Nos.16 Barasat and Municipality 16/1, Thakur Pukur formerly Badu (hereinafter referred to as the said land).since Road, This land was owned partly by the Vigneshwara Properties PVT.Ltd., that is, 1.685 acres of R.S.Dag No.270 and 0.265 acre in R.S.Dag No.270/306 being Municipal Holding No.16.

The rest of the land measuring 0.685 acres in R.S.Dag No.270 and 0.095 acres in R.S.Dag No.270/306 belonged to Pragma Bultech PVT.LTD.Pragma Bultech PVT.LTD.and Vigneshwara Properties PVT.LTD.herein are sister concerns having common Directors and ShareholdeRs.The deponent of the affidavit on behalf of the company is in control of both these two companies.

The agreement was Rs.1.65 crore per acre.

price that was fixed by At the time of entering into the contract, the Company and its sister concern, Pragma Bultech PVT.LTD.were under the bona fide impression that the land, in fact, measured in all 3.32 acres.

In fact, after acquiring the said land, the Company herein and Pragma Bultech PVT.LTD.had erected a boundary wall.

After erection of the boundary wall, the land was not re-measured.

The management of both the Company herein and Pragma Bultech PVT.LTD.were under the bona measured fide 3.32 impression acres that the approximately walled and, land in accordingly, consideration was determined at Rs.5.50 Crores.

aggregate the total In fact, if the area of the land is measured based on the plans annexed to the conveyance deeds it would be more than 3 acres and, in fact, around 3.30 acres.

It was agreed that before the conveyance is executed, the land would be measured by a surveyor and the final consideration, accordingly, determined.

The petitioner Ranjit Kumar Saha was not willing to declare the entire consideration as price of land in question.

The petitioner was willing to pay only a part of the land price by cheque and the balance in cash.

On the other hand, the company was not willing to accept any cash payment.

was reached, Traders cheque LTD.as as in would price of one of the pay an aggregate the land to Finally, a solution petitioners the sum of company company, one I.P.Rs.69,96,000/herein, that by is, Vigneshwara Properties PVT.LTD.and Pragma Bultech PVT.LTD.which would be proportionately reflected in the Conveyance Deeds to be executed by the company herein and Pragma Bultech PVT.LTD.in favour of I.P.Traders PVT.LTD.As to the balance amount, the petitioner agreed to pay by cheque but not as land price.

This, the said companies decided to accept partly in the name of the company herein, partly in the name of Vigneshwara Properties PVT.LTD.and partly in the name of ATC Logistics PVT.LTD.an associate concern which is also under the control and management of the present company.

This agreement was reached sometime around early April, 2014 and would be borne out from the dealings and transaction.

On the basis of measurement of the land, that is, 3.32 acres and believing it to be correct area, the petitioner paid the difference amount, that is, total price of the land on the basis of consideration the for area the of 3.32 land, acres that is, less than the apparent Rs.69,96,000/-, only by account payee cheques to the company herein, that is, Rs.1.90 Crores only to Pragma Bultech PVT.LTD.Rs.90 lakhs Pragma and Rs.2 Crores only to ATC Logistics PVT.LTD.only to These payments were made between 15th April, 2014 and 16th April, 2014, particulars whereof are given below:

Date	Amount Paid to	16.04.2014	Rs.2,00,00,000/-	ATC Logistic	
15.04.2014	Rs.1,90,00,000/-	Vigneshwara	15.04.2014	Rs.90,00,000/-	Pragma

It was agreed and understood that after final measurement, necessary adjustments in the price would be made.

The land was thereafter measured sometime around end May, 2014 by a surveyor Mr.Amin Molla and it was found on actual measurement that the land was, in fact, 2.73 acres and not 3.32 acres.

Accordingly, it was agreed that Rs.1 crore would be returned to the petitioner.

The two Conveyance Deeds were thereafter executed both on 28th May, 2014, one with the company herein and other with Pragma Bultech PVT.LTD.The market value of the land as assessed by the Registering Authority for the purpose of assessment of stamp duty, was Rs.5,34,46087/- out of which that applicable to the Vigneshwara Properties PVT.LTD.for 5 bighas 18 cottahs of land was Rs.3,68,54,472/- and that for the company for 2 bighas 7 cottahs and 3 chittacks was Rs.1,65,91,615/-.

Only after the full stamp duty was paid by the petitioner on the market value so assessed by the Registering Authority, the Conveyance Deeds were accepted for registration on 2nd June, 2014.

Thereafter, dispute arose between the parties with regard to the refund of excess amount received by the Company.

The company was willing to refund an aggregate sum of Rs.1 Crore which the petitioner was not willing to accept unless the excess stamp duty and registration charges that were paid on the Conveyance Deed and assessed market value of the land are paid to the petitioner.

This difference worked out to approximately Rs.37,62,457/-.

