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Court : Kolkata

Decided On : Aug-13-2012

Judge : Ashim Kumar Banerjee &Amp; Shukla Kabir Sinha

Appeal No. : A.P.O. No. 289 & 299 of 2012 & C.P. No. 297 of 2009

Appellant : Hindusthan Copper Ltd

Respondent : M/S. Integral Construction Company India Others

Judgement :

Ashim Kumar Banerjee, J.

Hindustan Copper Limited, the appellant above named, is a wholly owned Government Company, principally, working in the field of excavation of copper and copper ore and deal with metals including copper, lead, zinc etc. They entered into an agreement with the respondent for excavation of copper ore in the State of Madhya Pradesh. The respondent executed the work and, from time to time, submitted running bills, those were paid. The final bill that was raised, is appearing at page 17 of the paper book. We find from the billing summary, a sum of rupees twenty three crores thirty two lacs fifty six thousand seven hundred sixteen was billed for the cumulative value of work done by the respondent. After taking into account the running bills, a sum of rupees six crores twenty two lacs became due and payable which would come to six crores ninety eight lacs after adding the Service Tax and giving credit to the sums paid on that account, a sum of rupees

one crore forty nine lacs became due and payable. Ultimately, the net amount as passed for payment was rupees one crore thirty three lacs ninety four thousand four hundred and ninety two for which respondent filed a winding up petition as against the appellant being C.P. No.297 of 2009. The facts would depict, initially, the respondent approached the High Court of Madhya Pradesh by filing a Writ Petition, inter alia, claiming for the said sum. The learned Single Judge dismissed the Writ Petition by observing, “for issuing a mandamus, crystallization of a legal right would be the basis. The document relied upon by the petitioner is full of incursions and interpolations which are apparently not been certified by any authority.” The learned Judge referred to the document at page 17. A Writ appeal was filed. The Division Bench observed, “without entering into the merits of the case, we are only inclined to grant liberty to the appellant to submit a representation to the Chairman-Cum-Managing Director of the respondent Company to deal with the facet of payment and if the same is admitted, the authority shall act accordingly. In any case, the representation shall be dealt with as per law and be disposed of within a period of two months from the date of receipt of the same.” A Review Petition was filed that was dismissed after condoning the delay. The respondent made a representation as we find from page 22-24. They contended to have excavated thirteen crores fifty eight lacs cubic meter. They also claimed to have certified removal of thirteen crores forty eight lacs cubic meter as per the joint measurement. Final bill was settled at rupees one crore thirty three lacs that was passed for payment. In such view, they prayed for payment within twenty one days with a caution that they would be moving the learned Company Judge having appropriate jurisdiction for winding up of the appellant company. The company did not reply to the notice of demand. Company filed an Affidavit-in-Opposition that would indicate no plausible reason to resist the order of winding up as pointed out by the learned Single Judge. The learned Judge found that the company only disputed the payability of the claim. His Lordship admitted the winding up petition and directed advertisement to be published. The appellant filed an appeal. The learned Judge dismissed the appeal finding it a defective one with liberty to file appeal afresh. Accordingly, a second appeal was filed as against the order of admission. However, the respondent, in the meantime, proceeded to advertise the notice that appeared before the learned

Single Judge again. The company could not file affidavit at the post admission stage. The learned Judge did not have any other option but to pass an order of winding up that would give rise to the other appeal being A.P.O. No.299 of 2012. The learned Judge recorded, “a casual prayer is made on behalf of the company for extension of time to file its Affidavit-in-Opposition at the post advertisement stage. It is almost taken for granted that since the company is a Government Company any prayer made for extension of time of any length would be taken as a command by Court and slavishly followed. These Government Organizations and their officers must be disabused of such impression as of yesterday.” His Lordship declined to extend the time and passed an order of winding up. Pertinent to note, despite advertisement, being published, no one has come up before the learned Single Judge either to support or oppose the winding up proceeding.

We admitted both the appeals and issued expeditious direction for hearing of the appeal. As and by way of interim measure we asked the appellant company to secure the claim by furnishing a bank guarantee for rupees one crore thirty four lacs. The company duly furnished such guarantee in favour of the Registrar, Original Side. We stayed the order of winding up. The appeals were heard on the above mentioned date.

Mr. Tilak Bose, learned senior counsel appearing for the appellant contended that the company was quite a solvent company as would appear from its balance sheet. It had a carry forward positive balance of rupees four hundred ninety crores. It had fifty one hundred manpower working in various establishments of the company being engaged in the field of copper. The learned Judge should have granted at least one extension to file affidavit to place it on record the worth of the company, particularly when none other than the respondent came to support the prayer for winding up. Mr. Bose relied on the decision in the case of M/s. Mechalec Engineers and Manufacturers -VS- M/s. Basic Equipment Corporation reported in All India Reporter 1977 Supreme Court Page-577. He would rely upon Clause-(c) and Clause-(e)of paragraph 8 to support his contention. The said two Clauses being relevant herein are quoted below :-

c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, it was 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 plaintiff's 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.

e) If the defendant has no defence or the defence is illusory or sham practically moonshine then although ordinarily the plaintiff is entitled to leave 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."

