THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

ORIGINAL SIDE APPEAL No.4 OF 2015

JUDGMENT:(per Hon'ble Sri Justice K.C. Bhanu)

This Original Side Appeal, under Clause 15 of the Letters Patents Act and Section 483 of the Companies Act, 1956, is filed challenging the Order, dated 17.03.2015 in Company Application No.102 of 2015 in Company Petition No.94 of 2014, whereunder and whereby the application filed for setting aside the *ex parte* Order, dated 27.01.2015, was allowed by the learned Single Judge of this Court subject to the condition that the appellant shall pay an amount of Rs.7,75,000/- within two weeks from the date of pronouncement of that order and file proof before the Registry, in default the said order shall stand revived.

2. Sri Vedula Srinivas, learned counsel appearing for the appellant, contended that the claim of the Company Petitioner with regard to payment of the salary is substantially disputed; that while accepting the reason for the absence of the appellant on the day when Company Petition was listed for hearing, the learned Judge has imposed an onerous condition of depositing an amount of Rs.7,75,000/-, which is not warranted in the facts and circumstances of the case; that filing of the Company Petition is to test the solvency of the Company and the Company Court is not a Civil Court for recovery of the amount due from the Company and therefore, he prays to set aside insofar as the order of depositing 50% of the amount due.

3. On the other hand, Mr.Mahfooz Nazki, learned counsel appearing for the respondent, contended that the appeal itself is not maintainable as the Order of winding-up of the Company has become final as the appellant failed to comply with the direction given by the learned single Judge; that the Order passed by

the learned Judge is discretionary one; that the appellant has not been seriously disputing about the claim of respondent with regard to payment of the salaries due; that in spite of sending several e-mails to pay the salaries, there was no response from the appellant; that upon considering the facts and circumstances of the case, learned single Judge has exercised the discretion in a judicious manner and that order needs no interference by this Court. He also submitted that as per Rule 9 of the Company Court Rules, 1958 (for short, 'the Rules'), Company Judge has got power to pass any order, which is just and reasonable in the facts and circumstances of the case.

4. Rule 6 of the Rules provides that the provisions of the Code of Civil Procedure, 1908 (for short, 'CPC') as far as practicable would be applicable to Company matters. Though the Company Application No.102 of 2015 purported to have been filed under Section 456 of the Companies Act, 1956 read with Rule 9 of the Rules and under Section 151 CPC, it has no application to the facts of the case. Learned counsel for both the parties stated that the provisions of the CPC as far as practicable would be applicable to the Company matters in terms of Rule 6 of the Rules. Therefore, order must have been passed under Order IX Rule 13 CPC. It is stated by the learned counsel for the respondent that there are so many lapses on the part of the appellant in contesting the matter and in spite of the fact that after filing of the Vakalat, appellant has not evinced any interest to proceed further in the Company Petition. The only issue to be decided in this appeal is whether a direction to pay 50% of the amount as claimed by the Company Petitioner is just and reasonable.

5. The appellant was set *ex parte* and the Company was ordered to be wound-up by an Order, dated 27.01.2015 as the appellant did not contest the matter after filing of Vakalat. In a petition filed to set aside the *ex parte* decree and order, if the defaulting party shows sufficient cause, the Court has power to set aside the *ex parte* decree on certain terms as it deems fit. Therefore, the Court is not powerless to impose certain terms as it deems fit. Though the claim of the respondent herein has been substantially disputed, the appellant has not filed a single document to show about payment of the salary to the respondent

herein during the period he worked. There is no dispute that the respondent is entitled for salary for the work done by him. The employer cannot evade payment of that amount. If really the employer is not liable to pay any amount to its employee, nothing prevented the employer from producing the concerned record, which has to be maintained statutorily by the Company, but that record has not been produced. It is not shown that *Prima facie* the claim of the employee is substantially disputed. The respondent herein has sent several e-mails claiming salary and there was no reply to the e-mails submitted by its employee. Even before the learned Company Judge, no document was filed to show that the claim of the respondent is substantially disputed. However, learned counsel for the appellant herein placed strong reliance on the decision reported in **IBA Health (India) Private Limited Vs. Info-Drive Systems SDN. BHD**, wherein it is held thus (Para No.33):-

> "33. We may notice, so far as this case is concerned, there has been an attempt by the respondent Company to force the payment of a debt which the respondent Company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding-up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt. Of late, we have seen several instances, where the jurisdiction of the Company Court is being abused by filing winding-up petitions to pressurize the companies to pay the debts which are substantially disputed and the courts are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. Remember, an action may lie in appropriate court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds. A creditor's winding-up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public."

From the above decision, it is clear that in the context of *bona fide* dispute, it was held that the conditions should not be onerous. Such a substantial disputed debt is not existing in this case *prima facie.* Therefore, the above decision relied upon by the learned counsel for the appellant has no application to the present facts of the case.

6. Learned counsel for the appellant also relied upon another decision reported in **Tea Auction Ltd., Vs. Grace Hill Tea Industry and another**, wherein it is held thus (Para No.23):-

> "23. While setting aside a decree, conditions can be imposed but such conditions should not be unreasonable or harshly excessive."

From the above decision, it is clear that an onerous condition cannot be imposed. *Prima facie,* it is not shown that the Company is not liable to pay any amount. When there is a serious dispute about the amounts payable to the respondent, then certainly direction for payment of half of the amount due can be said to be an onerous condition. As on today the amount payable to the respondent has not been disputed by producing necessary documents. In view of facts and circumstances of the case, it cannot be said that the condition imposed by the learned single Judge is onerous or too harsh. Considering the facts and circumstances of the case, imposing a condition to pay an amount of Rs.7,75,000/- cannot be said to be onerous and it is within the discretion of the learned Judge to impose such condition. Therefore, that order needs no interference by this Court. The appeal is devoid of merit.

7. However, in view of the fact that time granted by the learned single Judge to pay the amount has expired while appeal is pending, we feel it reasonable to grant two weeks' time from today, failing which, the order of the learned single Judge, dated 27.01.2015, shall be given effect to. Registry is directed not to entertain any application seeking 'extension of time' or 'for being mentioned' in this regard. Any observation or finding given in this appeal is only for the purpose of disposal of the present appeal.

8. Accordingly, the Original Side Appeal is disposed of. There shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

JUSTICE K.C. BHANU

JUSTICE M.SEETHARAMA MURTI

Date:15.04.2015

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