

**HONOURABLE SRI JUSTICE G.CHANDRAIAH
AND
HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA**

O.S.A.No. 55 of 2011

DATED 28TH APRIL, 2016

BETWEEN

Bhagyanagar Solvent Extraction Private Limited,
Rep. by its authorized signatory Mr. Jagadish
And ors

...Appellants

And

Metro Steel Rolling Mills Private Limited,
Chennai, rep. by its Managing Director and ors.

.....Respondents.

**HONOURABLE SRI JUSTICE G.CHANDRAIAH
AND
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O.S.A.No. 55 of 2011

JUDGMENT: (Per Hon'ble Sri Justice G.CHANDRAIAH)

This appeal under Section 15 of the Letters Patent read with Section 483 of Companies Act, 1956, is preferred challenging the judgment dated 21.09.2011 passed in Company Petition No. 57 of 2006 vide which a learned Single Judge of this Court while allowing the aforesaid Company Petition filed by the first respondent-Metro Steel Rolling Mills Private Limited ordered for winding up of the appellant Company-M/s. Bhagyanagar Solvent Extractions Private Limited.

The facts of the case in brief are that: the first respondent-Company considering the request of the appellant-Company sanctioned Rs.200 lakhs on 11.06.2004 and disbursed the same to it, to which, the appellant-Company executed a Memorandum of Understanding dated 11.6.2004 and furnished securities towards the loan availed from the respondent-Company. Thereafter, disputes arose between the parties. The respondent-Company filed Company Petition No. 57 of 2006, which was allowed by the learned single Judge of this Court by judgment dated 21.09.2011. Hence the present appeal.

Having heard the learned Counsel on either side and gone through the material on record, the only question that arise for consideration is, whether statutory notice as required under Section 434 of the Companies Act, 1956 (for short 'the Act') is served at the registered office of the appellant-Company.

The learned Counsel appearing for the appellant-Company while reiterating the grounds raised in the appeal, mainly submitted that the statutory notice which is mandatory in terms of Section 434 of the Act was not served at the registered office of the appellant-Company and that even the subsequent knowledge of the same could not cure the defect and therefore the learned Single Judge ought not to have allowed the Company Petition. To substantiate his contention, he relied on the averments of the first respondent-Company made in para 15 of the Company Petition, wherein it was averred as follows:

“ The petitioner states that, in such circumstances the petitioner had issued statutory notice dated 17.01.2006 to the Registered Office of the respondent

calling upon the Respondent to pay the outstanding amount of Rs.2,74,522,259-44 due as on 17.1.2006 within 21 days from the date of receipt of the said notice. The respondent failed had deliberately avoided service of the statutory notice on them and has evaded service and payment.”

He also relied on the cross-examination of P.W.1 who was the Managing Director of the first respondent-Company, relevant portion of which reads as under:

“....It is not true to suggest that no statutory notice was sent to the respondent Company. It is not true to suggest that the respondent company avoided service of statutory notice. I did not file any document to show that the respondent company deliberately avoided receipt of notice and also I did not file any document to show that the proof of service of notice....”

In support of his contentions that service of statutory notice is mandatory in terms of Section 434 of the Act, he relied on the decisions of this Court and other High Courts in *Vysys Bank Ltd., Vs. RANDHIR STELL AND ALLOYS (P) Ltd {1993, 76 CC 244}*, *B.VISWANATHAN VS. SESHASAYEE PAPER AND BOARDS LIMITED {1997 3 COMPLJ 209}*, *DEVI TRAVELS (P) LTD Vs. INTER GLOBE AIR TRANSPORT {LAWS (APH)-2006-10-106}*.

On the other hand, the learned Counsel appearing for the first respondent-Company submits that the appellant did not raise the issue of service of statutory notice as envisaged under Section 434 of the Act either before the learned Single Judge or in the grounds of Memorandum of this appeal. He further submits that the appellant-Company, for the first time, raised

such ground during the course of arguments. He stressed that nowhere in the proceedings before the learned Single Judge sought to meet or deny the argument of the Respondent-Company that the statutory notice dated 17.01.2006 was served upon them and the appellant company has avoided service of statutory notice. Referring to the interim order granted by this Court on 22.12.2001, it is submitted by the learned Counsel for the respondent-Company that inasmuch as the appellant-Company didnot comply with the conditions imposed therein, it (appellant-Company) is not entitle to any relief. In support of his contentions, he relied on the decision of the Apex Court in *BHARAT SANCHAR NIGAM LIMITED Vs. ABHISHEK SHUKLA* {(2009) 5 SCC 368}.

Perused the material on record.

We have given our anxious consideration to the submissions put forth by the learned Counsel on either side. The question involved herein is purely a question of fact and it is well settled that a question of fact can only be raised by leading evidence before the trial judge and no question of fact can be raised for the first time at the appellate stage. It is to be seen from the averments of the first respondent-Company made in paragraph 15 of the Company petition that though statutory notice dated 17.1.2006 was taken to be served on the appellant-company, however, the appellant-Company had deliberately avoided service of statutory notice and has evaded service. Quite contrary to the same, the Managing Director of the first respondent-Company in his cross-examination stated that he did not file any document to show that the respondent company deliberately avoided receipt of notice and that he did not file any document to establish proof of service of notice. On the other

hand, the first respondent-company in its affidavit of evidence at para-7 stated that it has issued a statutory notice dated 17.1.2006 (Ex.A.5) to the appellant-company requesting to pay the outstanding due amount. In these backdrop of averments, it is obvious that a disputed question of fact arises regarding service of statutory notice. Such question of fact, normally, cannot be allowed to be raised for the first time at appellate stage inasmuch as such new or fresh disputed questions of fact required to be resolved on additional evidence to be undertaken by the trial Court. Nonetheless, the proper function of an appellate Court is to correct an error in the judgment or proceedings of the Court below and not to adjudicate upon a different kind of dispute that had never been taken before the Court below. Unless it is corrected in the manner provided under law, it will operate as *res judicata* between the parties in all subsequent stage of the lis. The expediency of correcting that defect may be doubted when the plea cannot be disposed of without deciding questions of fact.

In the decisions relied on by the learned Counsel for the appellant-company, referred supra, it was reiterated that the condition of serving notice at the registered office was mandatory in terms of Section 434 of the Act and absence of a notice under Section 434 of the Act, the Company petition is not maintainable. However, in the case on hand, the appellant-Company submits that no such notice was served on it, whereas the respondent-company submits that such notice was issued, however, the appellant-Company deliberately avoided service of notice. In view of these disputed facts, we are of the

considered opinion that ends of justice would be best served if the matter is remanded to the learned single Judge for resolving the issue regarding service of notice by allowing both the parties to lead evidence in support of their pleas.

Accordingly the appeal is allowed setting aside the order dated 21.09.2011 passed by the learned Single Judge of this Court in Company Petition No. 57 of 2006 and remanded to the learned Single Judge of this Court for considering the matter in respect of service of notice on the appellant-Company by keeping open to both the parties to lead evidence in support of their respective pleas on the issue stated supra and dispose of the matter on merits and in accordance with law.

Miscellaneous petitions pending consideration if any in the appeal shall stand closed in consequence. No order as to costs.

JUSTICE G.CHANDRAIAH

JUSTICE A.SHANKAR NARAYANA

DATED 28th APRIL, 2016.

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