

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 26.02.2019

CORAM :

The Honourable Mr.Justice R.Subbiah
and
The Honourable Mr.Justice Krishnan Ramasamy

OSA.No. 187 of 2014

M/s.Percept H Private Limited
P - 22, Raghuvanshi Estate,
Senapati Bapat Marg,
Lower Parel, Mumbai 400 013
Represented by its Authorised Signatory

... Appellant

Vs

M/s.Galaxy Amaze Kingdom Limited
Galaxy House,
No.14, Main street,
Venugopal Nagar Main road,
Thirumullaivoyal,
Chennai 600 062.

... Respondent

Prayer: Original Side Appeal filed under Order 36, Rule 1 of Original Side Rules to set aside the judgment and decree dated 04.03.2014 passed in Company Petition No.41 of 2012.

Petition filed under Sec.433(e), (f) and 434(1) (a) of the Companies Act 1956 to i)Order winding up of the Respondent Company namely M/s. Galaxy Amaze Kingdom Ltd and ii)Appoint the Official Liquidator as the Liquidator to take charge of and protect all the assets and affairs of the Respondent Company and in whom the said assets shall vest pending the winding up proceedings.

For Appellant : M/s.B.Giridhara Rao

For Respondent : Mr. Prakash Goklaney

J U D G M E N T

(KRISHNAN RAMASAMY, J.)

The present Original Side Appeal has been preferred by the appellant/petitioner against the order of the learned Single Judge in C.P.No.41 of 2012 dated 04.03.2014.

2. The brief facts of the case is as follows:-

i) The appellant/Company have been carrying on business as an Advertising Agency. The Registered Office of the appellant/Company is situated at Mumbai, and its Branch Office is located at Chennai. During the course of its business, the respondent approached the appellant/petitioner and availed the services relating to press release and other media services to advertise their products. Pursuant to the services rendered by the appellant/petitioner to the respondent, the appellant/petitioner raised four invoices, the details of which are mentioned below in a tabulated column:-

S.No.	Invoice No.	Date	Amount
1	No.GAK/08/58	30.05.2008	Rs.2,47,383/-
2	No.GAK/08/59	31.05.2008	Rs.3,29,844/-
3	Nos.GAK/08/69	30.06.2008	Rs.2,22,449/-
4	Nos.GAK/08/82	31.07.2008	Rs.6,83,270/-
		Total	Rs.14,82,946/-

ii) The respondent, vide an e-mail, dated 13.08.2008 admitted their liability and assured that the outstanding payment will be made to the appellant on or before 22.08.2008. The respondent, once again, vide e-mail dated 09.09.2008, expressed their difficulty in settling the payment and apologized for the delay in remitting the payment, and assured that they will pay atleast an outstanding sum of Rs.10 lakhs to the appellant, on or before 25.09.2008. Again, by letter dated 09.12.2008, the respondent expressed the difficulty to settle the outstanding amount of Rs.10,00,000/- and assured that the said sum will be settled on or before 29.12.2008. The respondent also issued a cheque for a sum of Rs.6,66,961/- towards part payment. However, when the appellant presented the said cheque for encashment, the same was returned with an endorsement as "Insufficient Funds". After causing the statutory notice, the appellant herein filed a criminal complaint, bearing case No.23196/SS/2009 under Section 138 of the Negotiable Instruments Act (henceforth, referred to N.I. Act) before the 62nd Metropolitan Magistrate, Dadar, Mumbai, against the respondent and its Directors and the said criminal case is pending.

3. In spite of the repeated requests made by the appellant, the respondent failed to settle the outstanding balance payment of Rs.13,61,347/-. Therefore, the appellant issued a legal notice dated 04.03.2011 to the respondent,

calling upon the respondent to pay a sum of Rs.13,61,347/- together with interest at 18% p.a. amounting to Rs.3,89,106/-, totaling to Rs.17,50,453/-, within 21 days from the date of receipt of the notice, failing which, wind up proceedings will be initiated against them. The respondent, on the other hand, after admitting their liabilities vide its e-mails dated 13.08.2008, 09.09.2008, (10.09.2008) and letter, dated 09.12.2008, sent a reply notice disputing the liabilities for the first time. As the said denial is not bonafide, the appellant preferred the Company Petition before this Court under Sections 433(e), (f) and 434(1) (a) of the Companies Act, 1956 to wind up the respondent/Company on the ground of its inability to pay the debts. The learned Single Judge, vide impugned order dated 04.03.2014 dismissed the Company Petition. Hence, the present Appeal.

