SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

A.D.S. Builders Guild Vs. Golden Tourist Resorts and Developer Ltd. and ors.

A.D.S. Builders Guild Vs. Golden Tourist Resorts and Developer Ltd. and ors.

SooperKanoon Citation : sooperkanoon.com/889785

Court : Himachal Pradesh

Decided On : Oct-06-2000

Reported in : [2003]115CompCas171(HP),[2004]50SCL314(HP)

Judge : R.L. Khurana, J.

Acts : Companies Act, 1956 - Sections 433 and 434

Appeal No. : Company Petition No. 1 of 1999

Appellant : A.D.S. Builders Guild

Respondent : Golden Tourist Resorts and Developer Ltd. and ors.

Advocate for Def. : L.M. Suri,; Deepak Suri and; K.D. Sood, Advs.

Advocate for Pet/Ap. : Kirti Uppal and; B. Umakant, Advs.

Disposition : Petition rejected

Judgement :

R.L. Khurana, J.

1. The present petition has been filed by A. D. S. Builders Guild, a sole proprietorship concern, hereinafter referred to as the petitioner, under Sections

433, 434 and 439 of the Companies Act, 1956 (for short 'the Act') for the winding up of the respondent-company Golden Tourist Resorts and Developer Ltd., having its registered office at Shimla.

2. Briefly stated, the averments made in the petition are these. The respondent/company intended to set up a residential school at Lalru (Punjab) on Chandigarh, Ambala Highway and for which purpose it had invited tenders. The petitioner also submitted its tender on September 15, 1996. The tenders received from various quarters were opened and after negotiations the tender of the petitioner was accepted. A formal agreement came to be executed between the parties on October 31, 1996. The estimated cost of construction was Rs. 2,32,54,375. The work was started by the petitioner. Subsequently, the respondent-company intended to make certain additions to the abovesaid work (project). In order to give separate identity, the work already awarded to the petitioner was termed as first phase and the additions thereto were termed as second phase. The petitioner submitted additional tender in respect of second phase quoting the rates 55 per cent. higher than the one quoted for the first phase. The work of second phase, which was a non-scheduled work, was not covered by the rates in respect of the work of the first phase. The rates for such non-scheduled work were to be agreed upon and accepted by the parties. In view of the inclusion of the work of second phase, the original period of 18 months fixed for the completion of the work, was raised to 24 months.

3. While the work of first phase was started by the petitioner in November, 1996, the work of the second phase was started in May/June, 1997. During the execution of the works, the petitioner pointed out to the respondent-company that :

(a) the rates quoted in the tender in respect of first phase required to be revised due to increase in the price of the materials and labour wages by virtue of the statutory notifications issued by the Government of Punjab and various other factors ; and

(b) the running bills being prepared for the work of second phase according to the rates quoted for the work of first phase were not correct.

4. It was agreed by the respondent-company that the matter relating to difference of rates in respect of the two works shall be settled by the chairman-cum-managing director of the respondent-company. The petitioner accepted such position and on this understanding continued with the works. Running bills were being prepared and payments on account were being made in respect of the work of first phase. A sum of Rs. 2,37,73,674.35 was paid to the petitioner against 22 running bills towards construction work, electrical fittings and public health in respect of the work of first phase.

5. In so far as the work of second phase is concerned, though the same was being carried out by the petitioner to the satisfaction of the respondent-company, no work order was issued by the respondent-company. The petitioner has been repeatedly approaching the respondent-company for issuance of such work order so that the matter relating to the rates in respect of the work of second phase is settled once for all. However, the respondent-company failed to settle the rates and issue the work order. Since the work was being executed, till July, 1998, about 87 per cent. of the work was completed. Further progress was retarded on account of non-payment of running bills by the respondent-company. The petitioner on November 30, 1998, sent a final bill to the respondent-company stating therein that till the payment was released, it would not be possible to complete the work finally. A sum of Rs. 1,93,03,350 was claimed by the petitioner in such final bill.

