(2013) 09 DEL CK 0053

Delhi High Court

Case No: Co. Petition 322 of 2012 and Co. Application 1538 of 2013

M/s. Shubham Constructions		APPELLANT
	Vs	
M/s. MVD Auto Components Pvt. Ltd. and Another		RESPONDENT

Date of Decision: Sept. 13, 2013

Acts Referred:

- Companies Act, 1956 - Section 433, 433(e), 434
- Evidence Act, 1872 - Section 92

Citation: (2013) 10 AD 373 : (2014) 182 CompCas 547 : (2013) 204 DLT 465 : (2013) 138 DRJ 274

Hon'ble Judges: R.V. Easwar, J

Bench: Single Bench

Advocate: Sunil Satyarthi and Mr. Raman Gandhi and Mr. Rahul Gola, for the Appellant; Sumit Bansal and Ms. Sumi Anand, for the Respondent

Final Decision: Dismissed

Judgement

R.V. Easwar, J.

This is a petition filed by M/s. Shubham Constructions hereinafter referred to as "the petitioner", u/s 433(e) read with section 434 of the Companies Act, 1956 seeking winding up of M/s. MVD Auto components Pvt. Ltd., hereinafter referred to as "the respondent". The petitioner is a proprietary firm engaged in the business of construction. The respondent is a company incorporated under the Companies Act. It manufactures and exports auto electrical switches, sensors, plugs etc. for passenger cars, commercial vehicles, earthmoving machinery etc.

2. The respondent approached the petitioner to construct its factory premises. An agreement was entered into between the petitioner and the respondent on 22.11.2007 setting out the terms and conditions. Clause 9 of the agreement provided that the respondent shall pay a sum of Rs. 1.20 crores to the petitioner for

the construction and that the bills as per approved quotation presented by the petitioner shall be cleared as per the schedule attached to the agreement. Clause 13 provided that the respondent can reduce or extend the covered area of the building, in which case the rate will be calculated at Rs. 700 per sq. ft for civil construction, Rs. 60 per sq. ft for electrical work and Rs. 75 for sanitary and plumb work. Another agreement was entered into between the petitioner and the respondent on 4.6.2008. The terms and conditions of this agreement were substantially the same as in the earlier agreement. However, clause 9 provided that the respondent shall pay a sum of Rs. 60 lakhs to the petitioner for the construction. Clause 13 provided that the respondent can reduce or extend the cover area of the building and in such a case the rate for the construction will be Rs. 450 per sq. ft for civil works, Rs. 35 per sq. ft for electrical work and Rs. 75 for sanitary and plumbing work.

3. On 27.4.2012 the petitioner sent a statutory notice u/s 433/ 434 of the Act to the respondent. In this notice the petitioner stated that according to both the agreements, the total work was for Rs. 1.80 crores and that as per the final bill given by the petitioner, the amount payable by the respondent was Rs. 96,33,752/-. It was stated that the aforesaid amount has not been paid despite repeated demands and even after the possession of the premises, after construction, was handed over to the respondent after receiving the consent and the certificate issued by the architect namely S.K. Sami. It was pointed out that the amount as aforesaid was payable to the petitioner along with simple interest at 24% per annum from June, 2010. The notice was duly served on the respondent who filed a reply to the same vide letter dated 7.5.2012. In its letter, the respondent stated as under:

That without admitting the contents of your notice dated 27/4/2012 you are hereby informed that your client should provide the "Statement of Accounts" on the basis of which the figure of Rs. 96,33,752/- (Ninety Six Lacs Thirty Three Thousand Seven Hundred Fifty Two Rupees only) is arrived at as mentioned in your above notice along with the proofs/receipts of WCT, Service tax, Power Installation Challan, Fire NOC and Labour Cess Challans with Copy of registration with Labour Department, proof of payment with ESI and EPF, Daily deployment Labour Report and also Annexure-A and Annexure-B as mentioned in your notice but the copy of the same not annexed with the same within 3 working days from the receipt of this intimation at the address mentioned herein above of my client. Furthermore, my client reserves their rights to reply upon your notice dated 27/4/2012 after receiving statement of accounts and other auxiliary documents as mentioned herein above from your client.

4. A reminder was also sent by the respondent to the petitioner stating that the petitioner had not sent the statement of accounts as demanded by the respondent and calling upon the petitioner to send the statement of accounts within 3 working days from the receipt of the letter. It was stated that the respondent would reply to the petitioner''s notice in detail after getting the statement of accounts.

