IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO. 426 OF 2016
IN
COMPANY PETITION NO. 1066 OF 2015

Shree Ram Urban Infrastructure Ltd. … Appellant
Vs.
Action Barter Private Limited … Respondent.

Mr. Arif Bookwala, Sr. Advocate, Mr. Lalit Kataria, Benedicta Lobo, Mr. Lalit Suryavanshi. Insiya Ali i/b M/s. Katariya & Associates for the Appellant.

Mr. S.K. Kapur a/w. Mr. Chetan Kapadia, Mr. Mayur Khandeparkar, Mr. Aditya Kanodia, Mr. Ishwar Nankani and Mrs. Gauri Memon i/b Nankani and Associates for the Respondent.

WITH
APPEAL (L) NO. 439 OF 2016
IN
COMPANY PETITION NO. 1066 OF 2015

Action Barter Pvt. Ltd. … Appellant
Vs.
Shree Ram Urban Infrastructure Ltd. … Respondent.

Mr. S.K. Kapur, Sr. Advocate a/w. Mr. Chetan Kapadia, Mr. Mayur Khandeparkar, Mr. Aditya Kanodia, Mr. Ishwar Nankani and Mrs. Gauri Memon i/b Nankani and Associates for the Appellant.

Mr. Arif Bookwala, Senior Counsel, Mr. Lalit Kataria, Benedicta Lobo, Mr. Lalit Suryavanshi. Insiya Ali i/b M/s. Katariya & Associates for the Respondent.

CORAM: DR. MANJULA CHELLUR, C. J. &
M. S. SONAK, J.

Date of Reserving the Order : 30 November 2016.
Date of Pronouncing the Order : 17 January 2017.

ORDER:-

1] Heard learned counsel for the parties. With their consent and at their request, we proceed to dispose of these appeals finally. These two appeals are taken up together, since they both challenge the order dated 5 October 2016, the operative portion of which reads thus:

> *"(i) The respondent company shall deposit a sum of Rs.5.90 crores within six weeks from today.*
> *(ii) In the event deposit is made and if a suit is filed by the Petitioner, the amounts so deposited will be transferred to the suit account and and to be invested initially for a period of one year to be followed by further renewals.*
> *(iii) If the company fails to deposit the amount within six weeks , the petition shall stand admitted, returnable within six weeks from the date of default and be advertised in two local newspapers i.e. Free Press Journal (in English) and Navshakti (in Marathi) and in the Maharashtra Government Gazette.*
> *(iv) The Petitioner shall deposit an amount of Rs.10,000/- with the Prothonotary and Senior Master of this Court towards publication charges, within two weeks from the date of default, with intimation to the Company Registrar failing which the Petition shall stand dismissed for non prosecution.*
> (v) *Pending the hearing and final disposal of the Company Petition, the Official Liquidator, High Court, Bombay, is appointed as Provisional Liquidator of the Respondent Company. The Provisional Liquidator shall forthwith take charge of the assets/properties and records of the Respondent Company without awaiting any notification.*
> *vi) The Liquidator shall act on a ordinary copy of this Order duly authenticated by the Associate of this Court.*
> *vii) The Advocates for the petitioner shall forthwith forward a copy of this order to the Company at its registered address."*

2] Mr. Bookwala, learned senior counsel appearing for Shree Ram Urban Infrastructure Ltd. (the Company), submits that there was no valid legal relationship of creditor and debtor between the Company and Action Barter Pvt. Ltd. (petitioning creditor) and in the absence of the same, the petition for winding up was not maintainable. Mr. Bookwala submitted that there is not even the slightest material placed on record to demonstrate that the petitioning creditor had paid any consideration to the Company. In the absence of such material, the agreement dated 2 April 2014 was unenforceable. Mr. Bookwala, without prejudice submits that in any case, the claim of the petitioning creditor, was a claim in the nature of damages yet to be ascertained by a competent civil court. In such circumstances, there was no question of entertaining any petition for winding up at the behest of such an petitioning creditor. Mr. Bookwala has relied upon the decision of Karnataka High Court in ***Greenhills Exports (P.) Ltd. and ors vs. Coffee Board – 2001 (106) Company Cases 391,*** to urge that in absence of adjudication that the Company has breached any contract, it cannot be said that there is any debt due by such Company and consequently, a petition for winding up is not maintainable.

3] Mr. S.K. Kapur, learned senior counsel appearing for Action Barter Pvt. Ltd. (petitioning creditor), submits that the agreement dated 2 April 2014 is quite clear and unambiguous. In terms thereof, the Company has not only acknowledged its liability to pay sum of

Rs.18 crores to the petitioning creditor, but further, in pursuance of the same, had issued post dated cheques towards the repayment of the said amount. After some of the cheques were dishonoured, the petitioning creditor addressed certain letters to the Company demanding payment, which were not responded to by the Company. Finally, statutory notice under section 434 of the Companies Act, 1956 came to be issued on 13 June 2015. Despite the receipt of the same, the Company did not even bother to reply to the same. In such circumstances, Mr. Kapur submits that there arises a statutory presumption that the Company is unable to pay its debts.

