THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

O.S.A.NO.1 OF 2015

ORDER: *(Per Hon'ble Sri Justice M.Satyanarayana Murthy)*

The respondent in company petition No.222 of 2013 preferred this appeal under Clause 15 of the Letters Patent Act and Section 483 of the Companies Act, 1956 against the order of admitting the company petition by the learned single Judge by his order dated 25.11.2014.

The parties to the appeal will hereinafter be referred to as "appellant" and "respondent" for convenience sake.

The respondent filed Company Petition No.222 of 2013 under Sections 433 (e) and (f) and 439 of the Companies Act, 1956, read with Rule 79 of the Companies (Court) Rules, 1959 for winding up of the appellant company in accordance with the provisions of the Companies Act, appoint Official Liquidator as provisional Liquidator pending the disposal of the Winding Up Petition under Section 450 of the Companies Act, 1956, pending disposal of the petition, the Official Liquidator, High Court, Andhra Pradesh or some other fit and proper person be appointed as Provisional Liquidator of the appellant company, together with all its business, assets, properties, income and books of accounts under the provisions of the Companies Act, 1956, and its directors, managers, agents, servants, officers and employees be restrained by an order of injunction from disposing off or parting with possession, alienating, transferring or selling or encumbering or creating 3rd party rights or charge on any of the assets and properties of the company in any manner whatsoever.

The case of the respondent herein is that M/s IL & FS Engineering and Construction Ltd., the appellant herein, is a limited company incorporated on 07.01.2011 under the provisions of the Companies Act, 1956, engaged in the business of infrastructure development and other allied businesses. The registered office of the company is situated at 6-3-1186/5/A, III Floor, Amogh Plaza, Begumpet, Hyderabad and at D.No.8-2-120/113/3/4F, Sanali Info Park, Cyber Towers, Road No.2, Banjara Hills, Hyderabad with authorised capital of Rs.75,00,00,000/- divided into 7,50,00,000 shares of Rs.10/- with paid up capital of Rs.58,85,08,560/- divided into 5,88,50,856 at Rs.10/- per share.

The appellant company approached the respondent company through its authorized officer and placed an order for supply of cables on various dates starting from 20.02.2008 with specifications mentioned in the purchase order. Accordingly, the respondent supplied the required cables ordered by the appellant company. The receipt of the same was acknowledged by the appellant company under different invoices. As per the terms agreed between the appellant and respondent herein, the appellant company has to pay price of goods within 45 days from the date of supply of the material. The respondent company supplied goods worth Rs.24,04,293/- on various dates, but the appellant company did not pay the value of the goods as agreed, but admitting its liability, issued letter of credit drawn on ICICI Bank Limited, towards payment of the amount due vide LC No.008ILC147308 dated 15.11.2008, but the bank dishonoured the letter of credit. Later, the appellant did not discharge the debt due, despite demands made by the respondent herein, but the appellant addressed a letter dated 07.09.2009 acknowledging the debt due to the respondent herein.

As the appellant did not discharge the debt, the respondent got issued a legal notice dated 06.01.2010 calling upon the appellant to pay Rs.24,04,293/- within a week time. On receipt of the said legal notice, the appellant issued a cheque bearing No.454342, dated 12.01.2010 for Rs.10,00,000/- towards part payment and the balance payable is Rs.14,04,293/-, but the same was not paid till date. While the matter stood thus, the appellant herein got issued a legal notice to the respondent to pay Rs.1,10,43,386/-, but the respondent denied and same and got issued legal notice dated 11.04.2013 calling upon the appellant herein to pay Rs.1,46,53,012/- towards loss sustained by the respondent.

The appellant/respondent filed counter denying all the material allegations while admitting supply of goods by the respondent herein, which are found defective. The appellant issued a legal notice dated 28.01.2011 for payment of compensation for supply of the damaged goods. The appellant herein also denied the payment of Rs.10,00,000/- towards amount due by way of cheque, but the said payment was made by the appellant on the representations made by the respondent herein that it was in a deep financial crunch threatening its very existence. The specific contention of the appellant is that the claim of the respondent is barred by limitation as the petition was filed in the year 2013 as the supplies made in the year 2008. Even as per the alleged letter dated 07.09.2009, the claim which is the subject matter of the company petition is barred by limitation. Finally, prayed for dismissal of the company petition.

In the operative portion of the impugned order, learned single Judge held that the question of limitation is mixed question of law and fact and prima facie, the letter dated 07.09.2009 shows that the amount will be released after restructuring process is completed and restructuring process is completed in the year 2013. Therefore, prima facie, it cannot be held that as it is barred by limitation, as such admitted the company petition.

Aggrieved by the said order passed by the learned single Judge, this intra court appeal is filed raising several contentions, more particularly, the claim of the respondent herein is barred by limitation. The other grounds need not be examined since both the counsel, during hearing, confined their arguments to the issue of limitation.

