IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 956 OF 2015

M/s. Blue Circle Infratech .. Petitioner
Vs.
M/s. Devisha Infrastructure Pvt. Ltd. .. Respondent

Mr.Narendra Walawalkar, senior advocate a/w. Mr. Ghanshyam Upadhyay, Mr. Kamalesh Mishra and Mr. Parth Pandey i/b Law Juries for petitioner.

Mr.Dinyar Madon, senior advocate a/w. Mr. Mikhail Behl, Mr. Sajal Yadav and Mr. S.K. Saxena i/b Karan K. Vyas for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 6TH FEBRUARY 2018

P.C.

1 This petition is filed to wind up the company M/s. Devisha Infrastructure Pvt. Ltd. (the company) on the ground that the company is indebted to petitioner, is unable to discharge its debt and is commercially insolvent.

2 Petitioner is engaged in the business of development of the land within the area of Mumbai, Navi Mumbai and Raigad District. The company is also in the similar business.

3 The company approached petitioner expressing a desire to purchase lands of petitioner situated at Village Rohinjan, Taluka Panvel, Dist. Raigad.

Agreements were entered into between petitioner and the company. Copies of the two agreements, which are the subject matter of this petition, are annexed to the petition. One term and condition of the said agreements was that after execution of the agreements for sale, petitioner was to take steps for change of user by obtaining N.A. orders from the concerned authorities concerning the lands and thereupon the company was to pay balance consideration. After payment of the balance consideration, Deed of Conveyance was to be executed and registered.

4 By virtue of various agreements for sale, which include two agreements that are the subject matter of the present petition (the said agreements), the company acquired from petitioner plots of land of a total value of Rs. 84,90,69,000/-. It is also to be noted that in the petition it is admitted that there is a running and current account between the company and petitioner concerning the transactions of the said lands and the company made various payments to petitioner from time to time totaling to Rs.74,67,60,500/- leaving a balance of Rs.10,23,08,500/-.

5 The details of land which was covered under the said agreements is described in paragraph 9 to the petition. With the agreement, petitioner also issued an irrevocable power of attorney to the company. Though a

copy of the power of attorney or the original power of attorney is not produced by either party, as mentioned in the agreement, the company was entitled to use the said power of attorney to execute the deed of conveyance of the plot of land even to third party but after paying the balance consideration. Admittedly, petitioner did not take steps to convert the plots of land from agricultural to N.A., but the plots have been converted from agricultural to NA. Though it is alleged, petitioner came to know about this conversion much later and company behind the back of petitioner got it converted, certainly, the company would have got the plots of land converted into NA using the power of attorney. Mr. Walawalkar relied upon the statements of accounts annexed at Page 24 and Page 25 of the petition. Page 24 is in internal ledger account maintained by petitioner for the period 1st April 2012 to 19th March 2015 and page 25, according to petitioner is the confirmation of account given by the company (Exh.'B'). The confirmation of accounts for the period 1st April 2012 to 31st March 2013 is dated 1st April 2013.

According to these documents, the amount payable to petitioner is only Rs. 3 crores and not Rs.10,23,08,500/- as alleged in the petition. This is itself raises a disputed question of fact.

6 The land was converted into NA pursuant to orders passed on 13th January 2014 and 7th August 2014. It is the petitioner's case that even

thereafter the company did not inform petitioner and complete the sale. The statutory notice under the Companies Act, as alleged in the petition, demanding balance consideration was caused to be issued on 24th December 2014 and the petition was filed on 2nd March 2015.

7 In the meanwhile, the Enforcement Directorate started investigating the company and its directors under the provisions of Prevention of Money Laundering Act, 2002 (PML Act) and petitioner's statement was recorded on 25th August 2015. The land, which is the subject matter of the petition, came to be attached by Enforcement Directorate, on 13th November 2015.

8 Affidavit in reply to the petition of one Satyan A. Kesarkar, one of the director of the company has been filed on 21st July 2017 denying liability. The defences raised are :

(a) Statutory notice dated 24th December 2014 was not received;

(b) Petition is not maintainable and a summary suit is not even maintainable because it is based on accounts and admittedly in the petition, it is stated that there has been running and current accounts between the company and petitioner concerning the transaction of the various lands.

(c) Though the contract is executory in nature which entails reciprocal promises and because land has been attached by the authorities under PML Act, even if the company makes the balance payment today, petitioner will not be able to enter into Deed of Conveyance;

(d) If petitioner's case was that even after the N.A. orders were passed, the company did not come forward to have the sale deed executed, the claim can only be for damages for breach of contract and that cannot be a debt as defined under the Companies Act, 1956 and unless petitioner obtains a decree, they cannot file a winding up petition.

(e) The post dated cheques which were given by company to petitioner was only by way of security to ensure that the company fulfills its obligation under the contract.

9 After hearing the opposing counsel and having considered the petition and the documents annexed thereto, I am of the opinion that there are quite a few disputed questions of facts which require to be proved in trial.

It has to be noted that the cheques that were given by the company as security, have been returned and there is not even a letter shown in the petition or in the subsequent affidavits, written from petitioner to company calling upon the company to re-issue fresh cheques to justify the stand of petitioner that these cheques were revalidated periodically.

The fact that the entire petition is based on running accounts between the parties itself raises a doubt that the amount claimed cannot be called a debt payable by the company.

Moreover, in paragraph 8 of the petition, it is stated that out of Rs.84,90,69,000/-, a sum of Rs. 74,67,60,500/- has been paid leaving a balance sum of Rs.10,23,08,500/-. The Ledger Account at Page 24 to the petition and Confirmation of Accounts at Exh.'B' relied upon by petitioner shows only Rs.3 crores as payable and there is no explanation in the petition for the difference.

10 Moreover, the document primarily relied upon by petitioner, which is at Page 24 of the petition, shows that it is the Ledger Account maintained by petitioner; the description of the land given in that document is different from the description given in paragraph 9 of the petition. It has to be noted that it is petitioner's case that there have been many transactions between the parties. Even the confirmation of accounts, assuming it says

that Rs.3 crores is still payable from company to petitioner, there is nothing to indicate that this amount is payable with respect to the land described in para 9 of the petition or under the said agreements.

11 Whether petitioner can execute conveyance of the land with the company or whether company can use the power of attorney to have the land conveyed in their favour, assuming company makes payment of the balance amount in view of the land being attached under PML Act, are questions that cannot be summarily decided. Moreover, it is petitioner's case that company has not fulfilled its obligations under the Contract inasmuch as company was unable to complete the sale upon obtaining N.A. orders. At the most, in my view, that can be called a breach of contract as petitioner will have to file an action in an appropriate forum for damages. Further, from the postal acknowledgement card annexed at Exh.'J' to the petition, one cannot assume that the statutory notice itself was received by the company. In the affidavit in reply, the company has denied having received a statutory notice. In the rejoinder, it is simply stated that petitioner has performed its part of obligation and the defence raised by respondent in the affidavit in reply is frivolous and moonshine.

12 In these facts and circumstances, as various disputed questions of

facts arise, I am unable to gather myself to conclude that there is a debt owed by the company to petitioner and company is unable to discharge its debt or is commercially insolvent.

13 Company petition dismissed. No order as to costs.

(K.R. SHRIRAM, J.)