THE HON'BLE SRI JUSTICE K.C.BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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O.S.A.No.40 of 2013

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JUDGMENT: *(Per Hon'ble Sri Justice M. Seetharama Murti)*

This Original Side Appeal under clause 15 of the Letters Patent Act and under Section 483 of the Companies Act, 1956 (for brevity 'the Act') by the respondent is directed against the order dated 10.10.2003 passed by the learned Company Judge in Company Petition No.183 of 2011.

2. We have heard the submissions of the learned Senior Counsel appearing for the appellant/respondent and the learned counsel for the respondent/petitioner. We have perused the material record.

3. In this appeal, the parties shall hereinafter be referred to as the appellant and the respondent as arraigned in this appeal for convenience and clarity.

4. The case of the respondent-company, in brief, is as follows:

The respondent-company, which is a registered private limited company in the State of California, United States of America had filed the creditor's winding up petition against the appellant-company. Earlier, one M/s.Beceem Communications, who are manufacturers of Chip sets and allied goods, had supplied the said goods to the appellant-company from time to time under various invoices. The said company had merged with the respondent-company. The value of the goods so supplied to the appellant is in accordance with the specification and requirement as per the contract price under four different invoices listed under paragraph 6(d) of the petition totalled up to 2,375,520 USD and the same is due and payable by the appellant. Inspite of several e-mails, correspondence and requests on numerous occasions, the outstanding amount had remained unpaid. The appellant in response to some of the communications of the respondent had requested to bear with the delay and had made promises to pay the amounts due. However, no amounts were paid. Therefore, the respondent had got issued a legal notice dated 22.06.2011 demanding payment with interest. In response to the said legal notice the appellant by a letter dated 14.07.2011 had intimated action plan for payment of amount to the respondent and asked the respondent to bear with the delay. However, the appellant had failed to remit any amount. Hence, the petition for winding up was filed as apart from statutory presumption under Section 434 of the Act, the appellant had lost its substratum.

5. The appellant had filed a counter affidavit urging *inter alia* as follows:

The appellant was granted tenders by BSNL for WiMAX project and the appellant-company has got strong financial back up with average turnover of about Rs.1,800 Crores for the last three years and are employing 4000 people directly or indirectly. The appellant had currently booked orders of about Rs.2,350 Crores and had got sanctioned bank limits of about Rs.1,323 Crores. In view of the said background, BSNL awarded WiMAX project where Beceem chips are to be supplied to one M/s.Gemtek Electronics (Kunshan) Co., Ltd., which are fitted into Gemtek Customer Premises Equipment (CPEs). Prior condition of purchase orders placed on Beceem mentions that the chip set and the CPEs must conform to the 100% technical requirements of BSNL tenders and M/s.Beceem communications as well as M/s.Gemtek Electronics (Kunshan) Co., Ltd., shall extend necessary support to the appellant to achieve successful validation and acceptance testing of CPEs by the BSNL. Since the process of validation and acceptance testing is not completed, the BSNL had withheld the payments due to the appellant company. The respondent being aware of the same is insisting upon its payment. Therefore, the claim is neither admitted nor a default was committed. There is no cause of action for filing the company petition. The appellant company has got strong balance sheet.

6. Apart from the above pleadings, it appears, further pleadings were also filed before the learned company Judge.

7. The learned company Judge by the impugned orders had held that the company petition deserves to be admitted and had accordingly admitted the same. However, keeping in view the ongoing project with BSNL, where substantial stakes of the parties are involved, the learned company Judge deemed it just and appropriate to defer the advertisement of the company petition for a period of six weeks and had accordingly ordered to defer the advertisement. Aggrieved of the said orders, the appellant/the respondent in the company petition had preferred this appeal.

8. Now the point for determination is: -

> **Whether, under the facts and circumstances peculiar to the case, the order impugned is liable to be set aside?**

9. <u>POINT:</u>

9.1 The facts and contentions are already stated supra, in detail. Ms/.Beceem Communications, which is merged with the respondent-company, had supplied chip sets and allied goods to the appellant under different invoices and in that regard an amount totalling to 2,375,520 USD is said to be due and payable to the respondent by the appellant.

