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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CO.APP. 1/2018

Date of decision: 1st February, 2018

M/S COMEX INFRATECH PVT. LTD. Appellant
Through Mr. Praveen Kumar, Advocate.

versus

M/S BHUSHAN DEALMARK PVT. LTD. Respondent
Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

Appellant-M/s. Comex Infratech Pvt. Ltd., impugns order dated 24th May, 2017 passed by the Company Judge in Company Petition No.55/2014 and C.A. No. 1982/2014, preferred by the respondent before us, M/s. Bhusan Dealmark Pvt. Ltd.

2. The impugned order admits the company petition and appoints the Official Liquidator attached to this Court as Provisional Liquidator with a direction to prepare complete inventory of all assets, and take over the assets, books of accounts, records etc. Premises are to be sealed.

3. Directions have been issued for furnishing details regarding names and addresses of the Directors, location of the books of accounts, moveable

and immovable assets etc. to the Official Liquidator. Citations have also been directed to be published.

4. The present appeal had come up for hearing on 12th January, 2018, when it was noticed and recorded that the appeal paper book filed was incomplete and without entire set of pleadings and documents filed before the Company Court. Relevant court orders were not enclosed. The appellant has thereafter filed documents.

5. Company judge vide Order dated 22nd July, 2016, had imposed costs of Rs.22,000/- on the appellant for 222 days' delay in filing and taking the reply to the winding up petition on record. Another opportunity to pay costs was granted by the Company Judge vide order dated 19th January, 2017. Yet, the said costs were not paid till the impugned order was passed on 24th May, 2017. In these circumstances, the reply filed by the appellant did not come on record and, therefore, cannot be taken into consideration.

6. The second default on part of the appellant as noticed in the impugned order was failure to comply with the direction in the order dated 22nd July, 2016 for filing of affidavit by the Managing Director, or in his absence, by all the Directors of the appellant company. It is accepted that affidavit has not been filed.

7. However, counsel for the appellant states that cost of Rs.22,000/- was paid by cheque on 10th October, 2017 to the counsel for the respondent after the impugned order and has been encashed. Such averment is not to be found in the grounds of appeal, which was filed on 26th September, 2017. In fact, the grounds of appeal do not refer to imposition of costs, failure to pay and that the reply was not taken on record.

8. We have also examined averments made in the winding up petition under Section 433 (e) read with Section 434 and 439 (1) (b) of the Companies Act, 1956 on the ground of inability to pay debts. The appellant had placed a work order on the respondent vide communication dated 23rd March, 2013 for one Motor Grader on monthly hiring charges of Rs.2,50,000/- plus service tax. The monthly charges were for 27 days per month, for up to 270 hours. Overtime charges were payable for usage beyond 27 days or 270 hours per month. The winding up petition refers to bills raised from time to time for monthly charges and over-time charges for the period of usage beyond 27 days or 270 hours and the outstanding amount due and payable by the appellant. Reference was made to the e-mail dated 8th January, 2014 sent by the appellant to the respondent, enclosing a copy of the statement of accounts. The appellant had acknowledged and accepted that Rs.12,00,155/- (possibly wrongly mentioned as Rs.12,37,780/- in the impugned order) was due and payable. The amount includes Rs.2,72,408/- and Rs.5,00,000/-, for which the appellant had issued two cheques, dated 9th September, 2013 and 5th November, 2013, drawn on Corporation Bank and Axis Bank, respectively. These cheques, along with another cheque dated 26th August, 2013, drawn on Corporation Bank for Rs.3,04,716/-, were lost and were not encashed. The appellant had asked for an indemnity from the respondent to issue fresh cheques. The appellant had subsequently paid Rs.3,04,716/- by way of RTGS. However, it is accepted and admitted that Rs.2,72,408/- and Rs.5,00,000/- were never paid.

9. We have referred to the aforesaid facts and figures only to highlight and satisfy ourselves whether any bona fide dispute or debate was raised by the appellant. This is because the reply filed to the company petition, which

was not taken on record by the Single Judge for want of costs, was rather vague and ambiguous. It was stated that the dispute raised relates to number of hours, overtime beyond normal hours and whether monthly payment was for 26 days or 27 days. It is indisputable and accepted that the Motor Grader had worked at the site of the appellant. Log book when the Motor Grader had operated was admittedly signed by the officer/employee of the appellant. Ex facie, we find that the pleas and defences raised by the appellant are sham and make belief. There is a lame and feeble attempt to resile from the acknowledgement and admission in the e-mail dated 8th January, 2014. The defence has to be rejected.

10. We believe that the appellant has been marking time and delaying payment. As per acknowledgment in the statement of accounts dated 8th January, 2014, Rs.12,00,155/- was due and payable. No payment has been made since then. Interest on the said amount would be due and payable. The reply to the company petition was filed belatedly after 222 days. Costs imposed vide order dated 22nd July, 2016 was not paid for nearly a year, when the impugned order dated 24th May, 2017 was passed. There was also non-compliance of the order dated 22nd July, 2016, as affidavits enclosing therewith relevant information and documents were not filed. Order dated 19th January, 2017 had directed the Managing Director to be present, failing which, the Court would be constrained to take coercive steps. This was also noticed in the impugned order. Admittedly, the Managing Director of the appellant company was not present.

11. It is stated that Jatinder Singh Bagga and his son Shiv Karan Bagga are Directors of the appellant company and Shiv Karan Bagga has suffered kidney failure. We can understand the difficult and hard times being faced,

but we cannot accept repeated and prolonged failure on the part of the appellant company and its Directors to file reply, and then comply with the orders. Court proceedings are not to be taken lightly. Straight forward and truthful reply and admission would have been appreciated. More than four years have lapsed but even the admitted amount due and payable, as were accepted in the e-mail dated 8th January, 2014, has not been paid. Wait cannot be endless and the creditors have their own obligations.

12. In these circumstances, we are not inclined to issue notice in the present appeal and the same is dismissed. However, the dismissal would not mean that the appellant cannot approach the Company Judge with payment towards principal amount, interest and cost. Of course, compliance by filing affidavit etc. should be also made. In case and if such application is filed, the Company Judge would consider the same in accordance with law.

13. With the aforesaid observations, the appeal is dismissed without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

FEBRUARY 1, 2018

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