6. In the meeting held on December 10, 1998, between the petitioner and the chairman-cum-managing director of the respondent-company all the pending issues between the parties came to be discussed and vide minutes of the said date, the chairman-cum-managing director of the respondent-company admitted the outstanding amount of Rs. 1,48,00,000 as payable to the petitioner by the respondent-company. However, later on, it was revealed that mobilisation advance had been deducted twice. Thus, the total outstanding amount is to the tune of Rs. 1,53,00,000. This amount did not include the element of interest claimed by the petitioner. The chairman-cum-managing director of the respondent-company had assured that the matter pertaining to interest would be settled by way of lump sum payment to the petitioner and that nothing in this regard was required to be reduced in writing. Thus, the payment of interest and the claim in respect thereof

was left to the discretion of the chairman-cum-managing director of the respondent-company. The petitioner has claimed lump sum interest of Rs. 20,00,000 on the outstanding amount of Rs. 1,53,00,000. In pursuance of the settlement arrived at on December 10, 1998, a sum of Rs. 5,00,000 was paid to the petitioner by the respondent-company vide cheque dated December 28, 1998. The balance amount was agreed to be paid on or before January 10, 1999. However, no amount was paid by the respondent-company. Left with no other alternative, the petitioner served a notice upon the respondent-company under Section 434 of the Act calling upon it to pay the amount due within 21 days. Despite such notice, the respondent-company failed to pay the amount and to discharge its liability.

7. The petitioner has thus claimed the winding up of the respondent-company on the following grounds :

'(i) That the respondent-company is unable to pay the admitted and due debt amounting to Rs. 153.00 lakhs and also the interest payable in lump sum amounting to Rs. 20.00 lakhs. Thus it shall be appropriate to wind up the respondent-company, i. e., GTR under Section 433(e) of the Companies Act,1956, being unable to pay the admitted and due debt despite the statutory notice having been served under Section 434 of the Companies Act, 1956, and the respondent-company has failed and neglected to pay the same ;

(ii) That since the respondent-company is unable to meet with its statutory liabilities and there are multifarious litigation pending against the respondent-company and also against its holding company and the management is in the process of fleeing India being unable to face prosecution initiated against the said company including the respondent-company, it is obvious that the respondent-company has not been able to achieve the objects for which it had been incorporated as contemplated and provided under the memorandum and articles of association of the company, as such, the respondent-company has lost the substratum. Thus, it shall be just and equitable to wind up the respondent-company under the supervision of this court under the provisions of the Companies Act, 1956.'

8. The petition is being resisted and contested by the respondents, inter alia, on the following grounds :

(a) Shri Rakesh Kant Syal, respondent No. 2 is not the managing director of the respondent-company ;

(b) No liability was admitted by the respondent-company either on December 10, 1998, or at any other time ;

(c) Work to the extent of only 25 per cent. has been carried out by the petitioner and he has abandoned the work since August, 1998.

9. While denying its liability, it was pleaded that the respondent-company has a sound position, earning profits and paying dividends to its shareholders and that it is in a position to discharge all its financial obligations. It was further pleaded that the petitioner is trying to hoodwink the court by referring to extraneous matters.

10. I have heard the learned counsel for the parties and have also gone through the record of the case.

11. It is well settled that a winding up petition cannot be stressed to seek enforcement for the realisation of debt where there exists a bona fide dispute. The company court is required to judge whether the defence put up by the company is bona fide and is in good faith. It has further to be seen that the defence raised is one of substance and the same prima facie is likely to succeed.

12. The apex court in Harinagar Sugar Mills Co. Ltd. v. M. W. Pradhan [1966] 36 Comp Cas 426, 430 (SC), has held :

'A winding-up petition is a perfectly proper remedy for enforcing payment of a just debt. It is a mode of execution which the court gives to a creditor against a company unable to pay its debts.'

13. It was further observed in the following terms, at page 430 of the report :

'It is true that a winding-up order is not a normal alternative in the caseof a company to the ordinary procedure for the realisation of the debts due toit ; but

none the less it is a form of equitable execution. Propriety does not affect the power but only its exercise.'

14. In Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. [1972] 42 Comp Cas 125 ; AIR 1971 SC 2600, it was held by the apex court (page 131) :

'The principles on which the court acts are first 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.'

15. Again in Amalgamated Commercial Traders (P.) Ltd. v. A. C. K. Krishnaswami [1965] 35 Comp Cas 456, it has been held by the apex court that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition filed ostensibly for 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.

