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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 3rd September, 2014

+ CO.APP. 39/2014 & C.M.APPLN.13415/2014

ARUN BHARDWAJ

..... Appellant

Through: Mr. Yogesh Jagia, Mr. Rajeev
Kumar and Mr. Amit Sood,
Advocates

versus

ONICRA CREDIT RATING AGENCY OF INDIA LTD

..... Respondent

Through: Nemo

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE SUNIL GAUR

GITA MITTAL, J. (ORAL)

1) The appellant before us joined the respondent-company on 19th October, 2009 pursuant to a letter of appointment dated 29th July, 2009 in the position of Executive Director on monthly salary of Rs.8,33,333/- inclusive of allowances apart from the salary. The appellant was also offered performance bonus of Rs.20 lakhs by the respondent; retention amount of Rs.10 lakhs as well as the joining bonus of Rs.30 lakhs in two instalments of Rs.15 lakhs each. The appellant makes a grievance that the first instalment of Rs.15 lakhs was paid to him. However, the second

instalment of Rs.15 lakhs was not paid to him.

2) The appellant joined the service of respondent-company on 19th October, 2009 pursuant to afore-noted communication. It is also the appellant's claim that on account of his efforts, the respondent-company increased its revenue and earned profits of Rs.5.18 lakhs which increased subsequently thereafter.

3) The appellant complains that he was forced to resign from the services of the respondent-company on 21st September, 2010 on account of disputes with one of the Directors, which resignation was accepted on the same date. The disputes between the parties relate to payment of performance bonus for the months of October, 2009 to March, 2010 as well as salary. As such, in all, a sum of Rs.82,61,287.49/- is claimed to be payable by the respondent-company to the appellant. It appears that on 26th November, 2010, the appellant had served a legal notice upon the respondent calling upon the respondent to pay the amount of Rs.51,24,109.33/- which demand was disputed and denied on behalf of the respondent-company vide response dated 15th December, 2010.

4) It is an admitted position that for the recovery of this amount, on 29th April, 2011, the appellant has filed CS (OS) No.1141 of 2011 on the original side of this Court. The respondent-company entered appearance in the suit and disputed the claim of the appellant. In addition, the respondent also filed counter-claim thereto claiming an amount of Rs.33,52,671 as payable by the appellant to it on the plea that the appellant had forged, fudged and fabricated figures for gaining incentives.

5) The appellant submits that a statement has been made by the

respondent-company in the Annual Tax Statement on the website of the Income Tax Department wherein the respondent-company has claimed to have paid to the appellant an amount of Rs.15,69,977/- on the 31st August, 2010 after deducting TDS of Rs.2,30,399/-.

6) Based on the said declaration on the Income Tax Department's website, another notice dated 27th February, 2013 was issued on behalf of the appellant under Section 433 & 434 of the Companies Act, 1956 claiming that the respondent-company had failed to pay the admitted debt of Rs.15,69,977/- to it. Based on non-compliance of this notice demand, the appellant filed Co. P. No.238/2013 seeking winding up of the respondent-company under the provisions of Section 433 (1) (e) of the Companies Act, 1956 on the ground that the respondent-company had failed to pay its admitted dues.

7) The respondent-company had entered appearance and the matter was heard by the learned Single Judge and by a detailed judgment dated 1st May, 2014, impugned by way of the present appeal, the learned Single Judge has held that the respondent-company has raised plausible and bonafide defence. In this regard, reliance was placed on the submissions of the respondent-company that the appellant had fabricated figures for the purposes of availing incentives.

8) So far as the statement in the Annual Tax Statement is concerned, the learned Single Judge has noted the following observations in the impugned order: -

“The respondent company has contended that there are bona fide serious disputes with respect to the amount claimed by the petitioner and in fact amounts are due and

payable by the petitioner to the respondent company.

The respondent has contended that as one of the terms of employment of the petitioner was that he would be paid performance bonus so the petitioner raised bills in cases which were not allotted to the respondent company by the clients for verification. The clients denied their liability to pay the said amounts. Since over billing was done and bills were raised for the work not assigned to the respondent company the payments could not be recovered and had to be written off as bad debts for cases not allotted to the respondent company and the respondent company also had to issue credit notes to the clients and suffered bad debts.

The respondent contends that the petitioner had forged, fudged, fabricated and manipulated the figures in order to show performance on the basis of which he would obtain higher incentives. As per the respondents, the respondents became aware of this method of operation after the tax had been deposited with the Income Tax Department and it is for the said reason that the respondent company did not pay the said amount to the petitioner for which tax was deposited with the Income Tax Authorities of the petitioner.”

9) It has been observed that the respondent-company has suffered bad debts of over Rs.4 crores and could not collect the amount exceeding to Rs.1.35 crores for the manipulations attributed to the appellant and that the claim by the appellant that substantial revenue had been generated, was false. The learned Single Judge has also held that the respondent-company has raised a factual dispute that requires examination and that there was no clear admission on the part of the respondent-company of the amount claimed by the appellant.

10) In the given circumstances, the fact that the income tax was

deposited with the Tax Authorities for the payments proposed to be made to the appellant prior to the discovery of the alleged manipulation does not entitle the appellant to maintain his petition under Section 433 (1) (e) of the Companies Act, 1956.

