IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.07.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
AND
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

ORIGINAL SIDE APPEAL NO.81 OF 2017

M/s.Suolificio Linea Italia (India) Private Ltd.,
Ankur Manor, II Floor, Flat No.2B and 2C,
182 (Old No.271) Poonamallee High Road,
Kilpauk, Chennai - 600 010.
By its authorized Signatory
Yuvraj Bahadur Mathur ... Appellant/Petitioner

Vs.

M/s. Nag Yang Shoes Private Limited,
Serkadu Village,
Katpadi Taluk, Vellore District - 6321065,
represented by its Managing Director. ... Respondent/Respondent

Prayer: Appeals filed under Order XXXVI Rule 1 of the O.S.Rules read with Clause 15 of the Letters Patent to set aside the judgment and order dated 19.06.2014 in C.P.No.401 of 2013.

For Appellant : Mr.S.Soundararajan

For Respondent : Ms.K.Nisha
for M/s.T.Prabakaran

JUDGMENT

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. This is an appeal, filed against the judgment and order, of the learned Company Judge, dated 19.06.2014.

1.1. By virtue, of the impugned judgment and order, the learned Company Judge, has dismissed the company petition, filed by the appellant.

1.2. The said company petition was filed by the appellant under Section 433(e) r/w Sections 434(1) and 439(1) of the Companies Act, 1956 (In short, 'the 1956 Act').

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2. Briefly, the case of the appellant was that it had sold and delivered certain goods, to the respondent, between the period 01.04.2012 and 20.11.2012 valued at Rs.37,00,147/-.

2.1. The appellant, evidently received payments, albeit, in part, against the supplies made.

2.2. The sum received by the appellant from the respondent was Rs.19,47,793/-, thereby, leaving a balance sum of Rs.17,54,767/-, as the sum, which was due and payable to it.

3. It is the appellant's case that despite several demands, the said amount, was not paid by the respondent. Accordingly, the appellant, served upon the respondent, a statutory notice dated 27.03.2013 under Section 434 of the 1956 Act.

3.1. In the said statutory notice, the appellant raised demand qua both the outstanding principal sum, (to which we made reference above i.e. Rs.17,54,767/-) as also with interest amounting to Rs.2,39,577/-.

3.2. Thus, the total demand, raised by the appellant against the respondent was a sum of Rs.19,94,344/-.

4. The record shows that the respondent replied to the statutory notice served upon it.

4.1. The reply issued by the respondent is dated 15.04.2013.

4.2. In the reply, the respondent, broadly, took the following stand: (1) That the amount claimed was not payable by it, though, a meagre amount, was due and payable. (2) Since, the books of accounts and vouchers had been sent for audit, the exact amount, if, due and payable, as per its books, would be remitted to the appellant. (3) As there was no contract between the parties for payment of interest and therefore, the respondent was not liable to pay interest as claimed or at all.

5. A perusal of the reply would show that the respondent did not dispute the receipt of the goods and the fact that transactions had taken place between the parties.

6. Since, the respondent company did not get back to the appellant, as to what was the amount, which, according to it, was due and payable, the appellant, instituted a company petition in this Court, to which, we have made a reference herein above.

6.1. Eventhough notice was served on the respondent, there was no representation on behalf of the respondent despite

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service.

6.2. The learned Company Judge thus, proceeded to hear the representative of the appellant.

7. Upon hearing, as alluded to above, the learned Company Judge dismissed the company petition.

8. Aggrieved by the dismissal of its petition, the appellant has approached this Court.

9. The record shows that on 06.06.2017, the Court directed the respondent to furnish details of the amount due and payable up till 2012.

9.1. This direction was issued by the Court after having regard to the reply dated 15.04.2013 issued, as indicated above by the respondent in response to the statutory notice dated 27.03.2013.

9.2. Accordingly, the respondent, filed two (2) sets of documents. The first set of documents comprised of debit notes, while the second set of documents included a copy of the consolidated statement of ledger account for the period spanning between 01.04.2012 and 31.03.2013.

10. The matter, thereafter, came up before the Court, on 06.07.2017, when the following was recorded:

> "1. Pursuant to the directions issued by my predecessor on 06.06.2017, the respondent has filed Debit Notes as well as the extract of the Ledger account.
>
> 1.1. According to the respondent, as on 09.02.2013, a sum of Rs.3,51,402.30 was due and payable to the appellant.
>
> 2. To be noted, the appellant had filed a company petition under Section 433 of the Companies Act 1956 (in short "the Act"), based on an assertion that goods had been supplied to the respondent company, qua which, payments to the extent of Rs.17,54,767/- were due and payable.
>
> 2.1. This outstanding payment pertains to the supplies made by the appellant for the period spanning between 01.04.2012 to 17.12.2012. The total worth of the supplies made, according to the appellant, was for a sum of Rs.37,00,147/-.
>
> 2.2. Therefore, after giving due credit,

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according to the appellant qua payments made, the outstanding sum was, as indicated above, a sum of Rs.17,54,767/-.