During the course of hearing Sri D.V.Seeetharama Murthy, learned senior counsel, would contend that the claim of the petitioner in the company petition is barred by limitation as it is beyond 3 years from the date of acknowledgement. In support of this contention he placed reliance on a Division Bench judgment of this Court in "***B.Narayana Rao v. M.Govinda Rajulu (Died) per L.Rs***[1]" and also judgment of Delhi High Court in "***Interactive Media and Communication Solution Private Limited v. GO Airlines Limited***[2]"

On the strength of the principles laid down in the above said judgments, learned counsel for the appellant, sought dismissal of the company petition, setting aside the order passed by the learned single Judge dated 25.11.2014 in C.P.No.222 of 2013.

Per contra, Sri Amancharla V. Gopala Rao, learned counsel for the respondent contended that the letter dated 07.09.2009 created a fresh contract to pay the debt, which will fall within the ambit of Section 25 (3) of the Limitation Act. Therefore, the claim of the respondent/petitioner is within time. In support of his contentions, he placed reliance on a judgment of the Apex Court rendered in "***A.V.Murthy v. B.S.Nagabasavanna***[3]" and prayed for dismissal of the appeal confirming the order passed by the learned single Judge of this Court.

Considering rival contentions of both parities and on perusal of the order of the learned single Judge, which is under challenge, the point that arises for consideration is:

"Whether the company petition is barred by limitation?"

P O I N T:

It is the case of the respondent herein that the appellant became indebted to a tune of Rs.24,04,293/- and issued a letter of credit drawn on ICICI Bank Limited dated 15.11.2008, which was dishonoured by the bank. Later, the appellant paid Rs.10,00,000/- by way of cheque bearing No.454342 dated 12.01.2010 towards part payment leaving the balance of Rs.14,04,293/- and the same is not paid till date. On demand of the respondent herein to pay the debt due, the appellant issued a letter dated 07.09.2009 acknowledging the liability to pay the date, later the respondent issued a notice dated 06.01.2010 calling upon the appellant to pay the debt due and there is correspondence between the parties claiming amount by one from the other.

The appellant specifically pleaded in his counter while denying payment of Rs.10,00,000/- by way of cheque, even if the letter dated 07.09.2009 would amount to fresh contract, but it would not extend the limitation for filing the company petition. Therefore, it is barred by limitation.

It is an undisputed fact that limitation for raising claim is three (3) years, but the learned single Judge concluded that the question of limitation is mixed question of law and fact and that the claim of the respondent herein is not barred by limitation. Thus, the learned single Judge expressed his, prima facie, opinion and did not record any finding, however permitted the parties to raise plea of limitation during trial of the company petition. There is no dispute regarding finding that limitation is a mixed question of law and fact. But here the undisputed fact is the execution of letter dated 07.09.2009 whereby the appellant herein acknowledging the debt and agreed to pay a total sum of Rs.24,05,293/- in full and final settlement of amount against LC No.008ILC147308 dated 15.11.2008 for an amount of Rs.24,05,293/- and confirmed that the amount to be paid to the respondent herein was Rs.24,04,293/- and will be released after the debt restructuring process is completed and E 1 form will be submitted by 2nd week of September, 2009. Taking advantage of this letter, respondent contended that it is a fresh contract under Section 25 (3) of Indian Contract Act. Whereas learned counsel for the appellant contended that even if the letter dated 07.09.2009 is taken as acknowledgment, under Section 18 of Limitation Act the limitation shall be computed from the date of the letter, hence the claim is barred by limitation. Even otherwise, if the letter dated 07.09.2009 is taken as a fresh contract under Section 25 (3) of Indian Contract Act, the claim is barred by limitation, since the application was filed on 23.07.2013.

Learned counsel for the respondent while contending that it is a fresh promise, which falls within the ambit of Section 25 (3) of the Contract Act placed reliance on a judgment of the Apex Court in ***A.V.Murthy v. B.S.Nagabasavanna*** (referred supra). In the said judgment while deciding the case under Section 138 of Negotiable Instruments Act, the Apex Court is the of the view that execution of letter amounts to fresh promise under Section 25 (3) of the Indian Contract Act and such promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of limitation is a valid contract.

The law declared by the Apex Court is not in quarrel. Even if the principle laid down in the above judgment applied to the present facts of the case, the limitation starts from the date of execution of fresh contract i.e. 07.09.2009. Therefore, by the date of filing of the company petition, claim of the respondent is barred by limitation.

In the company petition, the respondent herein has not pleaded that the letter dated 07.09.2009 is a fresh contract, which falls within the ambit of Section 25 (3) of the Indian Contract Act, since it is not a debt barred by limitation by the date of execution of such letter.

