Form No. J.(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :

The Hon'ble Mr. Justice Ashim Kumar Banerjee
And
The Hon'ble Mr. Justice Shukla Kabir Sinha

A.P.O. No. 278 of 2012

C.P. No. 131 of 2010

Sanchay Dey
-VS-
Pailan Park Development authority Ltd.

For the Appellants	:	Mr. Vijoy Nand Mishra (Advocate)
For the Respondents	:	Mr. Debangshu Basak, Advocate) Mr. Deepnath Roy Chowdhury, (Advocate) Mr. Kaunish Chakraborty (Advocate) Mr. Diptangsu Basu (Advocate)
Heard on	:	July 24, 2012
Judgment on	:	July 31, 2012

ASHIM KUMAR BANERJEE.J:

If one party conceals anything the Court may draw adverse inference and decide the controversy accordingly. When none of the parties

placed their case properly before the Court it would be difficult for the Court to come to a right conclusion one way or the other. Such is the case here. The learned Judge found the Company being dishonest having taken dishonest plea to resist the winding up proceeding. Yet he could not give any relief to the appellant creditor as the appellant-creditor was also not clear on his version. He has now approached us with the present appeal.

Facts would depict, the appellant claimed to have been entrusted with the job of alumunium fittings in the company's project at Pailan Park. If we go by the statutory notice of demand we would find that he supplied goods installed in various buildings belonging to the company. The company duly received and acknowledged without raising any objection. The work was completed on February 4, 2008. After measurement was completed on February 4, 2008, he raised bills on February 27, 2008 that remain unpaid. He further contended, during the period from March 1, 2003 till January 2006 he received various payments leaving a balance sum of rupees sixty five lacs thirty-five thousand eight hundred due and payable. He summarised his claim by contending that the total cost was rupees

one crore thirty lacs twenty three thousand and three hundred out of which he received payment to the extent of rupees sixty four lacs eighty seven thousand and five hundred leaving a balance sum of rupees sixty five lacs thirty five thousand and eight hundred. According to him, the company assured payment by November 2009 that did not come. He was entitled to interest at the rate of ten per cent per annum. Hence, the statutory notice of demand raised on December 11, 2001.

The company promptly replied through their advocate. The company denied receipt of any bill. The company asked for copies of the bills and challans. The company denied any privity of contract between them on the one hand and the appellant on the other. They also denied any sum being due and payable. In all, they denied the relationship itself, far to speak of entrusting working to them.

The appellant filed a winding up petition claiming the said sum of rupees sixty five lacs thirty five thousand and eight hundred. The appellant annexed bills and copies of measurements were claimed to have been signed by the company. The copies of the bills would also

show that the company received those on February 27, 2008. Yet they denied the relationship.

Company filed affidavit taking a complete different stand. In the affidavit they admitted the relationship however, avoided payment on the ground of settlement of claim. According to them, between the period of September 2002 to 2005 various verbal orders were placed. The company used to make part payments that position continued till 2005. The company also admitted to have paid rupees sixty four lacs eighty seven thousand and five hundred as per their books. The company claimed, in and around February 2008, the appellant for the first time raised bills. The company scrutinized those. Upon such scrutiny those were found to be inflated. The company corrected those bills and found that after taking into account payments made up to January 28, 2006 only a sum of rupees sixty two thousand three hundred and sixty five became due and payable. The company paid the said sum in cash. The appellant received it in full and final settlement. Hence, no claim. The company however did not sufficiently explain their reply to the statutory notice as to why it was so inconsistent with the affidavit.

The appellant-creditor filed affidavit in reply that would make the situation more complex. The appellant creditor in his affidavit claimed that the last payment as claimed by the company was not made on January 28, 2006. Even in 2008 company made payments through Account Payee Cheques aggregating rupees two lacs. The appellant-creditor gave credit for those three cheques and contended that the purported final payment of rupees sixty two thousand three hundred and sixty five as on March 2008 would automatically fall flat as the cheques were issued on October 3, 2008 much after the said date. In short, if the account was settled finally how could there be further payments? The appellant however does not explain as to how he would adjust the said three payments as against his claim made in the statutory notice of demand as well as petition. Pertinent to note, his claim in the winding up petition was on the basis of a principal sum as on February 27, 2008. His statutory notice was issued on December 11, 2009 that would also indicate the self-same figure as if no further sum was ever received thereafter.

The learned Judge was perplexed. His Lordship very rightly declined to exercise discretion in favour of the appellant.

