JSN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY PETITION NO.720 OF 2015

Mayaland Hotels Pvt. Ltd. ...Petitioner
Versus
Junobo Hotels Private Ltd. ...Respondent

Mr. Vikram Sathye, *a/w. Mr. Abhishek Sawant, Ms. Jyoti Ghag, i/b. Thakore Jariwala & Associates for the Petitioner.*
Mr. Javed Gaya, *a/w. Ms. Lokhandwala a/w. Ms.Vidya Choudhari, a/w. H.V. Kode i/b. M/s. Chambers of Javed Gaya for the Respondent.*

CORAM: G.S. PATEL, J.
DATED: 15th March 2016

P.C.

1. Having heard Mr. Sathye for the Petitioner, I am convinced that this Petition is thoroughly misconceived. *Ex-facie*, the Petition itself raises disputed questions of fact and triable issues, even on the basis of the document that is the foundation of the claim.

2. The Petition was filed in May 2015. There is a very substantial reply of September 2015. On file before me even today there is no Rejoinder. I am told that an Affidavit in Rejoinder was prepared but was not filed for want of the necessary permission from the Court. The statement is materially misleading. No application seems to have been made to take the Rejoinder on file.

There is no reason given why no such application was made. In addition, I find that this matter was placed out of turn for admission yesterday by the Petitioner who obtained circulation without even caring to ensure that its own Rejoinder is on file. I have not allowed that Rejoinder to be filed. I see no reason why I should.

3. Before I proceed to Petition itself, I must note the marked reluctance of the Petitioner to proceed either yesterday or today. The parties are admittedly in arbitration. That in itself is not a reason to dismiss this Petition if otherwise a case is made out, though an order of admission would undoubtedly have the result of terminating that arbitration. From yesterday, I have noticed that despite having the matter circulated, the Petitioner does not want to proceed. I am told instead, again and again, that there are settlement talks and that this Petition should be simply adjourned. To get this Petition circulated and to then be unprepared to proceed is patently unfair to other litigants waiting in line and is an unconscionable abuse of the liberty granted to advocates and parties to circulate urgent matters without mentioning them. This will not be permitted in future; circulations will be refused to advocates and parties who misuse these privileges, in addition to costs.

4. In any case, this repeated mention of a likely settlement seems to be no more wishful thinking on the Petitioner's part, at least going by the marked lack of enthusiasm from Mr. Gaya for the Respondent.

5. On the face of it seems to be this Petition has been used a some sort of pressure tactics to resolve other contractual disputes between the parties. The case of the Petitioner is simplicity itself. It accuses the Respondent of deliberate non-payment of a legally payable debt. The Petitioner says that it had an agreement of 13th February 2011 with the Respondent under which the Petitioner was to act as the Respondent's exclusive local partner for the latter's proposed start-up venture in India. According to the Petitioner, it was to be paid USD 500,000 plus service tax. Of this, an amount of USD 300,000 plus service tax was to be paid with the agreement. The Petitioner claims that the Respondent said that it did not have sufficient funds. It promised to pay that amount in a short while. The remaining USD 200,000 was due on 31st December 2011. The Petitioner says that the Respondent defaulted despite requests and the Petitioner then issued a legal notice dated 14th May 2012. This is not the statutory notice. That followed some time later on 8th April 2015. According to the Petitioner, the main Agreement was cancelled and another 'Termination Agreement' dated 2nd August 2012, a copy of which is at Exhibit "E" at pages 61 to 64 was executed by the parties.

6. What the Petitioner says in paragraph 8(e) is:

> "Petitioner was to be paid the amount of USD 500,000 as per the payment schedule annexed to the Agreement".

7. The Petitioner then says that there were delays in making payment and that the last installment of USD 180,000 has not been paid till date.

8. Clearly, this entire Petition is based on a reading of the agreement of 2nd August 2012 at Exhibit “E”, page Nos.61 to 64. This titled as a ‘Termination Agreement’. It purports to terminate the previous agreement. Clause 2.1 says that a fee would be payable by the Respondent to the Company “pursuant to a new agreement made between them”. Mr. Sathye for the Petitioner claims that the chart at page 64 was a part of this agreement. This is a tabulation of payments. It does not bear any exhibit or reference number or indication. It is referenced nowhere in the agreement at Exhibit “E”. It is not separately identified as an annexure to that Agreement. If it was indeed attached as a part of that Termination Agreement, Clause 2.2 or some other clause in the Agreement Exhibit “E” would undoubtedly have said so. There is no reference to the tabulation at page 64 anywhere in the body of the agreement at Exhibit “E”.

