IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 300 OF 2013

M/s. Sunderland Developers Pvt. Ltd. .. Petitioner
Vs.
Henkel Adhesives Technologies India Pvt. Ltd. .. Respondent

Mr. Ajay K.J. Panicker a/w. Mr.M.K. Tiwari i/b Ajay Law Associates for petitioner.

Dr.Birendra Saraf, advocate a/w. Mr.Ashish Kamat, Ms.Pinky Shah, Ms.Jigisha i/b Negandhi Shah & Himayatullah for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 4TH JANUARY, 2016

P.C.

1 The petition has been filed on the basis that the respondent owes to the petitioner a sum of Rs.4,38,26,564.53 which is a debt and the respondent is unable to discharge its debt and therefore the respondent is commercially insolvent. Hence it is just and convenient in the interest of justice that the respondent-company is ordered to be wound up.

2 The petitioner was invited by the respondent to submit a tender for construction of a factory building for the respondent at Navi Mumbai. The petitioner submitted an offer which was accepted by the respondent and was awarded contract vide an agreement dated 18.10.2006. The total contract

value was Rs.4,14,00,000/-. It is the case of the petitioner that when 92% of the total work awarded to the petitioner was completed, the respondent illegally terminated the contract. Thereafter, the parties had various meetings to resolve the inter-se disputes. It is also stated that the respondent's Architect has certified the work done by the petitioner and issued a final certificate dated 16.07.2010, revised on 21.07.2010 and further revised on the same date whereby the Architect is alleged to have certified a net payable at Rs.86,74,900/-. The petitioner has raised objections to these deductions by the Architect and the matter has been referred to arbitration to a sole Arbitrator Mr. Justice M.S. Rane (Retd.).

3 The counsel for the petitioner states that this claim in the arbitration is for the debt mentioned in the petition. The respondent has also filed counterclaim before the Arbitrator claiming in excess of Rs.8,00,00,000/-. Both the counsels states that evidence is being lead before the Arbitrator by both the parties to prove their claim as well as the counterclaim. Issue of limitation has also been raised which is being considered by the Arbitrator.

4 It is trite that when a dispute raised is substantial and genuine and bona-fide, the Company Court should not entertain a petition for winding up. Certainly, the Company Court is not expected to hold a full trial in the

matter. The Apex Court in the matter of ***IBA Health (India) (P) Ltd. Vs. Info-Drive Systems Sdn. Bhd.***[1] in paragraphs 20, 21, 22, 23, 31, 33 and 35 has held as under :

> *20 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.*

> *21 In this connection, reference may be made to the judgment of this Court in Amalgamated Commercial Traders (P) Ltd. V. A.C.K. Krishnaswami and another (1965) 35 Company Cases 456 (SC), in which this Court held that "It is well-settled that 'a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented*

1 2010(10) SCC 553

ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

22 The above mentioned decision was later followed by this Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. (1971) 3 SCC 632. The principles laid down in the above mentioned judgment have again been reiterated by this Court in Mediquip Systems Systems (P) Ltd. v. Proxima Medical Systems (GMBH) (2005) 7 SCC 42, wherein this Court held that the defence raised by the appellant-company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The above mentioned judgments were later followed by this Court in Vijay Industries v. NATL Technologies Ltd. (2009) 3 SCC 527.

23 The principles laid down in the above mentioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to 14 pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

24 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 it debts, the law should take its own course and the company of course will have an 15 opportunity on the liquidation application to rebut that presumption.*

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31 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.

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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.

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35 We have referred to the above aspects at some

> *length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. A Company Court, therefore, should be guarded from such vexatious abuse of the process and cannot function as a Debt Collecting Agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.*

5 The fact is both the parties have filed claim and counterclaim before the learned Arbitrator, their evidence is also being recorded to decide whether the petitioner is entitled to the claim as alleged before the Arbitrator or not and the claim is the same as alleged in this petition. In view thereof, I am not inclined to dismiss the defence of the respondent as spurious or speculative or illusory or misconceived. The winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. I cannot hold that the dispute raised is not *bona-fide*.

6 In the circumstances, the petition stands dismissed with no order as to costs.

7 It is, however, clarified that the views expressed are *prima-facie* and it is entirely open to the parties to raise all their grounds before the learned Arbitrator.

(K.R. SHRIRAM, J.)