IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 187 OF 2015
IN
COMPANY PETITION NO. 550 OF 2013

Hydrocarbon Development
Co. Pvt. Ltd. … Appellant/ Org. Respondent.
V/s.
ETA Star Holdings Limited and anr. … Respondents.
(Respondent No.1-Org.Petitioner)

Mr. Ashish Kamath a/w. Mr. Zaid Ansari, Mr. Mangesh Kokare and Mr.Deep Morabia I/b Zaid Ansari and Associates for the Appellant.
Mr. Aditya Shah I/b Little and Co. for the Respondent No.1.

CORAM : A.S. OKA AND M.S. SONAK, JJ.
DATE : 3rd SEPTEMBER 2018.

PC:

1] Heard learned counsel for the parties.

2] The appellant challenges the order dated 14th November 2014 made by the learned Company Judge making Company Petition No. 550 of 2013 instituted by the respondent No.1 (respondent) absolute in terms of prayer clauses (a) and (b), which read as follows:

> *"(a) The said Company, Hydrocarbon Development Company Private Limited be wound up by and under the directions, supervision and control of this Hon'ble Court in accordance with the provisions of the Companies Act, 1956;*
> *(b) This Hon'ble Court be pleased to appoint the Official Liquidator, High Court, Bombay as Liquidator of the Company together with all its business, assets, properties, income and books of accounts with all the powers under the provisions of the Companies Act, 1956."*

3] Mr. Ashish Kamath, learned counsel for the appellant, submits that mere offers made by and on behalf of the appellant to pay certain amounts to the respondent No.1, could never have been construed by the learned Company Judge as some unconditional admissions of liability. He points out that to Clause 9.8 of the conditions of contract, on which the claim of the respondent was based and submits that this clause entitles the appellant company to question the invoices even after the payments may have been made under them. Mr. Kamath submits that the contractual provision in Clause 9.8, very clearly does not bar the appellant company from disputing liability to pay even though certain communications by and on behalf of the appellant company may have contained offers to pay the invoice amounts to the respondent No.1. Mr. Kamath submits that since contractual provision in Clause 9.8 has not even been considered by the learned Company Judge, the impugned order warrants interference.

4] Mr. Kamath submits that the correspondence, which is purported to contain assurances of payments to the respondent No.1, if construed in the proper context, clearly amount to '*without prejudice*' offers for payment. He points out that all such correspondence ought to have been construed in the context of Clause 9.8 of the contract, which entitles the appellant company to question the invoices even after payments may have been made under the same. Mr. Kamath submits that since this crucial aspect has been overlooked by the learned Company Judge, the impugned order warrants interference.

5] Mr. Kamath submits that the amounts claimed by the respondent were disputed and the appellant in fact had claims and counter claims against the respondent. Mr. Kamath points out that in terms of the contract, the respondent was required to furnish the bank guarantees, insurance policies and make the appropriate provisions for dumping of mud. He points out that there are admissions emanating from the respondent with regard to failures on this score. He points out that in fact, the learned Company Judge by order dated 20th July 2016 has directed the Official Liquidator to file a suit on behalf of the appellant company against the respondent in relation to such claims and counter claims. Mr. Kamath submits that the learned Company Judge's order dated 20th July 2016 constitutes a very relevant consideration for interfering with the impugned order of winding up of the appellant company.

6] Mr. Aditya Shah, learned counsel for the respondent, defends the impugned order by pointing out that the contentions now sought to be raised by the appellant were never even raised before the learned Company Judge. He points out that the appellant company from time to time made promises for payment and even gave confirmed payment schedules. He points out that after the appellant company reneged and the respondent was constrained to issue notice dated 9th June 2012 terminating the contract dated 6th April 2011, that the appellant for the first time, by its letter dated 18th June 2012 raised the issues relating to bank guarantee, insurance policies, dumping of mud etc. Again, the appellant company once again assured payments of the invoice amounts if the respondent was to agree for a fresh payment schedule and continue with the drilling operations under the contract. He points out that the so called disputes with regard to payment of the admitted and assured amounts were raised by the appellant company at a highly belated stage and despite the fact that there was absolutely no substance in the disputes so raised. He points out that the disputes apart from not being substantial, were by no means *bonafide* . He points out that on behalf of the appellant's statement was made that the appellant company is not in a position to even deposit the principal claim in order to establish *bonafides* and commercial solvency**.** Mr. Shah, therefore, submits that there is absolutely no error in the impugned order and this appeal may therefore, be dismissed.

