In Re: Universal Consortium of Engineers P. Ltd.

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Court : Kolkata

Decided On : Feb-27-1980

Reported in : [1983]54CompCas36(Cal)

Judge : Salil K. Roy Chowdhury, J.

Acts : Companies (Court) Rules, 1959 - Rule 28

Appeal No. : Company Petition No. 506 OF 1979

Appellant : In Re: Universal Consortium of Engineers P. Ltd.

Advocate for Pet/Ap. : S.B. Mukherjee and ;S. Pal, Advs.;Ajit Sinha, Adv. led by P.C. Sen, Adv.

Judgement :

Salil K. Roy Chowdhury, J.

1. This is a winding-up petition which was presented on the 11th of September, 1979, and on the returnable date notice was directed to be served on the company along with a copy of the petition. The company appeared and took leave to file an affidavit-in-opposition to show cause why the winding-up petition should not be admitted and the petitioning-creditor also took leave to file an affidavit-in-reply.

2. Thereafter, the matter was heard on the 3rd of December, 1979, and after hearing the parties it appeared to me that this was a matter which can be adjusted

mutually and with that end in view to which the respective counsel for the parties agreed, the matter was adjourned from time to time till I was informed that it could not be settled amicably between the parties. Therefore, the matter was heard at length.

3. Mr. S.B. Mukherjee, appearing with Mr. S. Pal, for the petitioning-creditor, submitted that the petitioning-creditor, who is a contractor, was appointed by the company which is also a company carrying on the business of constructing multi-storeyed buildings at various parts of Calcutta. The petition was placed before me and it appears that there is no dispute as to the fact that the petitioning-creditor firm which is a registered partnership firm has carried out painting and white-washing works in the various construction projects of the respondent-company and submitted their running bills and ultimately a final bill for payment. In fact, the petitioning-creditor has received on account lump sum payments from time to time. By a letter dated the 1st of September, 1978, the petitioning-creditor-firm wrote to the company to confirm the amount due as on 30th of June, 1978, which account was checked by the company and a sum of Rs. 60,614.77 was confirmed to be the sum due up to 30th of June, 1978, by the company to the petitioning-creditor. It also appears that subsequently various other works were done and bills were submitted and the company also made on account payments by lump sum amounts as would appear from annex. A at pages 23-25 of the winding-up petition. The contractor firm claims a sum of Rs. 1,38,011.32 by the statutory notice dated the 12th of July, 1979, and the company has failed and neglected to pay the said amount. Mr. Mukherjee also produced the measurement sheets in respect of No. 18/3, Gariahat Road, Calcutta, which appears to have been checked and signed by the company's representative. Mr. Mukherjee also placed before me the correspondence between the parties and submitted that the disputes, sought to be raised as to the rates, measurement and amounts paid are not bona fide and having regard to the clear admission and checking of the measurement sheets by the representative of the company it must be held that the winding-up petition is not an abuse of the process of the court and the disputes raised by the company to the debt due to the petitioning-creditor are not bona fide and there is no substance or merit in the said defence either in law or in fact. Therefore, the winding-up petition should be admitted.

4. Mr. Ajit Sinha (led by Mr. P.C. Sen), appearing for the company, submitted that this is a matter where the winding-up proceeding is not the proper remedy. He strongly relied on the principles laid down in Ofu Lynx Ltd, v. Simon Carves India Ltd. [1971] 41 Comp Cas 174 (Cal) at page 185 and Bengal Flying Club [1967] 71 Cal WN 38 and submitted that in the very nature of the contract, which is a building contract, there are built-in disputes as in fact the rates were never agreed and the bills wereinflated and various fictitious items have been included as would appear from the affidavit-in-opposition filed on behalf of the company by one Mr. Nirmal Mitra affirmed on the 26th of October, 1979, and from the admitted correspondence between the parties.

5. After carefully going into the matter and the admitted correspondence between the parties and having regard to the nature of the transaction between the parties, I am of the view that so far as the petitioning-creditor's claim up to 30th June, 1978, to the extent of about Rs. 60,000 odd as hereinbefore stated is admitted, after checking, but in respect of the subsequent works various disputes have been raised both as to measurement and rates and the payments. In fact, the company is alleging over-payment. Therefore, it will not be proper to make any order for payment but taking an overall view of the matter in a practical manner, I cannot hold that this is a matter which can be said to be an absolute abuse of the process of the court. But at the same time an order for payment cannot be made at this stage. Therefore, I am making the following order following the well-known principles to be applied in a winding-up application. As I have already observed, I cannot hold that this is an abuse of the process of the court but actual quantification is a question of accounts between the parties and adjustment for which I adjourned the matter to enable the parties to act in a commercial manner and maintain the good relation between the parties which existed before, but I failed ultimately. Therefore, the proper order under this situation is as follows:

The winding-up petition is admitted. The company is directed to furnish security to the extent of Rs. 60,000 to the satisfaction of the Registrar, Original Side, by the 31st of March, 1980. On such security being furnished the petitioning-creditor would be relegated to a suit which should be filed by 30th of April, 1980. If such security is furnished and the proposed suit is filed by the petitioning creditor within the time as aforesaid the said security will stand to the credit of the said proposed suit to be filed by the petitioning-creditor and earmarked for satisfaction of any decree which may be passed in the said suit and in that event the costs of this application would be costs in the said suit. But in default of furnishing such security by the company within the time as aforesaid the stay hereby granted would stand vacated and the winding-up petition would be advertised once in Statesman, once in Basumati and once in Calcutta Gazette and the matter will appear in the list on the 12th of May, 1980. In case the proposed suit is not filed by the petitioning-creditor but the security is furnished by the company within the time as aforesaid, in that event the present application will stand dismissed with costs and the security will stand discharged. On those terms the winding-up petition wouldremain permanently stayed and compliance with Rule 28 of the Companies (Court) Rules, 1959, would be dispensed with.

6. This Registrar, Original Side, and all parties to act on a signed copy of the minute on the usual undertaking to complete and file this order.