9.2 The learned senior counsel for the appellant while reiterating the points urged in the counter referred to supra had contended as under:

The learned company Judge ought to have properly appreciated the facts and the respondent company's failure to comply with the purchase order in toto. The learned company Judge ought to have appreciated the fact that due to the failure of the respondent in complying with the terms of the purchase order placed on it, there has been delay in execution of the project and consequently receivables from BSNL are delayed. The learned company Judge ought to have seen that the process of validation and acceptance testing of CPEs by BSNL is not completed and hence, BSNL had withheld huge amounts due and payable to the appellant. The chip set supplied by the respondent is not performing/meeting the specifications/standards of the purchase order and consequently the same had failed validation and acceptance of BSNL is evident from the numerous letters from BSNL to the appellant. The said fact ought to have been appreciated by the learned company Judge. The learned company Judge ought to have seen that subsequent to e-mail dated 27.08.2013 of the respondent confirming the non-availability of the engineering resources to support the services of the product sold by the respondent in compliance with the terms of the purchase order, the amount so admitted and to be paid became a disputed liability as unless and until the respondent complies with the technical specifications including the acceptance test to the satisfaction of BSNL, BSNL could not make payment to the appellant. In the facts and circumstances, there is every likelihood that BSNL may blacklist the appellant company for non performance of the obligations and consequently the appellant would be disqualified from participating in future tenders that may be floated by the BSNL. Further, there is no possibility or likelihood of the BSNL releasing the payments withheld. The learned company Judge ought to have appreciated the strong financial position of the appellant and that lives of about 4000 persons working directly or indirectly are at stake. The learned company Judge ought to have appreciated the fact that the respondent instead of filing a suit for recovery has filed the company petition as a measure of arm twisting to recover the amounts without fulfilling its obligations and complying with the terms of purchase order placed on it. The learned company Judge in the impugned orders having taken note of the valid defence and contentions of the appellant-company had failed to appreciate the same and had erroneously held in paragraph no.11 of the impugned order that the contentions of the appellant can only be properly appreciated and adjudicated after oral and documentary evidence is let in, in the matter and had postponed the decision on the tenable contention and an arguable point of law which was found to exist. The appellant company had stated its tenable defence as to why the admitted amount to be paid has become a disputed liability and had also pleaded and urged as to how the amounts receivable by the appellant were held up awaiting acceptance testing reports from BSNL and also about the opportunities which the appellant may have in contesting the claim in future. All the contentions were simply ignored by stating that the contentions of the appellant can only be properly appreciated and adjudicated after oral and documentary evidence is let in, in the matter, which is incorrect.

9.3 He had placed reliance on the decision in **SRC Steel (P) Ltd., v. Bharat Industrial Corporation Ltd.,**

9.4 Per contra, the learned counsel for the respondent while supporting the order impugned had contended that there is no dispute that Ms/.Beceem communications which had since merged with the respondent had supplied the subject goods to the appellant from time to time under various invoices in accordance with the specification and requirement as per the contract price and that an amount totalling to 2,375,520 USD is due and payable by the appellant company and that several e-mails were sent and correspondence was exchanged and requests were made on numerous occasions and that despite request to bear with the delay and promises and also intimating action plan for payment of amounts, no amount was paid and that, therefore, a statutory presumption under Section 434 of the Act is attracted and that for non payment of the admitted dues the appellant company had lost its substratum and that the learned company Judge had appropriately considered the facts and the submissions and had rightly admitted the company petition and that since the advertisement of the company petition was deferred no prejudice has been caused to the appellant. The learned counsel for the respondent having further referred to the e-mails and correspondence had pointed out that the appellant had admitted its liability and the amount due and payable to the respondent company and that the appellant had assured in the correspondence that it would pay USD 1,187,760 latest on or before 10.04.2011 and that despite such a promise no amount was paid and that the respondent was constrained to issue a legal notice dated 22.06.2011 demanding payment with interest and that in response to the said legal notice, a letter dated 14.07.2011 was sent intimating the following action plan for payment of amount to the respondent viz., 1) USD 299,760 by September 2011; 2) USD 588,000 by October, 2011; 3) USD 599,760 by November, 2011 and 4) USD 588,000 by December 2011 and that on number of occasions requests were made by the appellant to bear with the delay and that ultimately the appellant had failed to remit any amount and that when the liability is admitted the commercial solvency or otherwise of the appellant company would not stand alone for consideration and that there is no bona fide dispute as to the liability and that if the debt is undisputably owing then it should be paid and that in case of refusal to pay the same, much less without a good reason, the appellant-company should not be allowed to avoid the statutory demand by proving that it is solvent. Further, the learned counsel for the respondent had specifically brought to the notice of the Court the contents of the affidavit at page 163 of the paper book wherein one Sri P. Sumanth, the Managing Director of the appellant company had stated that pursuant to the discussions between the companies, the appellant-company had agreed for mutual settlement for paying the admitted liability to the tune of US$ 2,075,520 as per the terms and conditions and in the manner which is stated in the said affidavit and he had forcefully contended that the order impugned calls for no interference. Thus, the crux of the contention of the respondent-company is that when the liability is undisputed and admitted it should be paid by the appellant to the respondent and that in case of refusal to pay the same, much less without a good reason, the appellant-company should not be allowed to avoid the statutory demand by proving that it is solvent.

