(2014) 02 CAL CK 0048

Calcutta High Court

Case No: A.P.O. No. 235 of 2013 and C.P. No. 77 of 2013

Venus Controls and Switchgear P. Ltd.	APPELLANT
Vs	
GE India Industrial P. Ltd.	RESPONDENT

Date of Decision: Feb. 6, 2014

Acts Referred:

- Companies Act, 1956 - Section 433, 434, 434(1)(a)

Citation: (2014) 186 CompCas 353

Hon'ble Judges: Arijit Banerjee, J; A.K. Banerjee, J

Bench: Division Bench

Advocate: Manju Bhutoria, Chayan Gupta and Abhijit Sarkar, Advocate-on-record, Advocate for the Appellant; Tapas Kumar Barman and Biswadip Ghosh, Advocate for the Respondent

Judgement

1. This appeal would relate to supply of goods. At the end of the day, the outstanding was of Rs. 8,22,729.34 that the company failed to pay. The appellant-company once paid a sum of Rs. 10 lakhs in protanto satisfaction of the claim of the respondent but the cheque was dishonoured for nonpayment as we find from page 87 of the paper book. Be that as it may, for the outstanding of Rs. 8,22,729.34 the respondent issued a notice of demand that the appellant-company replied denying their obligation to pay. The learned advocate would contend, the goods were of sub-standard and inferior quality and the statement of account as on December 31, 2009, showing a balance sum of Rs. 8,22,729.34 was sent on the understanding, as would appear from pages 20-23 of the paper book, the respondent would replace the inferior quality goods by "standard quality". The respondent was not satisfied with the reply. They filed a winding up petition that the appellant contested by filing affidavit-in-opposition. In the affidavit-in-opposition the company annexed a host of correspondences that did not find mention in the advocate''s letter of reply. The respondent categorically denied the existence of

those correspondences. According to them, those were fake and manufactured, to put up a sham defence to the admitted claim of the respondent. The company filed supplementary affidavit disclosing e-mails that the petitioner did not specifically deny. However, on going through the e-mails nothing much turned on that, at least the learned single judge (GE India Industrial P. Ltd. v. Venus Controls and Switchgear P. Ltd. [2014] 186 Comp Cas 348 (Cal)) was not impressed. His Lordship held, the company had no bona fide defence, while admitting the winding up petition for the said sum along with interest at the rate of 12 per cent per annum. Hence, this appeal by the appellant.

2. At the admission stage the Division Bench directed the appellant/company to deposit the amount that they did. Today we have heard the parties on the appeal.

3. Ms. Manju Bhutoria, learned counsel appearing for the appellant would base her argument on the strength of the security that the company furnished. Drawing an analogy from sections 433 and 434 of the Companies Act, 1956, she would contend, following the practice of this court, the company, to show their bona fides, offered to secure the claim before the learned single judge as well as before the Division Bench. The learned single judge did not permit the company to secure the claim that the Division Bench did. The company is thus entitled to pray for relegation of the dispute for a regular trial on merits.

4. Ms. Bhutoria would contend, assuming the correspondence annexed to the affidavit-in-opposition are in dispute, the e-mails are not in dispute, that would have an echo of what had been stated in the correspondence annexed to the affidavit-in-opposition. To support her contention, Ms. Bhutoria has relied upon two unreported decisions of this court; one of the Division Bench in the case of Duncan International (India) Ltd. v. A.I. Champdani Industries Ltd., dated July 2, 2008 and the other of the single Bench in the case of Ashok Kumar Deora Vs. Baljit Securities Limited, .

5. Learned counsel appearing for the respondent, could not seriously dispute the existence of the e-mails. He would rather contend, the claim was categorically admitted not only in the statement referred to above but also in the affidavit-in-opposition. He would draw our attention to page 31 of the paper book where we find the company stating : "The company has never denied that payment of goods worth approximately Rs. 8,22,729.34 was outstanding and had only assured the petitioner to pay off the same in the event the goods supplied were duly replaced by good and proper quality, as required by the company". Relying on the said unequivocal admission he would support the judgment and order of the learned single judge.

6. In the Division Bench decision we would find, while disposing of the appeal on concession by the company offering security to the claim, no law was decided. The Division Bench recorded the offer of the company to secure the claim and relegated

the parties to suit without any discussion on fact or law. The single Bench decision would however consider the relevant precedents on the subject. It was more of a theoretical discussion on the analogy of finality of adjudication of claim in a winding up proceeding. His Lordship was of the view, the finality arrived at the admission stage could not be reopened in view of the decision in the case of SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., . His Lordship considered all other decisions on the issue including another decision of the same Division Bench in the case of Dhariwal Steel P. Ltd. v. Bengal Rolling Shutters and Engineering Works. His Lordship lastly observed, "the company cannot, at the post-advertisement stage, disturb or unsettle the finality of a finding as to the indisputable nature of a debt rendered at the admission stage of a creditor''s winding up petition".

7. We have considered the rival contentions. The contemporaneous correspondence annexed to the affidavit-in-opposition are in dispute. Such dispute could not be effectively dealt with by the company in their subsequent pleadings. The learned advocate while giving reply to the statutory notice of admission did not make a mention of the e-mails. Even if we accept the authenticity of the e-mails, it would not specifically raise any constructive defence that could resist successfully a winding up petition. Even if we give some credence to the same, we cannot lose sight of the unequivocal admission in the affidavit-in-opposition coupled with the statement of account referred to above.

8. It is true, the company secured the claim that they did to have an effective hearing of the appeal. If we look to section 434 of the said Act of 1956, we would find, the company could resist the winding up petition offering security at the stage of giving reply to the statutory notice of demand, instead they denied the claim. They could also offer security on the first returnable date. They did not opt. After completion of the pleading, in course of hearing when they could not successfully resist the winding up petition, offering security would rather strengthen the presumption that they were neglecting to pay the debt. A company might be in a precarious condition to pay off its creditor''s dues, that would be a "failure". A high mighty, if willfully neglects to pay an admitted debt, that would certainly come within the mischief of "neglected" within the meaning of section 434(1)(a). Hence, we do not give much importance on such issue.

9. The leaned single judge dealt with the defence in detail. We need not reiterate. His Lordship came to the right conclusion that would deserve no interference.

10. The appeal fails and is hereby dismissed. There will be no order as to costs.

11. The Registrar, original side is directed to hand over the amount lying with him to the respondent along with the interest accrued, if any, in the meantime. The learned judge directed payment of interest at 12 per cent that we, however, feel, little on the higher side compared to the present lending rate. We reduce it to 8 per cent per annum on and from the date of the statutory notice of demand till the date of

making of the deposit with the Registrar, original side. The company is granted liberty to pay the interest amount within a period of two weeks from date. There would be stay of operation of this judgment and order for a period of two months from date.