4. The learned counsel appearing for the appellant contended that, pursuant to the services rendered by the appellant to the respondent, the appellant/petitioner raised four invoices and the respondent also admitted their liabilities vide letter dated 13.08.2008 stating that they are expecting receipt of some payment from 2-3 places of collection, and that, they will remit the amount due to the appellant. Subsequently, by another letter dated 09.09.2008, the respondent has stated that a sum of Rs.10,00,000/- will be paid on or before 25.09.2008, and also apologized for the inconvenience caused to the appellant and further stated that they are putting all efforts to collect payments due to them from other sources also so as to pay the amount to the appellant at the earliest. But, by another communication dated 09.12.2008, the respondent denied the liability, which necessitated the appellant to initiate proceedings under Section 138 of the Negotiable Instruments Act and the same are pending before the Metropolitan Magistrate Court at Dadar, Mumbai. The learned counsel furthermore submitted that proceedings under Section 138 of N.I. Act, and the wind-up proceedings initiated under Sections 433 (e), (f) and 434(1) (a) of the Companies Act, 1956 are entirely different proceedings for different relief, and the same cannot be interlinked.

5. The learned counsel further submitted that though challenging the said proceedings, the respondent filed Criminal Revision Petition and Writ Petition, contending that the Magistrate Court, in Bombay does not have jurisdiction to entertain the complaint, only the Courts in Chennai has jurisdiction, both the Sessions Court and High Court at Bombay dismissed those two Petitions filed by the respondent, holding that the issue of jurisdiction has to be decided only at the time of trial. Therefore, as on date, the Criminal Case filed by the appellant is pending. However, the appellant sensing that

the respondent is commercially and financially insolvent and are finding difficult to settle the claims, initiated wind-up proceedings by filing the Company Petition. However, the learned Single Judge without considering all these aspects, dismissed the Company Petition for the reason that there are disputes in the liabilities, which cannot be resolved in a Company Petition, which is totally against the settled principle of law. In support of such contention, the learned counsel referred to the decision of the Hon'ble Supreme Court, reported in [(1971) (3) SCC 632] in the case of M/s.Madhusudan Gordhandas & Co Vs Madhu Woollen Industries Pvt.Ltd., wherein, it is held as follows:-

" 20. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon. and the sum demanded by the, creditor was unreasonable (London and Paris Banking Corporation reported in (1874) LR 19 Eq. 444. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company When the company contended that the work had not been done properly was not allowed. (Re. Brighton Club and Norfolk Hotel Co. Ltd. Reported in (1863) 35 Beav 204)

21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (Re. A Company 94 S.J. 369) reported in 94 SJ 369 Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (Re. Tweeds Garages Ltd. (1962) CH 406. The principles on 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."

Therefore, he submitted that the aforesaid principle laid down by the Hon'ble Supreme Court is applicable to the present case also. Further, the learned counsel pointed out that, the stand taken by the respondent that such e-mails were not sent by them, but by some other person, without their knowledge, is false, as no evidence to prove the same were produced by the respondent/Company.

6. On the other hand, the learned counsel for the respondent strongly disputed the entire liability of the respondent. The learned counsel submitted that, in the reply notice, the respondent have categorically disputed their liability and the cheque was issued only for security purpose and the same was presented by the appellant for realization, without the knowledge of the respondent and lodged a criminal case against the respondent under N.I. Act, as if, the respondent has issued invalid cheque, and the said case is pending before the 62nd Metropolitan Magistrate, Dadar, Mumbai. Further, the learned counsel submitted that, even e-mails dated 13.08.2008, 09.09.2008 and letter dated 09.12.2008, alleged to have been sent by the respondent were not sent by them, but the same were sent by some other person, without the knowledge of the respondent.

