IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO. 766 OF 2015
IN
COMPANY PETITION NO. 824 OF 2014

M/s. Poonam Enterprises .. Appellants
versus
Hindustan Dorr-Oliver Limited .. Respondent

Mr. Vaibhav Joglekar i/b. D. P. Desai for Appellants.
Ms Shilpa K. for Respondent.

CORAM: DR. MANJULA CHELLUR, C. J. AND
M. S. SONAK, J.
DATE : 05 OCTOBER 2016

P.C.:

1] Heard learned counsel for the parties.

2] This appeal challenges order dated 14 September 2015, by which the company court has dismissed the petition seeking winding up of the respondent company on the ground of its inability to pay the debts.

3] Mr. Joglekar, learned counsel for the appellant submits that the defence raised by the company is neither *bona fide* nor substantial. The company did not respond to the statutory notice and in the correspondence on record, the company neither disputed the debt nor did it indicate its defence. Mr. Joglekar laid emphasis upon the statement of accounts at pages 128-129 of the paper book to submit that several payments made even prior to the raising of bills by the appellant are sought to be passed of as payments made towards the discharge of bills in question. Mr. Joglekar submits that this is inconceivable and the defence raised by the company, is therefore dishonest and in the nature of an after thought.

4] Upon consideration of the submissions of the learned counsel for the parties and the perusal of record, we are satisfied that the impugned order warrants no interference.

5] In the case of a petition for winding up of a company on the ground of indebtedness, two rules are well settled. First, if the debt is *bona fide* disputed and the defence is a substantial one, the court will not wind up the company. Secondly, where the debt is undisputed, the court will not act upon a defence that the company has the liability to pay the debt but chooses not to pay a particular debt. In such a situation, the court will not even insist upon precise quantification of the debt by the creditor. The principles on which the courts act are first that the defence of the company is in good faith and one of substance. Secondly, the defence is likely to succeed in a point of law and thirdly the company adduces *prima facie* proof of the facts on which the defence depends.[1]

6] It is also settled position in law that proceedings for winding up of a company are not legitimate means to recover the claimed amount. If the debt is bona fide disputed on substantial grounds, the court should dismiss the winding up petition and leave the creditor to establish his claim in an action, lest there is danger of abuse of the winding up procedure. The company court always retains 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. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The company court, at the stage of a winding up petition is not expected to hold a full trial of the matter. It must decide whether the grounds

1 1971(3) SCC 632 M/s. Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt. Ltd.

appear to be substantial. The grounds of dispute 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.[2]

7] Applying the principles to the facts, we find that the company court has exercised its discretion on correct lines. The claim, in the present case, arises out of supply of goods and labour charges under 34 invoices raised by the appellant upon the company. The company has raised disputes with regards to the supply of goods by pointing out that there was inordinate delay on the part of the appellant in completion of the works and the company's client (BPCL) has in fact levied penalty upon the company. That apart, the company has pointed out that payments were made by the company from time to time and detailed statement in this regard is also produced on record. The statement, no doubt, makes reference to '*hold back amount*'. However it is claimed that this is quite consistent with the contract between the parties.

8] The case set out by the appellant appears to be founded upon shifting sands. This is not a case where the company has failed to make any payments. Rather, this appears to be a case where the payments made by the company have been appropriated by the appellant towards certain other claims, which were allegedly due. The appellant however submits that the appropriation of such amounts is consistent with the provisions of Section 60 of the Contract Act. The case as originally set out was that the payments under 34 invoices are outstanding. The case as emerges in the rejoinder is different. Although, payments are usually made once the invoice is raised, there is nothing inconceivable in advance payments. All this depends upon

2 (2010) 10 SCC 553 IBA Health (India) Pvt. Ltd. vs. Info-Drive Systems Sdn. Bhd.

the terms of the agreement and the evidence adduced. At the stage of a winding up petition, the company court is not expected to hold a full trial of the matter. Suffice to observe that the opinion of the company Judge that such debt is *bona fide* disputed and the defence raised is not insubstantial suffers from no legal error in the facts and circumstannces of the present case.

9] The company, both in its statement and affidavit in reply admitted dues of Rs.15.22 lacs. The said amount has already been paid by the company to the appellant, which has received the said amount without prejudice. Lest there be any misunderstanding, we clarify that the observations in paragraph 9 of the impugned order do not mean that the company is due and payable only Rs.15.22 lacs to the appellant and nothing further. All that the observations mean is that the balance claim is disputed and therefore, it is for the appellant to take out appropriate proceedings before the civil court to establish such claim and recover the same from the company. We therefore clarify that no observations in the impugned order or the present order shall in any manner influence of affect any action which may be initiated by the appellant for recovery of such amounts. The observations only relate to determining the existence or otherwise of a *bona fide* dispute.

10] For the aforesaid reasons, we dismiss this appeal. There shall however be no order as to costs.

CHIEF JUSTICE

(M. S. SONAK, J.)

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