This was not what was agreed to at the time of the transaction.

Finally, as per agreement, the Company refunded an aggregate sum of Rs.1 crore, out of which Rs.52 lakhs was repaid by the Vigneshwara Properties PVT.LTD.on 16th July, 2014 and Rs.48 lakhs was repaid by ATC Logistics PVT.LTD.With such payment, the accounts stood settled and no money remained due or payable by any of the companies either to the petitioner or to his company, I.P.Traders PVT.LTD.Mr.Mitra has submitted that since there is no amount due and payable and the parties have agreed to settle their dispute by accepting a sum of Rs.1 Crore, the winding up petition is liable to be disputed.

It is argued that in any event having regard to the defence disclosed in the affidavit, it cannot be said that the company is defenceless.

The learned Senior counsel has relied upon the following decisions:i) Unreported judgment of Calcutta High Court in Re: R.A.V.Dravya (P) Ltd., C.P.No.86 of 2014, dated 16th October, 2015; ii) Unreported judgment of Calcutta High Court in R.A.V.Dravya (P) LTD.versus Concast Global Ltd., ACO No.206 of 2015, APOT No.547 of 2015, CP NO.89 of 2014 dated 14th March, 2016; iii) In the Goods of: Kamal Kumar Mitra and In the Matter of: Taxation Services Syndicate LTD.reported at 2008 (3) CHN384 iv) Niranjana Lal Todi & Anr.

versus Nandlal Todi & ORS.reported at 2011 (1) CHN (Cal) 762; v) V.N.Devadoss versus Chief Revenue Control Officer-cum- Inspector & ORS.reported at (2009) 7 SCC438 In reply, Mr.Mainak Bose led by Mr.Utpal Bose, learned Senior Counsel submits that the story as spun in the affidavit is completely unbelievable.

It would be clear from the recital of the Conveyance Deeds that the parties all throughout knew that the exact area to be sold under the agreements was 2.73 acres and the plea that is now being raised that the parties on mistaken belief about the actual area of the land had agreed to the consideration over Rs.5 Crores and thereafter on ascertainment of covered area had agreed to refund Rs.1 Crore is a cooked up story and an ingenuous musk invented to defeat a legitimate claim of the petitioner.

In this regard reference is placed on the judgment of the Honble Supreme Court in IBA Health (India) PVT.LTD.versus Info Drive Systems SDN.

BHD reported at 2010(10) SCC553 In order to admit a petition for winding up, the Court has to be satisfied that there is a neglect to pay a debt.

The refusal to pay a sum of money on legitimate grounds cannot constitute a neglect to pay a debt.

The Court has to be satisfied that the Company is required to discharge a debt and has without any just cause refused to pay the said amount.

The considerations that weigh the Court in deciding an application for winding up on the ground of failure and/or neglect to pay a debt is akin to the same principle that the Court applies while considering an application under Order 37 of the Code of Civil Procedure or Chapter XIII A of the Original Side Rules.

affidavit evidence.

The winding up petitions are decided on The Court needs to find that if there is a plausible explanation offered by the Company for not paying the amount which creditor.

is being claimed as a debt by the petitioning The Court is also required to keep in mind that an order admitting the winding up is likely to visit the company with severe civil consequences.

The Court before admitting the winding up is required to arrive at a conclusion that the claim of the petitioning creditor was indisputable.

The standard of proof required by petitioning creditor to prove his case in the winding up application is of the same degree and standard that is required to prove in a plaintiffs case in a summary suit.

the Calcutta The tests to be applied are laid down initially by High Court in Smt.

Kiranmoyee Dasi versus Dr.J.Chatterjee reported at (1945) 49 CWN246which are:8.(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 entitled him to defend that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows 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 plaintiff 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 illusory the or ordinarily defendant sham the or has no defence practically plaintiff is or moonshine entitled to the defence then leave is although 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. The said judgment was followed by the Honble Supreme Court in M/S.Mechalec Engineers & Manufacturers v.

M/S.Basic Equipment Corporation reported at AIR 1977 SC577 In Madhusudan Gordhandas & Co.versus Madhu Woollen Industries (P) LTD.reported at AIR 1971 SC2600 the Supreme Court held that if the Company raises a defence in good faith or a defence which is likely to succeed or prima facie likely to succeed at the trial, in that event the winding up application would fail.

Sir George Jessel Master of the Rolls in London and Paris Bank Corporation reported at 19 Equity Cases 444 said that the Company should have reasonable ground for not paying the debt of the petitioning creditor, to avoid liquidation proceedings.

The company must be in a completely defenceless position.

would suffice if the company raised a triable issue, It for relegation of the winding up application to a civil forum.

In the instant case, the company has set up a defence of a sale transaction.

