

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.08.2016

CORAM:

THE HONOURABLE Mr.JUSTICE A.SELVAM
and
THE HONOURABLE Mr.JUSTICE P.KALAIYARASAN

O.S.A.No.197 of 2015
and M.P.No.1 of 2015

Sabari Exim Private Limited
Trade Centre, 2nd Floor,
114 & 115, Wallajah Road,
Chennai - 600 002.

.. Appellant

Vs.

SIMS Metal Management Limited
Sir Joseph Banks Corporate Park,
Suite 3, Level 2, 32 Lord Street,
Botany New South Wales 2019,
Australia.

.. Respondent

Original Side Appeal under Order XXXVI Rule 1 of Original
Side Rules, r/w Clause 15 of the Letters Patent against the
Order dated 30.04.2015 made in Company Petition No.350 of 2014.

For appellant : Mr.S.R.Rajagopal
For respondent : Ms.Anitha Thomas
for M/s. V.J.Mathew & Co.,

JUDGMENT

(Judgment of the Court was delivered by
P.KALAIYARASAN, J.)

This Original Side Appeal is directed against the Orde of
the learned single Judge, dated 30.04.2015, admitting the
Company Petition and appointing the Provisional Liquidator to
the appellant company.

2. The facts leading to the filing of Company Petition
for winding up of the appellant company are as follows :

(i) The appellant entered into a contract with the
respondent Foreign company on 03.05.2012 for purchase of steel
scrap from the respondent. As per Clause 5 of the contract, the
appellant was to establish 100% irrevocable Letter of credit for
the contract value latest by 14.05.2012. The period was also
extended to 18.05.2012. But the appellant failed to open the
Letter of credit, as required under the contract, which lead the

respondent company to go for Arbitration, as per the Arbitration Clause 12 of the contract.

(ii) The Arbitration was conducted under the Australian Maritime and Transportation Commission (AMTAC), Arbitration Rules in line with Clause 12 of the contract and the Arbitral Award, dated 28.02.2013 was passed in favour of the respondent company. As per the Award, the appellant company has to pay within 21 days, a sum of USD 19,50,000 plus pre-awarded interest of USD 3541.96, apart from cost and subsequent interest.

(iii) Despite the receipt of the copy of the Foreign Arbitral Award and demands from the respondent company, the appellant company failed to make any payment. This Court in original side also rejected the objections raised by the appellant company under Section 48 of the Arbitration and Conciliation Act, 1996 and therefore, it becomes enforceable under Section 49 of the Arbitration and Conciliation Act.

(iv) The respondent company issued statutory notice, dated 26.08.2014 under Section 434(1) (a) of the Companies Act, stating dues payable by the appellant company. As the appellant company has not paid the decretal debt in spite of the demand, the respondent company filed petition for winding up of the company.

3. The learned single Judge, after analysing the divergent contentions, admitted the Company Petition and appointed the Official Liquidator, High Court, Madras as provisional liquidator of the appellant company.

4. The learned counsel appearing for the appellant contends that the company court has been abused as an Executing Court ; that this Court in O.P.No.56 of 2014 passed an order on 26.06.2014, permitting the respondent to proceed with Execution; that instead of seeking to wind up the appellant company, the respondent ought to have filed an E.P; that the amount itself is bonafidely disputed by the appellant company; that appointment of Official Liquidator summarily is not correct and that the debt had arisen primarily because of force majeure and the appellant company had no control about the prevailing situation and conditions.

5. The learned counsel appearing for the respondent per contra contends that it is the option of the creditor either to opt Execution or to seek to wind up the company for non-payment of debt; that this Court held that the Foreign Award is enforceable one under Section 49 of the Arbitration and Conciliation Act, 1996 and therefore, the decree is deemed to be a decree of this Court; that force majeure has been rejected by this Court, while rejecting the objections of the appellant

company under Section 48 of the Arbitration and Conciliation Act, 1996 and that for the decretal debt, the respondent company is entitled to file petition under Companies Act, for winding up of the appellant company. It is further contended that the learned single Judge, after elaborate discussion has rightly appointed Provisional Liquidator.

6. There is no dispute that appellant company entered in to a contract on 03.05.2012 and as per the contract, the appellant was to establish an irrevocable Letter of credit for the contract value latest by 14.05.2012 and the period was extended till 18.05.2012. But the appellant company could not establish irrevocable Letter of credit, as per the contract.

7. The respondent company moved the Original Side of this Court in O.P.No.56 of 2014 to record its satisfaction that the Foreign Arbitral Award is enforceable under Part 2, Chapter 1 of the Arbitration & Conciliation Act, 1996. The appellant filed its objections under Section 48 of the Arbitration and Conciliation Act.

8. The learned single Judge of this Court, after hearing both sides, allowed the Original Petition holding that the Arbitration Award, dated 28.02.2013 is held enforceable and shall be deemed to be a decree of this Court.

9. The above order has also been challenged and this Division Bench today dismissed the appeal filed by the appellant herein, confirming the orders of the learned single Judge. Thus, the Foreign Award, dated 28.02.2013 is enforceable and becomes decree of this Court.

10. The learned counsel on either side cited voluminous Judgments of the Hon'ble Supreme Court as to the winding up petition filed by the creditor and sustainability of such petition in case of existence of bonafide dispute as to the debt. It is apposite to cite the following few Judgments of the Hon'ble Supreme Court to fortify the settled propositions in the above context.

(i) In *Harinagar Sugar Mills Co., Ltd., v. M.W.Pradhan* (Now G.V.Dalvi), Court Receiver, High Court, Bombay, reported in (1966) 3 SCR 948, it has been held as follows :

"5...In *Palmer's Company Precedents*, Part II, 1960 Edn., at P.25, the following passage appears :

"A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay

its debts."

