

(2000) 03 BOM CK 0078

In the Bombay High Court

Case No : Company Application No. 362 of 1999 in Company Petition No. 147 of 1999

ABG Heavy Industries Ltd. (formerly known as Onaway Engineering P. Ltd.)

APPELLANT

Vs

Hindustan Shipyard Ltd.

RESPONDENT

Date of Decision : 08-03-2000

Acts Referred:

Citation : (2001) 105 CompCas 413

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : R.M. Kadam and C.S. Kapadia, instructed by I.J. Nankani, for the Appellant; G.A. Rebello, instructed by Ruben Fernandes, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Nijjar, J.—This application has been filed for setting aside an order of admission dated April 16, 1999. The reasons given for absence of the company on the date when the matter came up for hearing are contained in paragraph 7 of the affidavit in support. It is stated that on March 15, 1999, a copy of the petition was received by the company. Initial reply was sent to the advocate for the petitioner on March 15, 1999. Thereafter the papers were misplaced. These papers were subsequently noticed on May 5, 1999- On enquiry it has been found that the order of admission has been passed on April 16, 1999.

2. Mr. Kadam submitted that in view of the above, the order of admission ought to be set aside. As opposed to this in the affidavit in reply, it is stated that the application which has been filed by the company is nothing more than a delaying tactic. It is submitted by Mr. Rebello that the petition was presented to this court on November 20, 1998. It was accepted on February 18, 1999, and returnable date was fixed on April 16, 1999. Notice of the petition dated March 5, 1999 was received by the company on March 6, 1999. Learned counsel has brought to the notice of this court a letter dated April 2, 1999, which has been addressed by the

company to the advocate of the petitioner. In this letter reference is made to letter dated March 15, 1999, which has been sent by the company to the petitioner. The letter also mentions that the petitioner has proceeded with arbitration on March 5, 1999. This letter dated March 15, 1999, was replied to by the petitioner on March 17, 1999. In this letter, it is clearly stated that the amount stands admitted by the company- It is also stated that the company is unable to pay and therefore, the petitioner is entitled to maintain the petition. It is also stated that the petitioner is entitled to proceed with all other legal remedies also, which could not be a bar to the presentation of this petition. This being the position, it would not be possible to accept the explanation given in paragraph 7 of the affidavit in support that the papers have been misplaced or that the returnable date was not known to the company. At best, the company could claim that there had been negligence in the office. This, in my opinion, would not be sufficient to excuse the absence of the company. Thus, the company petition was rightly admitted ex parte. On merits, Mr. Kadam has submitted that the petition wrongly proceeds on the basis that the accounts have been reconciled. The reconciliation statement is dated November 21, 1995. Learned counsel has pointed out to the reconciliation statement and stated that it consists of three pages. The first page contains the alleged reconciliation which is signed by the representatives of the company as well as the petitioner. On the second page there is a statement showing payments made to the petitioner. This statement is signed by a different officer of the company. The third page of the statement is also signed by somebody else. He, therefore, submitted that reconciliation statement is no reconciliation in the eyes of law and it appears to have been antedated. As opposed to this Mr. Rebello, learned counsel for the petitioner has stated the reconciliation statement is nothing more or less than what it purports to be. The details which are contained on the subsequent two pages are incorporated in the reconciliation statement itself. The reconciliation statement actually consists only of the page which shows the liability of the company in the sum of Rs. 45,03,039. I find considerable force in the submission made by Mr. Rebello, learned counsel for the petitioner. Thereafter Mr. Kadam has submitted that the arbitration clause has been invoked by the petitioner. This necessarily means that even the petitioner admits that there are disputes which have arisen between the petitioner and the company. I do not find much substance in the aforesaid submissions. The company petition was presented to this court on November 20, 1998. It was accepted on February 18, 1999. The returnable date was fixed on April 16, 1999. Mr. Kadam had thereafter submitted that the petitioner having invoked the arbitration clause was not justified in moving the company court. He submitted that this is a material suppression of fact as the arbitration clause has been invoked on November 12, 1998, when the petition is presented to this court on November 20, 1998. He also submitted that the pendency of the arbitration proceedings clearly indicates that there are bona fide disputes which have arisen between the petitioner and the company.

3. I do not find much substance in the aforesaid submissions. It is settled law

that the arbitration proceedings or civil suits are not a bar to the maintainability of the company petition. Learned counsel thereafter submitted that the payments were only to be made to the petitioner on the basis of clause 7.3 of the contract. This clause provides that the payments will be made against invoices submitted by the contractor in triplicate supported with the quantities of work performed by the contractor and certified by the representative authorised by the purchaser. He submitted that none of the invoices have been certified by the company. In reply to this it is submitted by Mr. Rebello that in view of the reconciliation statement dated November 21, 1995, the condition contained in Clause 7.3 of the contract is deemed to be waived. Learned counsel also relied on a letter dated December 29, 1997, to submit that in any event the liability has been admitted by the company. A perusal of this letter shows that the company had written to the petitioner referring to the earlier discussions also and stated that the delay in release of your payment is solely due to non-release of the corresponding payments from Essar Projects Ltd. Thereafter a suggestion is made requesting the petitioner to accept the proposal of accepting the steel materials of equivalent value in lieu of the payment. This proposal, however was rejected by the petitioner. In view of the above also, I do not find much substance in the submissions made by Mr. Kadam. Even if the petition cannot be maintained on the basis of the reconciliation statement, the liability under any circumstances is admitted.

4. In view of the above, this application is dismissed. Advertisement of the petition is stayed for a period of six weeks. Parties to act on the copy of the order duly authenticated by the company Registrar of this court.