The company has disclosed the balance sheet wherefrom it appears that a sum of Rs.2,96,24,205/- was shown in the Column No.11 of Notes of Financial Statement for the year ended 31st March, 2015 as profit from sale of land.

statement of account appears to have been The said certified independent auditor after going through the accounts.

by the However, it is clear from the independent auditors report that the company did not disclose the pending litigations and, accordingly, in the said report, the

auditor observed as follows: The company does not have any pending litigation which would impact its financial position.

The candid loan and apparently honest independent auditor.

was disclosure treated made as profit by the in absence company to of the In a fairly recent decision, the Honble Supreme Court in IBA Health (India) PVT.LTD.versus Info-Drive System SDN.

BHD.

reported at (2010) 10 SCC553 has elaborated on the issue and indicated the guideline that the Court is required to follow in admitting the winding up petition.

The observations are:- 20.

The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability?.

In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt?.

A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived.

The Company Court, at that stage, is not expected to hold a full trial of the matter.

It must decide whether the grounds appear to be substantial.

The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle.

It is settled law that if the creditors debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor fiRs.to establish his claim in an action, lest there is danger of abuse of winding up procedure.

The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt.

23. The principles laid down in the above mentioned cases indicate that if the debt is bona fide disputed, there cannot be neglect to pay within the meaning of Section 433(1)(a) of the Companies Act, 1956.

If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and nonpayment of the amount of such a bona fide disputed debt cannot be termed as neglect to pay so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

31. Where the petitioner company cannot be regarded as having a bona fide dispute, creditor winding up.

the of Bona fide dispute implies the existence of a substantial ground for the dispute raised.

Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition.

The Company Court is expected to go into the causes of refusal by the company to pay before coming to that conclusion.

The Company Court is expected to ascertain that the company's refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil court.

34. A creditor's winding up petition, in certain situations, implies insolvency or financial position with other credit ORS. banking institutions, customers and so on.

Publication in the Newspaper of the filing of winding up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications.

Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed.

The Company Court, at times, has not only to look into the interest of the creditors but also the interests of public at large.

35. We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused.

A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the substantially should be company disputed.

guarded from to A pay a Company such debt Court, vexatious which is therefore, abuse of the process and cannot function as a Debt Collecting Agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere. The explanation offered by the company of a sale transaction and that the parties proceeded on a misconception that the area is larger than 2.73 acres and, accordingly, an excess amount was paid by the petitioning creditor which subsequently on ascertainment of the actual area was refunded without refund of the excess stamp duty and registration cost paid is difficult to accept.

The survey alleged to have been conducted on 28th May, 2004 without notice to the petitioner.

The Company has attempted to justify the receipt of Rs.2 crore as consideration for the sale of land on the basis of stamp duties assessed by the collector at Rs.1,65,91,615/- and Rs.3,68,58,472/- on 2nd June, 2014 in respect of conveyances executed in favour of two other companies, namely Vigneshwara Properties Private Limited and Pragma Buildtech Private Limited.

There is no document to show that the petitioner had agreed to pay a sum over and in excess of the amounts mentioned in the said conveyance deeds as

consideration of the sale and on that assumption a cheque of Rs. company 2 crore has covering failed to the balance disclose any amount document was to issued.

show that The the present petitioner is in any way connected with the transactions which the company alleged to have with Vigneshwara and Pragma.

Even if it is accepted that a sum of 48 lakh was paid towards refund of excess amount received, even then a sum of Rs.1.52 crore would be payable by the company to the petitioning creditor.

In the reply adjustment alleged.

of to the sale winding up consideration notice, with the no such other defence companies of was The company has not been able to establish even prima facie that this particular transaction is any way related to the sale transactions.

However, following the principle that the Court can direct security instead of directing the company to pay the amount and allow the company to establish its defence even if it is extremely weak, the company is directed to furnish cash security for a sum of Rs.1.52 crore with the Registrar, Original Side, High Court at Calcutta within a period of six weeks from date with intimation to the petitioner.

winding up In the event of furnishing cash security, the petition shall remain permanently stayed and the petitioning creditor would be required to file a suit for recovery of the amount claimed in this proceeding.

instituted within a period of four If the suit is not weeks after notice of furnishing security, the Company shall be entitled to claim refund of the said sum and the Registrar, Original Side, High Court shall return the said amount without any further order.

The Registrar, Original Side, High Court shall deposit the said amount with the United Bank of India, High Court Branch in a suitable fixed deposit account yielding highest return and keep the said account renewed till the disposal of the suit.

In default of furnishing cash security within the aforesaid period, the petition will be advertised once in The Statesman and once in Aajkaal.

The advertisements should indicate that the matter will appear before the Court on the first available working day after the publications being made.

expiry of four weeks from the date of Publication in the official gazette will stand dispensed with.

However, there shall be no order as to costs.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

(Soumen Sen, J.

) S.

Kumar

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