He also informed us, on the self-same issue, an arbitration proceeding was going on. He referred to the minutes of the arbitration proceedings appearing at pages 72-77 of the paper book that would show that on the identical issue, the Chairman-cum- Managing Director appointed Arbitrator to adjudicate the disputes between the parties and the arbitration proceeding was going on. He informed us that the next date of arbitration was fixed on in August 2012 that too, at the instance of the learned counsel appearing for the respondent.

He prayed for setting aside of the order of admission so merged in the order of winding up coupled with a prayer for permanent stay of the winding up proceeding.

Opposing the appeal, Mr. Supriyo Bose, learned counsel appearing for the respondent contended that the respondent excavated copper ore for which bills were submitted and the final bill was passed for payment for the admitted sum of rupees one crore thirty four lacs. Apart from the said sum, the respondent had a claim that was disputed by the company pending adjudication in arbitration. Mr. Bose contended that the amount covered in the winding up petition was not the subject matter of arbitration. Hence, the company was bound to make payment of the amount so passed for payment. He prayed for appropriate order for

encashment of the bank guarantee in protanto satisfaction of his claim.

The conduct of the appellant company was deplorable. They took it for granted that the Court would show lenience to the appellant because of their governmental status. The appellant did not take the proceeding seriously. The aspect of arbitration was never highlighted before His Lordship at least, we do not find any such eventuality. When the petition was admitted the company should have been vigilant enough to prefer appeal. Earlier defective appeal was dismissed with liberty to prefer the appeal afresh that was done at a belated stage. The appellant did not file affidavit at the post admission stage.

However, the learned Judge put them on terms and should have granted opportunity to file affidavit particularly when none approached His Lordship supporting the prayer for winding up. As observed by us hereinbefore, the company having rupees four hundred ninety crores profit for the financial year 2010-11 and manpower of fifty one hundred, could not have been wound up that too, at the instance of an unsecured creditor whose claim is yet to be adjudicated upon in a pending arbitration proceeding.

Mr. Supriyo Bose, learned counsel strenuously contended, the arbitration would relate to additional claims. We do not find any definite assertion on that score. From the photostat copies of the documents related to arbitration as submitted before us we would find that the claim in the arbitration would relate to excavation and removal of copper ore under the self-same agreement against which the petitioning creditor claimed rupees one crore thirty four lacs. From the reply submitted by the appellant we find that the respondent contended before the arbitrator that the final bill was passed for rupees one crore thirty four lacs that was withheld in absence of sanction from the Board of Directors. The core issue in the arbitration, as we find from the reply, is as to whether the appellant company would be obliged to pay for the additional excavation done by the respondent. The respondent claimed that the company took benefit of such work hence, they were obliged to make payment for the additional quantity in accordance with the provisions of Section 73 of the Indian Contract Act. We also find that the claim in the arbitration would relate to the identical amount being value of the final bill that

was sought to be passed by the appellant company. It is admitted position arbitration is still pending and awaiting its disposal.

The decision in the case of Haryana Telecom Ltd. -VS- Sterlite Industries (India) Ltd. reported in All India Reporter 1999 Supreme Court Page-2354 would be of no assistance to us. In the said decision the issue was raised as to whether a winding up proceeding could be stayed under Section 8 of the Arbitration and Conciliation Act, 1996. The Apex Court observed that the power of winding up of a company was conferred on the Court and notwithstanding any arbitration agreement between the parties the arbitrator would have no jurisdiction to pass the said order. We fail to appreciate, how this decision would help us to decide the present controversy. In the instant case, the subject matter of the claim was itself pending and awaiting decision of the arbitrator. Pursuant to our order the appellant already secured the entire claim through bank guarantee. We also permitted the respondent to withdraw the amount through encashment of bank guarantee by giving counter guarantee for the same. The Registrar would hold the same till disposal of the arbitration proceeding and would get it renewed from time to time. We thus hold that this is not a fit and proper case to wind up the appellant company. In this regard, we may refer to Clause (e) of the guideline so stipulated in the case of Kiranmayee Devi reported in Volume-49, Calcutta Weekly Notes Page-246.

“e) If the defendant has no defence or the defence is illusory or sham practically moonshine then although ordinarily the plaintiff is entitled to leave 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.”

We feel, both the appeals must succeed.

The order of admission of the winding up proceeding dated February 6, 2012 is set aside.

The judgment and order dated July 2, 2012 passing a final order of winding up of the appellant company is also set aside.

The Appeal No.289 of 2012 and 299 of 2012 are allowed and disposed of without however any order as to costs.

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

Shukla Kabir (Sinha), J.

I agree.

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