

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
COMPANY PETITION No.158 of 2015

% 05.10.2015

Between:

M/s Kuoni Travel (India) Private
Limited, Mumbai, repled., by its Authorized
Signatory-Ajit Kumar Madhusoodan

..... Petitioner

And:

\$ M/s Tecumseh Products India Private
Limited, Hyderabad.

.....Respondent

< Gist:

> Head Note:

! Counsel for the petitioner: Mr. Gandham Durga Bose

^ Counsel for the Respondent: Mr. M.Laxmi Narasimham

? Cases Referred:

1. 2014 LawSuit (Cal) 961
2. 1998 LawSuit (Pat) 388
3. (1971) 3 SCC 632
4. 1965 (35) Comp. Cases 456 (SC)
5. 1964 AIR (MP) 231

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

*FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH*

COMPANY PETITION No.158 of 2015

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And

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Limited, Hyderabad.

...

Respondent

JUDGMENT PRONOUNCED ON 05.10.2015

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

1. Whether Reporters of Local newspapers : **Yes/No**
may be allowed to see the
Judgment? Yes/No

2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : **Yes/No**

3. Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? : **Yes/No**

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.....Respondent

Counsel for the petitioner: Mr. Gandham Durga Bose

Counsel for the Respondent: Mr. M.Laxmi Narasimham

The Court made the following:

ORDER:

This Company Petition is filed for an order to wind up the respondent for non-payment of the debt due to the petitioner.

I have heard Mr. Gandham Durga Bose, learned counsel for the petitioner and Mr. M.Laxmi Narasimham, learned counsel for the respondent.

The respondent is a company incorporated under the Companies Act, 1956 (for short 'the Act'). The petitioner is a travel agent which was looking after the needs of the respondent in the matter of arranging air tickets, visas, etc. The respondent has approached the petitioner and entrusted the work of arranging visa to its Managing Director in February, 2014, for his visit to France from 17.3.2014 to 22.3.2014. It is the pleaded case of the respondent that on 25.02.2014, all the relevant documents including the passport of its Managing Director were handed over at the local office of the petitioner at Hyderabad for processing visa. However, the respondent could secure visa to its Managing Director only on 25.3.2014.

As the petitioner was claiming a sum of Rs.10,97,200/- by sending invoices, the respondent issued

notice, dated 22.4.2014, wherein it was stated that due to the failure of the petitioner to secure visa for its Managing Director, his business trip was forced to be cancelled, as a result of which, the respondent has lost esteemed customers and suffered business loss to an extent of Rs.40 lakhs. The respondent has relied upon Clause-9 of the agreement, dated 19.6.2012 and claimed that because of the failure of the petitioner to secure visa to its Managing Director, it is liable to pay damages under the said Clause and has, accordingly, issued notice to the petitioner on 22.4.2015. More than four months after receipt of the said notice, the petitioner has replied to the same, wherein while denying any negligence on its part in securing visa to the Managing Director of the respondent, it has relied upon Clause-8.1 of the agreement, dated 19.6.2012, and stated that the respondent is not justified in withholding the amount admittedly due and payable by it.

Learned counsel for the petitioner submitted that while the amount claimed by the petitioner is not a disputed amount, the claim of the respondent, that it is entitled to withhold the amount admittedly payable by the petitioner, is based on an imaginary ground that it is entitled to recover damages from the petitioner for the alleged loss caused on account of non-securing of visa to its Managing Director.

Learned counsel for the respondent submitted that the respondent is claiming a set-off against the payment receivable by the petitioner-company due to the loss suffered by the respondent on account of the negligent handling of the visa issue by the petitioner. He has relied upon certain judgments which include the judgment of Calcutta High Court in ***Martin & Harris Pvt Ltd Vs. Organon (India) Pvt Ltd***^[1] and that of the Patna High Court in ***BOC India Limited Vs. Zinc Products and Company Pvt Limited***^[2] to fortify his submission that

one of the tests to be applied, in order to know whether denial of debt is *bona fide* or not, is whether the dispute is raised by the respondent for the first time in the winding up proceedings or it was raised even before presentation of the winding up petition.

As noted hereinbefore, the respondent has relied upon Clause-9 of the agreement to justify the claim made by it towards damages, while the petitioner has relied upon Clause-8.1 thereof. While this Court does not intend to adjudicate as to whether the petitioner is entitled to claim a set-off or not as, such a question does not arise in a Company Petition filed for winding up of the respondent for non-payment of the alleged debt, it would, however, like to examine the above-mentioned Clauses only for being *prima facie* satisfied as to whether the claim for set-off made by the respondent has any basis and consequently, denial of the debt by it is *bona fide* or not.