According to Section 25 (3) of Indian Contract Act fresh promise to pay time barred debt is enforceable and valid contract, but here by the date of execution of letter, the claim of the respondent herein was not barred by limitation and at best it may amounts to acknowledgment of debt within the meaning of Section 18 of the Limitation Act.

Section 18 of the Limitation Act deals with the concept of acknowledgement of debt by the person or by the agent of such person. Acknowledgment means admission of liability. It must relate to some existing debt or other obligation to some property or right. The liability must be existing on the date of acknowledgment. It must be in writing and signed by the person against whom such property or right is claimed or by some person through whom he derives title or liability. The acknowledgment must be before the expiry of the period prescribed under the law of limitation and that such admission of liability must be unequivocal.

There is a distinction between acknowledgment of debt and promise to pay the time barred debt. According to Section 25 (3) of Indian Contract Act, new promise to pay debt, barred by limitation, is a valid agreement giving starting point of limitation. Where letter acknowledged the liability for payment of the debt due strictly amounts to acknowledgment as it implies promise to pay the debt due to the respondent herein. At best, letter dated 07.09.2009 would amounts to acknowledgement i.e. conscious admission of the existing liability of the appellant to the respondent. Therefore, limitation starts from the date of acknowledgment of liability and the claim must be made within 3 years from the date of such acknowledgment.

In the present undisputed facts, the letter dated 07.09.2009 falls within the ambit of Section 18 of the Limitation Act. Even if, the contention of the respondent herein is accepted that it is a fresh contract or promise to pay the time barred debt within Section 25 (3) of the Contract Act, the limitation would start from the date of such letter, which expired by 07.09.2012. If letter dated 07.09.2009 is conditional acknowledgment, it amounts to bond to attract the Article 30 of the Limitation Act since the appellant agreed to pay the debt after restructuring process is completed. But here the letter dated 07.09.2009 is not a bond within the Section 2 (d) of the Limitation Act, which defines bond as follows:

> Section 2 (d) "*bond*" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed or is not performed as the case may be;

Under Indian Stamp Act, the definition of the bond is exhaustive. The definition of bond under Section 2 (5) of the Indian Stamp Act is as follows:

> "(5) *Bond* :--"Bond" includes,--
>
> (a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
>
> (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
>
> (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another. "

The bond defined under Section 2 (d) of the Limitation Act is *in pari materia* with the definition of 'bond' under Section 2 (5) (a) of the Indian Stamp Act, but the other requirement specified under the Stamp Act is attestation by a witness. But here the letter dated 07.09.2009 would not satisfy the requirement of 'bond' under section 2 (5) of Indian Stamp Act or under Section 2 (d) of the Limitation Act.

Sri D.V.Seetharama Murthy, learned senior counsel for the appellant, while contending that the claim of the respondent herein is barred by limitation, drawn the attention of this Court to a judgment of the Division Bench of this Court in ***B.Narayana Rao v. M.Govinda Rajulu (Died) per L.Rs.*** (referred supra), where it was held as under:

> "A bare perusal of this Section shows that the period of limitation in cases of acknowledgments in writing would start running from the date the acknowledgement is signed and not from any other date subsequent to signing of the acknowledgement. Therefore, the trial Court was not right in corning to the conclusion that the time would start to run after two months of the signing of the agreement. On this ground alone we find that the suit should have been dismissed. The other issues are not considered because the fate of the suit has got decided on the question of limitation itself."

Similarly Sri D.V.Seetharama Murthy, learned senior counsel for the appellant, drawn the attention of this court to another judgment of Delhi High Court rendered in "***Interactive Media and Communication Solution Private Limited v. GO Airlines Limited***" (referred supra). The said decision is of no assistance to the appellant, it has got only persuasive value though not binding on this Court, but the judgment of the Division Bench of this Court is a binding precedent. Therefore, we are of the firm opinion that the claim of the respondent herein is hopelessly barred by limitation. Learned single Judge though made an observation that limitation is mixed question of law and fact, committed an error in arriving at conclusion that the claim of the respondent herein is, prima facie, within time. In view of our foregoing discussion, we hold that the claim of the respondent is barred by limitation and the admission of company petition No.222 of 2013 is not in accordance with law and the same is liable to be set aside. The point is answered in favour of the appellant and against the respondent.

In the result, the appeal is allowed setting the aside the order dated 25.11.2014 passed by the learned single Judge in Company Petition No.222 of 2013 and dismissed the company petition. No order as to costs. Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE RAMESH RANGANATHAN

JUSTICE M.SATYANARAYANA MURTHY

21.07.2016.
Ksp

---

[1] 2004 (2) ALT 294 (D.B.)

[2] 199 (2013) DLT 267

[3] (2002) 2 Supreme Court Cases 642