7] The rival contentions now fall for our determination.

8] The respondent's claim, which has ultimately led to the passing of the impugned order arises from contract dated 6th April 2011 in relation to drilling and exploration of oil and gas in certain designated areas. The contract *inter alia* stipulated that the appellant makes payment within 30 days from the receipt of invoices from the respondent. In case of any dispute in relation to the invoices, such dispute had to be raised by the appellant within 30 days from the receipt of invoices and that too by stating the reasons for such disputes. The contract provides that the respondent was entitled to terminate the contract with 30 days written notice in the event of non-payment of amounts under the invoices.

9] The record bears out that the respondent from time to time raised several invoices, some of which were paid by the appellant company. In respect of the unpaid invoices, the appellant company vide e-mail dated 23rd May 2012 admitted their lapse but offered to pay the amounts between the period 7th June 2012 and 6th July 2012. The appellant gave further assurances that they would try to clear the invoiced amounts even earlier, if possible. In fact, to the e-mail dated 23rd May 2012, a full schedule of payments was attached and the respondent was requested to refrain from taking any drastic decision to close down the operations at the site. On the same date, i.e., 23rd May 2012, the appellant addressed yet another e-mail agreeing to prepone the date of the first installment.

10] Again, on 24th May 2012 the appellant sent yet another e-mail confirming and promising payments under the invoices. The contents of the both e-mails dated 23rd May 2012 and 24th May 2012 have been quoted by the learned Company Judge in paragraphs 3 to 5 of the impugned order. In the context of the contractual provisions which contemplated raising of disputes by stating reasons within 30 days from the receipt of invoices, the promises and assurances as contained in these e-mails militate against the contention that the payments were offered '*without prejudice*'.

11] In fact, in part compliance with the promises and assurances, the appellant, without any demur paid the respondent the first installment of US$ 135,000. Thereafter, however, the appellant company failed and neglected to make any further payments as assured by it in the two e-mails.

12] The respondent by notice dated 9th June 2012 terminated the contract recording therein that an amount of US$ 22,72,317 remained unpaid and called upon the appellant to pay the same. Some correspondence ensued between the appellant and the respondent, in which, for the first time, the appellant whilst not seriously disputing the liability to pay the amounts which it had promised to pay in its e-mails dated 23rd May 2012 and 24th May 2012, raised certain claims in the context of non-furnish of bank guarantee, insurance policies and some dumping of mud by the respondent.

13] In response to the respondent's statutory notice dated 15th April 2013, the same counter claims were sought to be advanced as some sort of defence to the respondent's claim. In response to the winding up petition as well, the same defences were once again urged. The learned Company Judge has quite correctly held that the belated disputes raised or the defences urged were neither bonafide nor substantial.

14] The so called defences based upon any alleged failure on the part of the respondent to comply with contractual requirements in relation to bank guarantee, insurance policies or dumping of mud sound in the arena of some sort of counter claims which the appellant seeks to raise after they were served with notice of termination dated 9th June 2012. The material on record indeed establishes that the appellant raised no disputes as regards the invoiced amounts within the time and in the manner stipulated in the contract, but rather sought for indulgence to effect payments under the same. Some payments were also effected in accordance with assurances given by the appellant, but thereafter the appellant reneged on its assurances and promises. In such circumstances, we see no error in the view taken by the learned Company Judge that the so called defences raised by the appellants were neither substantial nor *bona fide.*

15] The impugned order makes no reference to any contention based upon Clause 9.8 of the contract, possibly because such a contention was never even raised before the learned Company Judge in all seriousness or at all. In fact, there is neither any ground in the appeal memo nor any statement that such a contention was raised before the learned Company Judge but the same was never considered. It is well settled that such contentions cannot be raised for the first time in Appeal.