In a Company Petition filed for winding up of the company for non-payment of the debt due to the claimant, if the company raises a *bona fide* dispute with regard to the claim of its creditors, the Court shall not adjudicate such disputed claim (See ***M/s Madhusudan Gordhandas and Co. Vs. Madhu Woollen Industries Pvt Ltd***^[3] and ***Amalgamated Commercial Traders (P) Ltd Vs. A.C.K. Krishnaswami and another***^[4].)

In ***BOC India Limited*** (supra), one of the tests applied to find out whether the denial of debt is *bona fide* or not is whether the dispute was raised for the first time in the winding up proceedings or it was raised at the very first instance before presentation of the winding up petition.

As noted hereinbefore, as far back as 22.4.2015, i.e., almost one year before the filing of this winding up petition, the respondent has raised a serious issue on the

alleged failure of the petitioner to secure visa for its Managing Director. The petitioner has not even responded to the said letter for more than four months before it has denied any failure or liability on its part. Be that as it may, as the respondent has raised the dispute much before the contemplation of the Company Petition, it cannot be said that the denial of debt by it is not *bona fide* and the same is intended to evade the legally payable debt.

In ***Martin & Harris Pvt Ltd*** (supra), the Calcutta High Court has dealt with a case where the respondent before it has claimed adjustment of the damages suffered by it, on account of wrongful termination of contract by the petitioner therein, against the amounts payable by it. It has relied upon the judgment of the Madhya Pradesh High Court in ***State of M.P. Vs. Raja Balbhadra Singh***^[5], wherein it was held as under:

"Where two persons have certain accounts and monies are payable by each to the other, they are both entitled to mutual adjustments of the monies provided they are really due and recoverable. The distinction between payment and adjustment is that payment is made to the creditor while the adjustment is made by the debtor himself. Although it is not called 'payment' in common parlance yet it undoubtedly partakes the character of payment. At all events, it cannot be called a claim for set off, nor can it be said to be a counter-claim, as the defendant does not seek enforcement of his claim, and, therefore, Court-fee is not due."

- On a general principle a person is entitled to pay to himself that amount which is due to him from another, if he has in his hand monies belonging to that other, provided that his dues are legally recoverable. Although that question will be adjudicated by the Court of law when it arises, he is not obliged to sue for the

recovery of the money which he is already in possession of."

Following the said judgment, the Calcutta High Court observed as under:

"Therefore, the plea of adjustment is not unrecognized in law provided the amount for which it is adjusted is legally sustainable and/or recoverable. It is essentially a question of evidence and the winding up petition should not be allowed as the liabilities are admitted. Furthermore, the petitioning-creditor have made a counter-claim including the amount admittedly adjusted against the claim made in the suit which cannot be said to be unreal, undisputable and moonshine."

Following the legal position which emerged from the above-mentioned judgments, I am of the opinion that though the claim for set-off or adjustment is made by the respondent towards the alleged damages against the amount payable by it, for the limited purpose of adjudicating the winding up petition, this Court cannot treat such a claim for set-off or adjustment as lacking *bona fides*. Whether the respondent is really entitled to such set-off or adjustment needs to be adjudicated by the competent Court of law. For the present purpose, it will suffice, if this Court is satisfied that the set-off or adjustment claimed by the respondent is not an after-thought and that it has been consistent in its stand in this regard much before the filing of the winding up petition.

On these facts of the case, this Court is of the opinion that as there is a serious dispute regarding the debt claimed by the petitioner, the remedy under Section-433(e) read with Sections-434(1) (a) and 439 of the Act is not an appropriate one and no order for winding up of the respondent for non-payment of the admitted debt can be passed.

The Company Petition is, accordingly, dismissed, however leaving the petitioner free to avail common law remedies for recovery of the amount claimed by it from the respondent.

*JUSTICE C.V.NAGARJUNA
REDDY*

05th October 2015

Note:

LR copies to be marked.

B/o

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[\[1\]](#) 2014 LawSuit (Cal) 961

[\[2\]](#) 1998 LawSuit (Pat) 388

[\[3\]](#) (1971) 3 SCC 632)

[\[4\]](#) 1965 (35) Comp. Cases 456 (SC)

[\[5\]](#) 1964 AIR (MP) 231