16. The High Court of Karnataka in T. Srinivasa v. Flemming (India) Apotheke Pvt. Ltd. [1990] 68 Comp Cas 506, has held that it is not for the court hearing a petition for winding up under Section 433 of the Companies Act, 1956, to assess evidence and refuse a decree or to draw up a decree in favour of the petitioner and then to proceed to wind up the company. In the summary procedure which the company court must follow, if the court is satisfied, prima facie, that the defence raised in the circumstances of the case is bona fide and is likely to succeed in a civil court, that would constitute sufficient reasons for the court to reject the petition, relegating the parties to the civil court.

17. According to learned counsel for the petitioner, the respondent-company has not been able to raise a bona fide dispute in the present case since the liability stands admitted in the meeting held on December 10, 1998, vide minutes as at annexure P 15 to the petition.

18. Learned counsel for the respondent-company, on the other hand, has contended that the alleged minutes dated December 10, 1998, are not admission of liability on the part of the respondent-company. It at the most records as to what was discussed between the parties at the meeting. In this regard learned counsel pointed out the heading of the minutes, which reads :

'Final figures presented and discussed on December 10, 1998, with C M. D.'

19. Alternatively, it was contended that respondent No. 2 Shri Rakesh Kant Syal, a signatory of the minutes on behalf of the respondent-company was neither the chairman-cum-managing director nor competent and authorised to accept the liability for and on behalf of the respondent-company. In support of his contention learned counsel has drawn the attention of this court to the annual reports for the years 1995-96 and 1996-97 of the respondent-company (annexures R1 and R2 respectively to the reply by respondent No. 1) wherein Smt. Pamila Syal, respondent No. 3, has been described as the Managing Director of the respondent-company. Even the petitioner himself in his petition has described respondent No. 3. Smt. Pamila Syal as the managing director of the respondent-company.

20. It is the admitted case of the petitioner himself that the matter relating to difference of the rates relating to first phase and second phase would be settled by the chairman-cum-managing director of the respondent-company. Clause 15 of the agreement dated October 31, 1996, admittedly entered into between the parties, also records ;

'That there is no provision for any arbitration in this agreement and in the case of any dispute arising out of this work, the decision of the vice-chairman (projects)/chairman-cum-managing director will be final, conclusive and binding on both the parties.'

21. In view of the above admitted positions, the questions involved in thepresent case whether the minutes dated December 10, 1998, amount to anadmission of liability by the respondent-company and whether respondentNo. 2 Shri Rakesh Kant Syal at the relevant time was the chairman-cum-managing director of the

respondent-company, have necessarily to be inquired into.Both these questions being disputed questions have to be answered withreference to the evidence to be led by the parties. The respondent-company,therefore, has been able to make out a bona fide dispute which requires determination by a civil court. The defence raised is one of substance and the sameprima facie is likely to succeed.:

A contention was raised by learned counsel for the petitioner that in view of the admitted payment of Rs. 5,00,000 by way of cheque on December 28, 1998, it can be safely held to be proof of liability and payable debt. In support of the contention, learned counsel placed reliance on a decision of the Madhya Pradesh High Court in S. R. P, Water Proofing Contractors (P.) Ltd. v. Osnar Chemicals (P.) Ltd. [1995] 5 Comp LJ 446.

22. The above ratio does not apply to the facts of the present case. The payment of Rs. 5,00,000 is alleged to have been made on account. Even if it be assumed that some amount is payable by the respondent-company to the petitioner, the exact liability (debt) in view of the facts involved in the present case is still to be determined. Therefore, it would not be justified in issuing the direction for the winding up of the respondent-company.

23. The High Court of Punjab and Haryana in Lakshmiji Sugar Mills Co. (Pvt.) Ltd. v. National Industrial Corporation Ltd. [1966] 36 Comp Cas 31, has held that if there is a bona fide dispute about the quantum of debt, the refusal to pay such a debt would not raise a presumption of inability to pay the debt under Section 434(1)(a) of the Act.

24. This court, exercising jurisdiction under Section 433 of the Act, is not a court which is essentially meant for settling money disputes between the parties. The jurisdiction of this court is to subserve the object of winding up the companies which have not paid their debts or which are unable to pay their debts. Therefore, the first prerequisite that prima facie there exists a debt against the respondent-company, must be established. However, when a claim or debt is disputed, the proper forum for that is a civil court.

25. Resultantly, the present petition is rejected reserving liberty to the petitioner to approach the civil court for such relief as may be available to him under the law with regard to the disputed debt.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com