11) The learned Single Judge has also noted that the appellant had resigned on 21st September, 2010 and filed the suit for recovery on 29th April, 2011 and that the counter-claim was filed shortly thereafter in 2013. There was a gap of two years between filing of the suit and the winding up petition. The Ld. Single Judge has not found credible the contention of the appellant that the statement of Income Tax Returns was noticed by him only in the year 2013 for the reason that the Annual Tax Statement for the year 2010 would have been reflected on its website by the Income Tax Department in the year 2010 itself. Nothing has been placed before us which would enable us to take a view contrary to that taken by the learned Single Judge.

12) Learned counsel for the appellant has placed before us a pronouncement of the Supreme Court of India reported as **(2010) 10 SCC 553 IBA Health (India) Private Limited v. Info-Drive Systems SDN. BHD.** Instead of furthering the case of the appellant, we are of the view, that this pronouncement of the Supreme Court squarely supports the view taken by the learned Single Judge. So far as the plea of admitted liability is concerned, the material observations of the Supreme Court read as follow: -

“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 creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first 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.

(Emphasis supplied)

It needs no elaboration that, as in the present case, if the creditor's debt is bonafide disputed on substantial ground, the court cannot proceed to making of the winding up orders.

13) Learned counsel for the appellant has also drawn our attention to para 24 of the afore-noted pronouncement wherein in the court considered the issue as to whether the company, winding whereof is sought, was commercially solvent. The observations of the Supreme Court in this regard would shed valuable light on the question raised before us and for the reason of convenience, the same are extracted and highlighted as under: -

“The appellant Company raised a contention that it is

commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.”

(Emphasis supplied)

We are informed in the instant case that the respondent-company is running a credit rating agency and has employed over 200 employees. Nothing has been placed before us to show that the respondent-company is insolvent.

14) Learned counsel for the appellant has placed reliance on the pronouncement of **IBA Health (India) (supra)** also to show in support of his contention that the respondent-company has failed to make a bonafide dispute. We are unable to agree with the submission made by

learned counsel for the appellant. The observations of the Supreme Court in para 31 of the above report decision are enlightening and read as follows: -

“Where the company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the company for the purposes of winding up. “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.”
(Emphasis supplied)

In the instant case as well, the Company Court has satisfied itself that the debt upon which winding up is founded is hotly contested and has, therefore, refused to entertain such petition. We see no reason to take a different view.

15) Our attention is also drawn by learned counsel for the appellant to a pronouncement of a Division Bench of this Court reported in **ILR 1969 Delhi 708 Gautam Electric Motors v. Firm Shantilal and Bros..** Learned counsel for the appellant submits that this Court can grant interim orders to balance the equities. In this regard, reliance is placed on the following directions in Gautam Electric (supra) issued by the Court: -

“In the present case, both the parties are commercial concerns. There is nothing to show that the appellant-

company is commercially insolvent. The sole question is whether it has a reasonable excuse for the non-payment of the admitted debt of the creditor. In view of the other litigation pending between the parties in this Court, the company is not acting unreasonably in thinking that the amount due to the creditor should not be paid inasmuch as the company would stand to gain something on balance from the creditor if the other dispute between the parties is decided. The object of the present winding-up petition is clearly, Therefore, to bring pressure on the company to pay up. The petition is not genuinely motivated to obtain a winding up of the company in the interests of all the creditors. In such a case, the Court has clearly a discretion under Section 433 of the Companies Act, which says that a company "may" be wound up by the Court if the Company is unable to pay its debts and even if the company is deemed to be unable to pay its debts under Section 433(1)(a) We are of the view that the ends of justice in the present case would be served if on the one hand the claim of the creditor against the company is secured and on the other hand the company is not forced to go into liquidation. We, Therefore, order that if the appellant-company gives a bank guarantee within 15 days to the respondent-creditor to the satisfaction of the Register of this Court for the payment of a sum not exceeding Rs. 25,000.00 with interest at 6 per cent per annum from the date of the presentation of the winding-up petition till its disposal, the winding-up petition shall be stayed till the disposal of suit No. 361 of 1968 (Shanti Lal & Bros. v. Gautam Electric Motors Pvd. Ltd.) pending in this Court for the expeditious disposal of which due steps will be taken both by the parties and this Court. To this extent the appeal is allowed, but without any order as to costs. If, however, the appellant-company fails to give such security,

the appeal would stand dismissed with costs.”

16) In the case in hand, we find that the debt is bonafide disputed and the counter-claim raised by the respondent-company within three months of the filing of the suit is pending adjudication. The appellant has to establish and prove its entitlements to the amounts claimed by it and also to establish that the respondent-company is not entitled to a decree on its counter-claim. In these circumstances, we are not inclined to pass orders in terms of the directions made by the Division Bench in para 15 above.

17) For all these reasons, we find no merit in this appeal which is hereby dismissed with costs which are quantified at Rs.25,000/-. The costs shall be deposited with the Delhi High Court Legal Services Committee within four weeks from today by the appellant. Let the copy of this order be sent to the Delhi High Court Legal Services Committee. The proof of deposit shall be submitted in this Court immediately on its deposit.

18) This appeal and the application are accordingly dismissed.

GITA MITTAL, J

SUNIL GAUR, J

SEPTEMBER 03, 2014

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