7. The learned counsel further submitted that, in response to the legal notice sent by the appellant, dated 04.03.2011, the respondent sent a reply, clearly stating that since criminal proceedings under N.I. Act have been initiated, and the same are pending trial before the Competent Court, and that, it is premature to initiate proceedings under the provisions of Companies Act, since it is yet to be decided as to whether, there is a debt subsisting. Therefore, the learned counsel submitted that, this aspect was rightly taken note of by the learned Single Judge and rightly dismissed the Company Petition holding that when the claim made by the appellant/petitioner is disputed by the respondent and proceedings under Section 138 of N.I. Act are pending before the competent court in respect of the very same amount claimed by the appellant, the question of invoking jurisdiction of the Company Court does not arise. Therefore, the learned counsel submitted that the order passed by the learned Single Judge is well considered and does not call for interference in this Appeal.

8. We have heard the learned counsel appearing for the appellant as well as the respondent and perused the materials on record.

9. On perusal of the e-mails, dated 13.08.2008 and 09.09.2008, which were filed by the appellant, in the form of typed-set of documents, it is seen that, such e-mails were addressed to one Arwa Kapasi, the Accounts Manager of the appellant/Company by Mr.M.P.Balaji Prakasam, the Director of the respondent/Company, wherein, the respondent/Company has categorically admitted the liability and infact, in one of two such communications dated 09.09.2008 and 09.12.2008, they have promised to pay Rs.10 lakhs of the outstanding amount.

10. Therefore, it is patently clear that the e-mails were sent by the respondent/Company to the appellant/Company. Thus, when it is clear that e-mails sent to the appellant were in the name of the respondent Company, by their Director, Mr.M.Balaji Prakasam, the stand taken by the respondent that such e-mails were not sent by them, but by some other person, without their knowledge, is not acceptable and appears to be fallacious. Even for the sake of arguments, if the contention of the respondent is accepted that without their knowledge, such e-mails were sent to the appellant, the respondent has not produced any evidence to prove the same. Atleast, the respondent could have produced document showing the action taken by them for such wrongful act committed by the person, who sent those e-mails in an unauthorized manner. Further, even in the reply notice sent by the respondent to the statutory notice issued by the appellant, no such stand was taken by the respondent. So in these circumstances, the defence taken by the respondent is not bona fide and it is only moonshine defence. Further, we would like to point out that proceedings filed under Section 138 N.I. Act, is for the purpose of prosecuting the accused under N.I. Act since the cheque issued by the respondent was dishoured. Whereas, the proceedings under the Companies Act to wind-up the respondent/Company, is on the ground that the respondent/Company is not able to pay the debts, due to their commercial insolvency. Therefore, we do not have any hesitation to hold that the Company is not in a position to clear the outstanding dues of the appellant as promised.

11. Hence, we are of the opinion that a prima facie case is made out by the appellant and the impugned order passed by the learned single Judge is liable to be set aside. Accordingly, we set aside the order passed by the learned Single Judge in the Company Petition and are inclined to admit the present Company Petition.

12. Accordingly, the Company Petition is admitted.

(i) Notice on the Court Notice Board.

(ii) Notice to the respondent.

(iii) Notice to the Registrar of Companies, Chennai.

(iv) Affixture of notice at the premises of the Registered Office of the respondent company.

(v) The appellant is directed to publish the Company Petition in one issue of Tamil Daily, "Malaimalar" and in one issue of English Daily "Business Time" and in the Tamil Nadu Government Gazette fixing the date of hearing on 24.04.2019.

(vi) The appellant is directed to publish the company petition giving at least fourteen days clear advance notice.

(vii) The Official Liquidator, High Court, Madras is appointed as Provisional Liquidator and he is directed to take charge of the assets of the respondent company. The Ex-Directors of the respondent company are directed to file their statement of affairs before the Official Liquidator within a period of 21 days. The appellant company shall deposit a sum of Rs.25,000/- (Rupees Twenty Five Thousand Only) towards initial expenses before the Official Liquidator appointed in this matter.

13. List the Company Petition on 24.04.2019, before the Company Court for further adjudication.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Registrar of Companies,
Chennai.

2.The Official Liquidator,
High Court, Madras.

3.The Sub Assistant Registrar,
O.S.Section,
High Court, Madras.

+1cc to Mr.Prakash Goklaney, Advocate Sr.17855

OSA No.187 of 2014

vba[co]
srg 04/04/2019