4] Mr. Kapur further submits that after the petition for winding up was instituted, the Company, despite several opportunities failed to even file a reply to the same. In such circumstances, the Company Court ought to have required the Company to deposit the entire claimed amount of Rs.21,76,37,260/- or directly admitted the petition for winding up and proceeded to appoint a Liquidator. Mr. Kapur submits that the claim of the petitioning creditor can no longer be regarded as any claim for damages in view of the clear admission of liability in the agreement dated 2 April 2014. Taking into consideration the gross defaults on the part of the Company and in the absence of even a plea that the Company is in a position to pay its debts, the only error committed by Learned Company Judge was the omission to direct the Company to deposit the entire amount claimed or in the alternate to directly admit the petition for winding up. For these reasons, Mr. Kapur submits that the appeal instituted by the Company is liable to be dismissed and the appeal instituted by the petitioning creditor is liable to be allowed.

5] We have considered the rival submissions and perused the material on record.

6] The agreement dated 2 April 2014, the execution of which is not even disputed by the Company records that, by agreement dated 12 May 2011, the petitioning creditor had agreed to purchase two flats from the Company. However, for reasons attributable to the Company, such agreement could not be honoured. The said agreement was, therefore, to be treated as cancelled subject, however, to the Company effecting payment of Rs.18 crores to the petitioning creditor. The schedule for payment of Rs.18 crores is set out in clause 4 of the agreement alongwith details of the post dated cheques. Clause 5 of the agreement provides for interest at the rate of 18% per annum, till the cheques are honoured upon the respective due dates. This clause also records that three separate cheques on account of interest have also handed over to the petitioning creditor. This clause also provides that in case of dishonour of any cheque, the entire amount standing due shall become payable at once, and the interest thereon shall commence immediately.

7] Clause 6 of the agreement amongst other matters, clearly records that the Company unequivocally admits to be indebted to the petitioning creditor for the consideration stated in the agreement. As noted earlier, the execution of the agreement dated 2 April 2014 is not even disputed by the Company and therefore, the company cannot distance itself from the contents of the agreement dated 2 April 2014 without bothering even to respond to the statutory notice under section 434 of the Companies Act, 1956 or filing a response to the petition seeking its winding up.

8] In the peculiar facts and circumstances of the this case, we cannot accept that the claim of the petitioning creditor is one in the nature of un-ascertained damages. In this case, the agreement dated 2 April 2014, in terms, records that the Company unequivocally admits to be indebted to the petitioning creditor for the consideration stated in the agreement. The circumstance that the Company has neither filed any response to the statutory notice nor filed any reply to the petition seeking its winding up makes it clear that the Company has no defence to offer, much less, any bonafide defence. This is also not a case of some mere paper admission of liability, as was contended by Mr.Bookwala. In pursuance of admission of liability, the Company even issued cheques for payment of agreed amount.

9] In ***M/s. Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries Pvt. Ltd. – 1971 (3) SCC 632,*** the Hon'ble Supreme Court has held that if the debt is bonafide disputed and the defence is a substantial one, the Court will not wind up the company. The principles upon which the Court acts are ‘first’ that the defence of the company is in good faith and one of substance, ‘secondly’, the defence is likely to succeed in point of law and ‘thirdly’, the company adduces prima facie proof of the facts on which the defence depends. In the present case, the Company has chosen to raise no defence at all, therefore, there is no question of examining whether the defence raised is a substantial one. The submissions made across the bar, in the facts and circumstances of the present case, hardly constitute any substantial defence, which can be said to have been made in good faith. Thus construed, there is really no case made out to interfere with the impugned order.

10] The decision in *Greenhills Exports (P.) Ltd. (supra)*, is inapplicable to the facts of the present case. In the said case, the Company in question had not only filed its response and raise a bonafide dispute, but further, the petitioner in the said petition was only alleging a breach of the contract and claiming damages therefor. The question whether the contract was breached or not and if so, whether the petitioner was entitled to damages or the quantum of damages were all matters, which were yet to be ascertained. In these circumstances, that it was held that there was not crystalysed debt, on the basis of which a winding up petition could be maintained. The facts and circumstances of the present case, as noted earlier, are quiet different.

11] In fact, we find substance in the contentions of Mr. S.K. Kapur that the Company should have been called upon to deposit a sum of Rs.18 crores instead of Rs.5.90 crores as directed in the impugned order. Failing which, the petition for winding up could have stood admitted. As noted earlier, the admission of liability by the Company is unequivocal. The circumstance that the statutory notice, despite receipt was not even responded, at least, raises a presumption of inability to pay debts. Further, despite opportunities, the Company chose not to file any response to the petition seeking its winding up. In such circumstances, based upon certain contentions unsupported by any material on record, it cannot be said that any defence worth the name, much less, a bonafide defence having some substance is raised by the Company, even insofar as the amount of debt is concerned.

12] Upon cumulative consideration of the aforesaid, we dispose of these appeals by making the following order:

(a) Appeal (L) No. 426 of 2016 instituted by the Company is hereby dismissed;

(b) Appeal (L) No. 439 of 2016 instituted by petitioning creditor is partly allotted;

(c) Clause (i) of the impugned order is modified. The Company is given an option to deposit Rs.18 crores instead of Rs.5.90 crores within a period of six weeks from today;

(d) Save and except the aforesaid modification, the impugned order shall stand and the directions contained therein shall be complied with by all concerned; and

(e) All concerned to act on the basis of authenticated copy of this order.

CHIEF JUSTICE

(M. S. SONAK, J.)