2.3. Furthermore, the appellant has also claimed interest in the sum of Rs.2,42,043/- Therefore, the total amount, which is due and payable, according to the appellant, was a sum of Rs.19,96,810/-.

3. In order to secure this payment, statutory notice dated 27.03.2013 was issued. In respect of the same, a reply notice dated 15.04.2013 was served by the respondent company on the appellant. In the reply, the respondent company took the following stand:

(i) No interest, as claimed, was payable at the rate of 18% p.a. as alleged or at all.

(ii) While supplies had been made, the amount payable against them was a meagre amount.

(iii) Since, the accounts and vouchers had been handed over to the Auditor, the exact amount due, as per its books of accounts, would be conveyed, shortly, to the appellant.

4. Since, no details were furnished, the appellant was constrained to move the company Court. Accordingly, a company petition was filed on 29.11.2013. In the company petition, despite the fact that the respondent company was served, there was no representation on its behalf on the date, when the impugned judgment was passed by the learned single Judge.

4.1. The learned single Judge rejected the company petition on the ground that the respondent company had denied that the amount was due and payable and, besides this, there was a dispute between the parties with regard to both the principal amount as well as the component of interest.

4.2. The learned Single Judge also observed that since the transactions in issue pertained to the year 2013, the balance sheet of the company on record would demonstrate that, it did not fall within the parameters of Section 433(e) of the Act.

5. According to us, learned Single Judge

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seems to have been misconstrued the material on record. The stand of the respondent company, clearly, is demonstrative of the following facts: Firstly supplies had been made. Secondly, that some amount was due. The respondent company only sought time to crystallize the amount which, according to it, was due and payable to the appellant.

6. Pertinently, the learned Single Judge, it appears, failed to notice that between 15th April 2013 and 29th November 2013, nothing was communicated to the appellant by the respondent company, as what was the amount due.

6.1. Furthermore, the respondent company, for the reasons best known to it, did not chose to file a reply in the company petition. The learned single Judge, according to us, seems to have taken into account the balance sheet of the respondent company as drawn up on 31.03.2011, based on which, he came to the conclusion that the respondent company's case did not fall within the parameters of Section 433 (e) of the Act. There is no discussion as to how the learned single Judge reached this conclusion.

7. We have examined the balance sheet. The balance sheet as on 31.03.2011, clearly, shows that the sales turn over achieved by the respondent company was a sum of Rs.2,57,93,274/-, against which it had recorded a meagre profit of Rs.13,73,868/-, albeit, after depreciation. Prior to depreciation, but, after charging all expenses, respondent company had registered a profit of Rs.1,36,85,803/-. Therefore, what clearly emerges is that while after depreciation profits for year ending 31.03.2011 were in the range of 5% before depreciation, albeit, post expenses profits earned were in the range of 53%. The respondent company necessarily seemed to have earned cash profits. But then, this was the position of the respondent company in March, 2011, as to how it fared in 2013 was not gathered by the learned single Judge.

7.1. According to us, the enquiry with regard to this aspect of the matter had to be

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made from the respondent company, who would be in possession of the requisite materials. The leaned single Judge, however, without calling upon the respondent company either to file a reply or its file the balance sheets for the years 2011-2012 and 2012-2013, came to the conclusion that the respondent company did not fall within the parameters of Section 433 (e) of the Act, without setting out any reasons in the impugned judgment. There could be only two possibilities. First, that respondent company was in financial doldrums. Second, that it had the money and still chose not to pay the appellant.

7.2. Furthermore, as noticed above, the debit notes have been filed by the respondent company on 28.07.2017, pertaining to the period just prior to the issuance of the statutory notice. As indicated above, the statutory notice is dated 27.03.2013. The five (5) Debit Notes which have been placed on record, bear the following dates: 04.12.2012; 26.12.2012: 05.01.2013: 22.01.2013 and 09.02.2013.

7.3. Even more curious is the fact that the respondent company has not placed on record the proof of despatch of the Debit Notes.

8. We have queried the counsel for the respondent company as to this aspect of the matter. We also asked the respondent company as to why no payment has been made in respect of the amount, which, even according to the respondent company is due and payable.

8.1. As adverted to above, according to the respondent company, a sum of Rs.3,51,402.30 was due and payable to the appellant.

8.2. At this juncture, learned counsel for the respondent company seeks a short accommodation.

9. Renotify on 17.07.2017. The Managing Director of the respondent company shall remain present, in Court, on the next date of hearing."

10.1. A perusal of the proceedings of 06.07.2017, would clearly show that even according to the respondent, a sum of Rs.3,51,402.30/- was payable to the appellant.

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10.2. This figure, according to the respondent, emerges after adjustment is made in the account of the appellant maintained by the respondent qua the debit notes issued by it.