9.5 On the other hand, the learned senior counsel for the appellant had laid stress on the submissions which are extracted supra and had brought to the notice of the court the following aspects: 'Prior condition of purchase orders placed on Beceem mentions that the chip set and the CPEs must conform to the 100% technical requirements of BSNL tenders and that M/s.Beceem communications as well as M/s.Gemtek Electronics (Kunshan) Co., Ltd., shall extend necessary support to the appellant to achieve successful validation and acceptance testing of CPEs by the BSNL. Since the process of validation and acceptable testing is not completed, the BSNL had withheld the payments due to the appellant company. The respondent being aware of the same is insisting upon its payment. Subsequent to e-mail dated 27.08.2013 of the respondent confirming the non-availability of the engineering resources to support the services of the product sold by the respondent in compliance with the terms of the purchase order, the amount so admitted and to be paid became a disputed liability as unless and until the respondent complies with the technical specifications including the acceptance test to the satisfaction of BSNL, BSNL could not make payment to the appellant. In the facts and circumstances, there is every likelihood that BSNL may blacklist the appellant company for non performance of the obligations, consequently the appellant would be disqualified from participating in future tenders that may be floated by the BSNL'.

9.6 As rightly pointed out by the learned senior counsel for the appellant, when these aspects were pointed out during the course of hearing and were urged before the learned company Judge and further, when it was pointed out on the basis of purchase orders, minutes of the review meeting of the BSNL and other documents that the amount receivable by the appellant from the BSNL is held up since acceptance testing reports from BSNL were awaited and that consequent payments by the BSNL to the appellant could not be made, the learned company Judge ought to have taken into consideration and ought to have adjudicated the said issues based on documents as it was necessary in the facts and circumstances of the case to examine and consider an arguable point that existed in the matter and as it was also necessary to examine the statement by the respondent company that 'they have no more engineering resources supporting the services of the product' had given rise to a cause of action or not to the appellant to make a counter claim and claim a sum, which is more than the sum payable by it to the respondent. However, the learned company Judge without going into the said aspects of the matter had postponed the adjudication on the said aspects including the technical part of the BSNL contract, which is said to involve both the respondent as well as M/s.Gemtek, by observing that such adjudication can only be done after oral and documentary evidence is lead in the matter.

10.1 In our well considered view, the order admitting the winding up petition filed by the respondent without adjudicating the above issues and aspects is not just and fair in the facts and circumstances of the case more particularly when the facts and law warrant adjudication of the same before the company petition is admitted. Hence, we are of the well considered view that the order impugned needs to be set aside and the matter deserves to be remanded for consideration and adjudication of the various issues and aspects mentioned supra before arriving at a decision as to whether or not the company petition deserves to be admitted. The point is accordingly answered.

10.2 This Court while granting the interim order dated 04.12.2013 had imposed conditions to the effect that the petitioner/appellant shall pay 3 Lakhs US Dollars within four weeks from that day and also another 3 Lakhs US Dollars within four weeks thereafter to the respondent. The said payments/deposits were said to have been duly made. The payments or deposits thus made, as the case may be, shall hold good for the present and be subject to the result of the final orders that may be made in the matter pursuant to the remand orders now being made by this Court.

11. In the result, the OSA is allowed and the impugned order is set aside and the matter is remitted for fresh consideration and adjudication of all the aspects including the issues and aspects mentioned supra in these orders before arriving at a decision as to whether or not the company petition deserves to be admitted. It is needless to mention that any observations made in these orders are only made for the limited purpose of disposing of this matter and, therefore, such observations shall not have any bearing on the merits of the matter. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal shall stand closed.

K.C.BHANU, J

M.SEETHARAMA MURTI, J

28th April 2015

Vjl