5. Since the respondent did not clear the dues to the petitioner, the petitioner filed the present winding up petition on 12.7.2012. On 16.7.2012 it sought permission of this Court to file an additional affidavit along with the statement of account. Permission was granted and the additional affidavit was filed along with the statement of account.

6. The contention of the learned counsel for the petitioner is that the respondent was due to pay Rs. 1.80 crores under both the agreement, that the total cover area built was 13,498.85 sq. ft @ Rs. 1285 per sq. ft and the total work done amounted to Rs. 2,23,34,998/-. Out of this amount the respondent had paid Rs. 50,76,246/- by cheques and Rs. 76,25,000/- in cash, leaving a balance of Rs. 96,33,752/-. It was submitted that the respondent itself admitted liability of Rs. 1,27,00,246/- which it actually paid and this fact was also recorded in the architect''s certificate and therefore it is not open to the respondent to contend that the total value of the contract was only Rs. 1.20 crores. It was further submitted that whatever defects in the work that were pointed out by the respondent were removed by the petitioner between October, 2009 and June, 2010 and the respondent had also occupied the premises and the petitioner cannot be held liable for the defects which arose due to wear and tear and lack of maintenance on the part of the respondent and that too for an indefinite period, contrary to the normal practice of holding the contractor liable only for a period of six months to one year from the date on which the possession is handed over after construction. It was further argued that the defects were pointed on 24.10.2009 in a joint meeting between the petitioner and the respondent and all these defects were removed by the petitioner and thus the amount claimed by the petitioner was payable. My attention was drawn to a series of mails exchanged between the parties and it was submitted that the respondent kept on making more and more demands and pointing out to more and more defects in the construction only with a view to delaying the payment due to the petitioner, even though these defects were not for the petitioner to remove as per the agreements entered into between the parties. It was contended, relying on section 92 of the Evidence Act, that no oral testimony is permissible against the terms and conditions which are reduced into writing and it is not therefore open to the respondent-company to point out alleged defects in the construction and keep increasing them for an indefinite period after taking over possession. It was submitted that the defence set up by the respondent was not substantial and amounted to moonshine. It was accordingly contended that the winding up petition should be admitted.

7. On the other hand the learned counsel for the respondent contended that the defence set up by the respondent was substantive and did not amount to moonshine. He pointed out that clause 3 of both the agreements defining the scope of the work was identical and it is inconceivable that there can be two agreements for the same work. He submitted that the petitioner was not even clear as to how much is due to it by the respondent. It is pointed out that as per the statutory

notice, the petitioner demanded a sum of Rs. 96,33,752/- with simple interest at 24% per annum from June, 2010. However, in the petitioner''s letter dated 6.7.2011 the amount demanded was Rs. 38,10,760/-; in the earlier e-mail dated 17.1.2011 the amount demanded was "approx 35 lacs". It was pointed out that when the petitioner does not know as to how much is due and payable to it by the respondent, there is no ground for filing the winding up petition. It was submitted that there were disputes with reference to all aspects of the contract. Moreover, the petitioner itself has admitted that there is a provision for arbitration in clause 12 of the agreements dated 22.11.2007 and 4.6.2008 under which the architect S.K. Sami was the sole arbitrator and even in the letter written by it to the arbitrator on 29.12.2012 it has not been made clear by the petitioner as to what is the liability of the respondent. Reliance was also placed on the certificate issued by the arbitrator S.K. Sami who proceeded on the basis that the total value of the contract was only Rs. 1.20 crores; even as per the arbitrator (Annexure R8) the total work done by the petitioner was of the value of Rs. 1,45,31,295/- and deducting the payment of Rs. 1,27,00,246 made by the respondent, the respondent was liable to pay only Rs. 18,31,049/- to the petitioner that too after removal of defects in building construction, receipt of fire-NOC challan, receipt of WCT and service tax and power installation challan etc. It is thus submitted that complicated questions of fact and law arise in this case which cannot be gone into by the Company Court and would be outside the scope of section 433(e) of the Act.

8. In his brief rejoinder, the learned counsel for the petitioner reiterated that after 4 years and after handing over possession, the defects cannot be allowed to linger and that the liability of the petitioner to rectify the defects cannot extend beyond a period of 6 months or one year from the date on which the possession is handed over, which is the normal practice. It is pointed that there is no proof that the defects were not because of the operations carried out in the factory by the respondent.