Mr. Vijoy Nand Mishra, learned counsel appearing for the appellant contended before us that the learned Judge failed to appreciate the conduct of the company. He referred to the series of the orders passed earlier by another learned Judge wherein the company was at the receiving end. On a combined reading of those orders we find that the so-called full and final settlement receipt purportedly, issued by the appellant was called in question. His Lordship directed the original to be produced. The company initially pleaded inability on the ground, it had been seized by the Income Tax Authority. Income Tax Authority appeared and said they did not have such document. The Director then said, it was in his possession. He disclosed it and tendered unqualified apology through affidavit.

Mr. Mishra contended, considering the conduct of the company the learned Judge should have admitted the winding up petition. He further contended, even if the said sum of rupees two lacs was mistakenly not given credit that would not change the scenario as the balance amount would be much more than rupees five hundred enabling this Court to entertain a winding up petition. He referred to the Division Bench decision of the Bombay High Court in the case of

Pfizer Ltd. –VS- Usan Laboratories P. Ltd. reported in **Volume-57 Company Cases Page-236** in this regard.

He prayed for setting aside of the judgment and order impugned in the appeal coupled with an order of admission of the winding up proceeding.

Opposing the appeal, Mr. Basak, learned counsel appearing for the respondent/company contended, claim was never admitted. There was no quantified debt that would maintain a winding up proceeding. The claim was bona fide disputed by the company that would require a regular trial by a Civil Court if an action was brought for the said purpose. According to him, the learned Judge very rightly declined to exercise his discretion that would deserve no interference by the Court of Appeal. He further contended, once the appellant could not satisfy the Court that there was a definite sum due and payable by the company to the appellant the winding up petition could not be held to be maintainable. Since the winding up petition was not maintainable it would deserve only the order of dismissal and nothing short of it. Question of securing their claim that too, an unsecured one could not arise. To support his contentions he referred two Apex

Court decisions in the case of **Mediquip Systems (P) Ltd. –VS- Proxima Medical System GMBH** reported in **2005 Volume-VII Supreme Court Cases Page-42** and in the case of **IBA Health (India) Private Limited –VS- Info-Drive Systems Sdn. Bhd.** reported in **2010 Volume-X Supreme Court Cases Page-553.**

The concept of bona fide dispute is being explained by the Courts in umpteen number of judgments. However, the genesis would still lie in the decision of the learned Single Judge in the case of **Kiranmayee Devi** reported in **Volume-49 Calcutta Weekly Notes Page-246** so reiterated by the Apex Court in the case of **M/s. Mechalec Engineers & Manufactures –VS- M/s. Basic Equipment Corporation** reported in **All India Reporter 1977 Supreme Court Page-577**. The decision in the case of **IBA Health (I) (P) Ltd.** (Supra) and **Mediquip Systems (P) Ltd.** (Supra) would reiterate the identical concept. It says, *"the principles on which the court acts are:*

i) that the defence of the company is in good faith and one of substance;

ii) the defence is likely to succeed in point of law; and

iii) the company adduces prima facie proof of the facts on which the defence depends."

Mr. Misra relied upon the decision in the case of **Pfizer Ltd.** (Supra) wherein the Division Bench of the Bombay High Court considered an issue where the principal claims were not in dispute. However, the interest was bona fide disputed. The Single Bench dismissed the winding up petition. The Division Bench reversed the decision by observing, *"merely because there was a dispute as to the liability to pay interest, that would not render the statutory notice invalid or result in dismissal of the winding up petition."* We are in doubt, how far this decision would help Mr. Misra.

In the present case, the learned Judge rightly observed that the conduct of the company was dishonest. There had been transactions galore running into crores. More than Rupees sixty-four lacs were admittedly paid by the company. Even then, the company initially denied the relationship, subsequently took a different stand in the affidavit that would make the position of the company vulnerable. However, the learned Judge could not extend the relief to the petitioning creditor, as pre-requisite to admit a winding up petition at the instance of the unsecured creditor would denote, there must be a quantified just debt due to the creditor by the company. The

appellant-creditor was inconsistent in his stand as discussed above. The learned Judge could not come to a definite conclusion as to the quantum. Hence, it would not be proper to admit the winding up petition. The decision in the case of **Pfizer Ltd.** (Supra) would have no application as the learned Judge while admitting the petition must come to a definite finding as to the quantum of debt that the learned Judge failed in view of the inconsistent stand of the appellant-creditor.

We do not find any scope of interference. The appeal fails and is hereby dismissed.

There would be no order as to costs.

Urgent Xerox certified copy of this order, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir (Sinha), J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[SHUKLA KABIR (SINHA),J.]