10.3. There are in fact, five (5) debit notes, to which, the respondent has made a reference. These are debit notes dated: 04.12.2012: 26.12.2012: 05.01.2013: 22.01.2013 and 09.02.2013.

10.4. As was noted by us, in our order dated 06.07.2017, all five (5) debit notes curiously, were supposedly, issued and adjusted just before the statutory notice dated 27.03.2013, was dispatched by the appellant.

10.5. Pertinently, while the debit notes have been placed on record, there is nothing placed on record by the respondent as regards the proof of dispatch of the aforementioned debit notes.

10.6. It is in this context, on 06.07.2017, we had queried the learned counsel for the respondent as to why proof of dispatch of debit notes was not placed on record. We had also queried the learned counsel as to why the sum of Rs.3,51,402.30/- which, even according to the respondent, was due and payable, to the appellant, was not made over.

10.7. The learned counsel for the respondent, had sought a short accommodation on this score, which was granted by the Court and the matter was re-notified for 17.07.2017.

10.8. In order to get to the bottom of the matter, we had also directed the presence of the Managing Director of the respondent company via, order dated 06.07.2017.

11. Since, the matter could not be taken up on 17.07.2017 and 18.07.2017, no effective orders were passed on the said dates. It is in this background, the matter came up for hearing before us, today, i.e., 19.07.2017.

12. What clearly emerges from record, is that, the respondent does owe, admittedly, a sum in excess of what is statutory provided for under Section 434 to trigger the proceedings under Section 433 of the 1956 Act. According to the respondent, the amount owed is a sum of Rs.3,51,402.30/-.

12.1. This sum has, admittedly, not been paid. Furthermore, as noticed by us, herein above, the debt claimed by the appellant has got scaled down to the figure indicated viz, Rs.3,51,402.30/- only on account of five (5) debit notes, to which, we have made a reference above.

12.2. No proof of dispatch of the five (5) debit notes has been placed before us.

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12.3. The learned counsel for the respondent has candidly admitted before us that the proof of dispatch is not available with the respondent.

12.4. In these circumstances, we find that the appellant's case has a ring of truth in it. The respondent, having not denied the delivery of goods in issue, we are inclined to conclude that the respondent owes a debt to the appellant for a sum more than that which is statutorily provided for under Section 434(1)(a) of the 1956 Act.

12.5. The defence of the respondent is clearly moonshine and sham, as noted above, and even if, for the moment the defence set up is taken into account, a sum equivalent to Rs.3,51,402.30/- is, admittedly, owed by the respondent to the appellant.

12.6. As indicated in our order dated 06.07.2017, the learned Company Judge appears to have come to the conclusion that the action filed by the appellant was not maintainable as the debt had been denied and the apparent financial health of the respondent was good.

12.7. Our analysis of the matter has shown that amounts are owed by the respondent to the appellant. Therefore, the reasoning given that since the debt has been denied by the respondent, and thus the action would not lie, according to us, cannot be sustained.

12.8. As regards the financial health of the respondent as noticed by us in our order dated 06.07.2017, this observation has been made without any deep analysis. The observation appears to be based on the balance sheet of the respondent as drawn up on 31.03.2011.

12.9. Since, the learned Company Judge had not called for balance sheets for the years 2011-12 and 2012-13, he could not have formed a definitive view as to the financial health of the respondent.

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13. Furthermore, in our view, perhaps, the learned Company Judge was handicapped as neither a reply had been filed by the respondent to the company petition nor was the respondent represented on the date of hearing.

13.1. In so far as the appellant is concerned, it could not have done any better, as the last balance sheet which was available on the record of the Registrar of Companies (ROC) was the balance sheet for the year ending 31.03.2011.

14. Thus, having regard to the aforesaid facts and circumstances, we are inclined to set aside the impugned judgment. It is ordered, accordingly.

15. Furthermore, given the fact that the respondent has admitted to at least the fact, that a sum of Rs.3,51,402.30/- is payable to the appellant, we are inclined to admit the company petition (C.P.No.401 of 2013).

15.1. However, the consequential direction, for issuance of advertisement and appointment of a Provisional Liquidator are deferred for the moment, to enable the respondent to respond to the assertions made by the petitioner in the company petition. We make it clear, though, that we have not scaled down the claim of the appellant to the sum of Rs.3,51,402.30/-.

15.2. Accordingly, the counsel and their parties will appear before the learned Company Judge on 24.08.2017.

16. The appeal is disposed of on the aforementioned terms.

Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

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To

1. The Sub Assistant Registrar,
   Original Side,
   High Court, Madras-104

2. The Record Keeper,
   Original Side,
   High Court, Madras-104

+2cc to Mr.S.Soundararajan , Advocate, S.R.No.50873

O.S.A.No.81 of 2017

VGII(CO)
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