9. I have carefully considered the facts and the rival contentions. In Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, , the Supreme Court held that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. It was further held that a petition presented ostensibly for a winding up order but really to exercise pressure on the company will be dismissed and under certain circumstances may even be stigmatised as a scandalous abuse of the process of the Court. This judgment was followed in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . In Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, the Supreme Court held that the defence raised, if it is a substantial one and not mere moonshine should be adjudicated upon by the proper forum on merits and not by the Company Court. After noticing these judgments, the Supreme Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., held as under: (Para 20)

The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor''s debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt.

Again in para 31 it was held as under:

Where the company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the company for the purpose of winding up. "Bona fide dispute" implies the existence of a substantial ground for the dispute raised. Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition. The Company Court is expected to go into the causes of refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain that the company''s refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil Court.

10. The principles laid down in the aforesaid cases have to be applied to the present case. The facts narrated above lead to the crystallisation of the following issues:

A. Was there only one agreement for construction or more than one?

B. Is it possible that there can be two agreements in respect of the same construction?

C. If there, in fact, were two agreements, did they relate to the same work or different works?

D. If the agreements relate to different construction works, what is the effect of clause 3 which defines the scope of the work?

E. If there were, in fact, two agreements aggregating to Rs. 1.80 crores, why is it that the arbitrator directed the respondent to pay only Rs. 18,31,049/- (subject to removal of the defects) to the petitioner on the basis that the value of the contract was only Rs. 1.20 crores?

F. Why did the petitioner make different claims upon the respondent at different times- Rs. 96,33,752/-, Rs. 35 lakhs (approx.) and Rs. 38,10,760?

G. If there was an arbitration clause in the agreements and the arbitrator had directed the respondent to pay Rs. 18,31,049/-, is it not binding on the petitioner also?

H. What is the basis for arriving at the total covered area at 13,498.85 sq. ft in the final bill raised by the petitioner?

I. Are the defects mentioned in the defect list prepared jointly on 24.10.2009 due to construction or defects in the maintenance and upkeep after it was handed over to the respondent?

J. Were these defects removed and if so, when? Was the petitioner liable to remove the defects, and if so, upto what period?

11. Each of the above issues is a substantive issue touching upon the liability of the parties in relation to the construction. The defence put up by the respondent is not mere moonshine or of such nature as to be thrown out at the threshold itself as being without merit. It appears to me that these are issues which have to be examined in depth and that the Company Court cannot do so in proceedings u/s 433(e) of the Companies Act. This is a hotly contested debt.

12. The learned counsel for the petitioner relied on three judgments of which two are of this Court. In J.K. Corporation Limited Vs. Digipulse India (P) Limited , which is a judgment of Vikramajit Sen, J. (as he then was), it was observed that the respondent was not entitled to any reduction in the price payable to the petitioner as he rejected the goods supplied by the petitioner after a long period of one year. This is a factual finding and per se does not support the stand of the petitioner before me. In the present case, there are several other issues along with the issue whether the respondent can point out to the defects in the construction after a lapse of long period, and withhold payment. The other judgment of this Court is that of the Division Bench in Joti Prasad Bala Prasad Vs. A.C.T. Developers (P.) Ltd., . I do not see how this judgment is relevant to the present case. In the cited case, the company judge had found that the defence raised by the respondent was without any merit, but still the winding up petition was dismissed. This decision of the company judge was reversed by the Division Bench. This case has nothing to do with the case before me. Lastly a judgment of the learned Single Judge of the Bombay High Court In The Matter of Ispat Industries Ltd. (2005) 2 CLJ 235 was cited in support of the contention that a mere discrepancy between the amounts claimed in the statutory notice and the amount actually due would not entitle the company court to dismiss the petition. The Bombay High Court held that a notice u/s 434 of the Companies Act will not be rendered invalid merely because of the fact that the amount of debt mentioned in the notice may not be exactly the correct amount of the debt due, provided the amount mentioned in the notice includes the debt due

and exceeds monetary limit prescribed in the section. In this case after the issue of the statutory notice, certain payments would appear to have been made by the respondent. After taking note of these amounts, a company petition was filed for the winding up of the respondent company and in this petition the reduced amount was mentioned. The respondent-company contended that there being a difference between the amount mentioned in the statutory notice and the amount mentioned in the petition filed u/s 433(e), the petition was not maintainable. It was this contention that was rejected. The Bombay judgment does not deal with the situation where a defence is taken to the effect that the petitioner itself is not clear as to the amount of debt which is due by the respondent, in view of the complicated nature of the facts and the issues involved. This judgment is also therefore, not applicable to the present case. In the aforesaid view of the matter I do not think I will be justified in admitting the company petition. I accordingly, dismiss the petition with no order as to costs.