9. When this is pointed out, the response is very interesting. The Petitioner now tries to bolster its case by referring (wrongly) to some documents annexed to the Affidavit in Reply while carefully avoiding all references to the contents of the Reply itself. According to the Petitioner, Exhibit “E” to the Petition is the same as Exhibit “II” to the Affidavit in Reply from pages 123 to 125. That simply cannot be. The document at Exhibit “II’ to the Affidavit in Reply reply has *no* chart or tabulation. What the Respondent has produced is the another agreement at Exhibit “III”, pages 126 and 127, which is altogether different from the agreement on which the Petitioner has filed this Petition. Exhibit “III” to the Reply is of the same day, 2nd August 2012. It is nowhere referenced in the Petition, even by way of mention. What therefore was the correct understanding between the parties, if any, is at the very least a triable issue, one that requires the taking of evidence and which I cannot possible adjudicate in the summary jurisdiction of a winding up Petition.

10. The averments in paragraphs 5, 6, 8, 9 and 14 amongst others of the Affidavit in Reply raise substantial defences. The Respondent says that while it did have an agreement with the Petitioner, this was not of the kind the Petitioner describes. The Respondent says that what is stated in the Petition is an over-simplification. The commercial dealings related to the establishment by the Respondent of a boutique hotel in North West Mumbai. There was a joint venture. This ran into trouble. There were difficulties regarding the selection of a appropriate project site. There were disagreements about necessary permissions and clearances. It was in these circumstances that the Termination Agreement referred to by both sides was executed. In paragraph 6 of the Affidavit in Reply, the Respondent specifically denies that the copy of the Termination Agreement annexed to the Petition included the schedule or tabulation at page 64. It says that the actual Termination Agreement was only of two pages; the correct version, according to the Respondent, is the one at Exhibit II to the Affidavit in Reply. It is in this context that the averments in paragraphs 7 and 9 of the Affidavit in Reply assume importance. In paragraph 7, the Respondent says that the further agreement contemplated in Clause 2.2. of the Termination Agreement was also entered into on 2nd August 2012. This agreement provided for reciprocal obligations. This agreement listed the sequence of the installments to be followed in disbursing payments to the Petitioner.

This schedule of payments is not in the Termination Agreement at all, but is in a later Service Agreement, to which the Petitioner makes no reference whatever in the Petition. All that the Petitioner had done is to produce a tabulation, annexe it to the Petition and to claim that it formed part of the Termination Agreement. Now it is true that the document produced by the Respondent at Exhibit "III", the Service Agreement does contain a schedule of payments. But that is not the basis of the Petition, and if the Petitioner now wants to invoke the Service Agreement rather than the Termination Agreement, the Petitioner must necessarily accept that it has annexed the wrong document; that the Agreement it has produced is not the correct one; and must also accept the other terms of the Service Agreement, including the correctness of what the Respondent says in regard to it; specifically, that the Petitioner was in default of even that Agreement, that the Service Agreement required the Petitioner to perform certain obligations; that the Petitioner did not do so; and that therefore there is no acceptance of any amount due to the Petitioner. Paragraphs 9, 14 and 17 of the Affidavit in Reply raise further plausible defences and issues requiring evidence.

11. In saying this, I am not answering the merits of the relative claims of the parties. Evidently all contentions have to be kept open for adjudication either in the pending arbitration or in suitable civil proceedings. My only finding is that the kind of determination that the Petitioner seeks is simply not possible in this fashion in these summary proceedings. The matters that require determination will have to be tried in appropriate proceeding. This Petition is not it.

12. It is not possible in these circumstances to say that there is no defence to the Petition or that the defences raised are spurious, specious or practically moonshine. A Petition such as this can have only one outcome. It must be dismissed. It is.

(G. S. PATEL, J.)