This view is supported by the decisions in *Bowes v. Hope Life Insurance and Guarantee Co* (1865) II HLC 388, *Re General Company for Promotion of Land Credit*, (1870) LR 5 Ch D 380 and *Re National Permanent Building Society*, (1869) LR 5 Ch D 309. It is true that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution."

(ii) In *IBA Health (I) (P) Ltd., v. Info-Drive Systems SDN.BHD*, reported in (2010) 10 SCC 553, it has been held as follows :

"It is settled law that if the creditor's debt is bonafide 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 bonafide disputed debt."

11. The Division Bench of this Court in *Neg Micon A/s Alsvoj v. NEPC India Limited*, reported in (2000) III CTC 107, has held as follows :

"13. Invoking the provisions of the Companies Act and seeking a prayer for winding up will not be entertained if it is only in the nature of exercising pressure to enforce payment of a debt. The Supreme Court of India in the case of *Amalgamated Commercial Traders Pvt. Ltd. v. A.C.K.Krishnaswamy*, 1965 (35) Comp.Cases 456 (So ruled thus,

"It is well settled that winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the Company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court."

The above view of the Supreme Court was in fact reaffirmed by it in the subsequent ruling viz., *Pradeshia Industrial & Investment Corporation of U.P v. North India Pertochemicals Ltd.*, and another, 1994 (3) SCC 348."

12. The Calcutta High Court in All India General Transport Corpn. Ltd. v. Ra Kumar Mittal, reported in (1976) CHN 169 held as follows :

"8...The petitioning-creditor has an option either to execute the decree and then come under the deeming provisions of Section 434(1) (b) or can serve a notice on the decretal debtor under Section 434(1)(a) at any stage after the decree is obtained whether the decree is put into execution and remains unsatisfied or without putting the decree in execution or at any intermediate stage."

13. It is discernible from the above Judgments that the creditor has a statutory right to move a petition for winding up to recover the debt except it is bonafide disputed. In this case, as per the foreign award, the appellant-company is liable to pay the amount decreed therein and the award is also recognised as enforceable. As per Section 46 of the Arbitration and Conciliation Act, 1996, the said foreign award shall be treated as binding for all purposes on the persons as between whom it was made. If the appellant is able to establish that there is bonafide dispute as to the debt demanded under the Award, then as per the above cited rulings, winding up petition can be held to be not legitimate. But here in this case, dispute as to the debt is stated to be on the ground that there is no concluded contract; that the appellant-company is not liable due to force majeure. This grounds were already taken in the Arbitration proceedings and the Arbitral Tribunal after pondering the said grounds passed the Award. In the petition filed before the Original Side, this Court rejected the very same grounds raised along with other objection under Section 48 of the Act and recognised the award as enforceable. Therefore, the above disputes now raised by the appellant cannot be construed bonafide.

14. Therefore, the learned single Judge has rightly found that prima facie case is made out and admitted the Company Petition and passed orders including appointment of Provisional Liquidator. This Court do not find any reason to interfere with the findings of the learned single Judge and therefore, this Original Side Appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed, confirming the Order of the learned single Judge, dated 30.04.2015 made in Company Petition No.350 of 2014. Consequently, connected miscellaneous petition is also dismissed. No costs.

-s/d-
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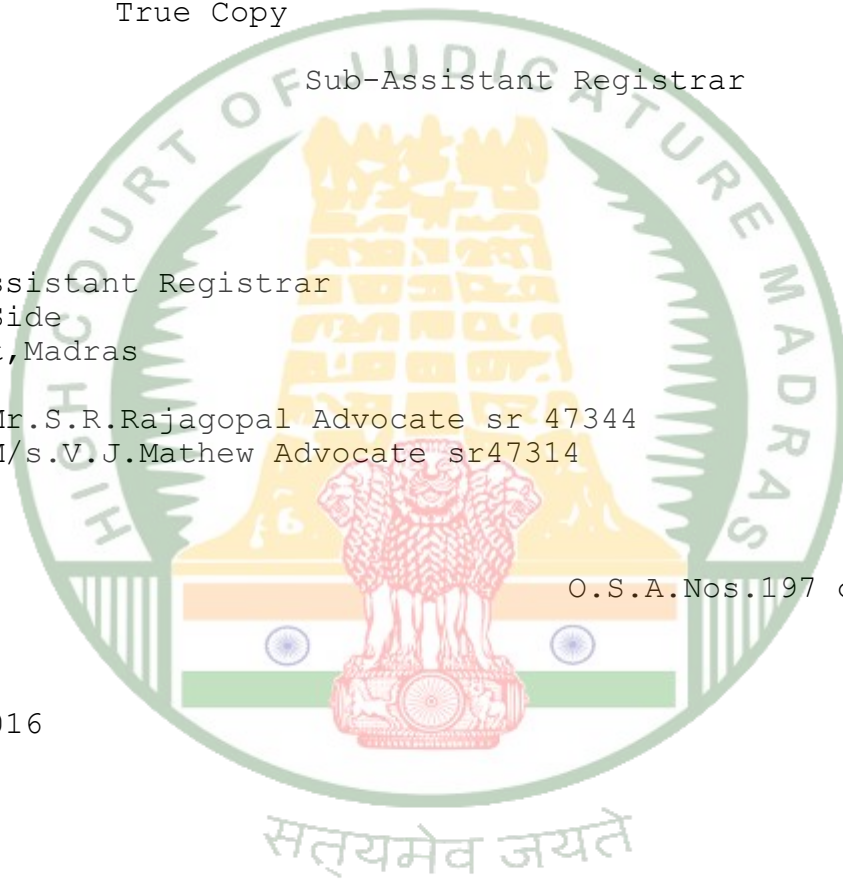
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