16] In any case, all that Clause 9.8 of the contract provides that the payment of any invoice shall not prejudice the right of the company to question the propriety of the charges therein, provided that company, during the course of this contract or within two years after termination of the contract shall give to contractor written notice of objection to any item or items thereof, the propriety of which company questions, specifying the reason for such objection. Should company, so notify the contractor, adjustment shall be made between the parties accordingly as the propriety or impropriety of such item or items may be determined.

17] As noted by the learned Company Judge, the record bears out that no disputes were raised by the appellant on the receipt of invoices from the respondent. On the contrary, clear and categorical assurances were made by the appellant that the invoiced amounts would be paid as per the payment schedule proposed by the appellant. Some payments were also made by the appellant in terms of the schedule so proposed. However, later on, the appellant reneged on its assurances. Even after the contract was terminated by the respondents, no serious disputes were raised with regard to the invoiced amounts, but rather, further assurances were offered for payments on the basis of revised payment schedule and provided the respondent continue with the contract work. There is no material produced on record by the appellant that the appellant gave any written notice of objection to any item or items referred in the invoices, the propriety of which the appellant sought to question and that too by specifying reasons for such objections. In such circumstances, the contention based upon Clause 9.8 of the contract deserves no acceptance even though, the record bears out that such a contention was never even raised before the learned Company Judge.

18] The Apex Court in ***M/s. Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt. Ltd. -1971 (3) SCC 632,*** has held that if a debt is *bona fide* disputed and the defence is a substantial one, the Court will not wind up the company. However, before the Company Judge accepts any defence based upon *bona fide* disputed debt, it will act on the following principles:

"(i) That the defence of the company is in good faith and one of substance;

(ii) That the defence is likely to succeed in point of law; and

(iii) That the company adduces prima facie proof of the facts on which defence depends."

18] The learned Company Judge has referred to Palmer's Companies Precedence, 17th Edition Part II at page 27 in which the position of *bonafide* dispute as a defence to a petition seeking winding up has been explained thus:

> *"The mere omission of a company to comply with a notice requiring payment of a debt, served pursuant to the above para, is not 'neglect' within the meaning of that paragraph if there is reasonable cause for the omission, and the fact that the debt in question is bona fide disputed is a reasonable cause. It is now settled that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court, and should be dismissed with costs.*
>
> *But, of course, if it is shown that the alleged dispute is not a bona fide one, the objection to the petition fails.* ***Thus it is not uncommon for a company, after again and again begging for time for payment of a debt, to spring on the petitioner, at the last moment, the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion, and meets with no favour from the Court."***
>
> *(emphasis supplied)*

19] The circumstance that the learned Company Judge by order dated 20th July 2016 made in the course of liquidation proceedings may have directed the Liquidator to institute a suit against the respondent in the context of the alleged breaches in relation to non-furnish of bank guarantee, insurance policies or issue relating to dumping of mud, is really not some good ground to interfere with the impugned order. Merely because the appellant may have raised some cross-claim against the respondent is not a ground to necessarily dismiss a winding up petition without even examining whether the defences based upon such cross-claim are both *bona fide* and substantial.

20] In ***Re Welsh Brick Industries Ltd. - (1946) 2 ALL E.R. 197,*** it was held that inspite of the fact that unconditional leave to defend had been granted in the King's Bench action, the Company Court could look into the matter and if it finds that there as no substance in the defence, could proceed to entertain the petition for winding up of the company.

21] The learned Company Judge, in order to test the *bonafides* of the appellant, had in fact enquired from the advocate appearing for the appellant as to whether the appellant was willing to deposit at least the principal claim of the respondent. The advocate for the appellant, on instructions, had fairly informed the learned Company Judge that the appellant is not in a position to do so. Our query in the Appeal Court also met with the similar response.

22] For all the aforesaid reasons, we see no good ground to interfere with the impugned order made by the leaned Company Judge. This appeal is therefore, dismissed. There shall however, be no order as to costs.

(M. S. SONAK, J.) **(A.S.OKA, J.)**