
(2011) 07 GUJ CK 0025
In the Gujarat High Court

Case No : O.J. Appeal No. 48 of 2010 in Company Petition No. 92 of 2009

Artee Roadways Pvt. Ltd.

APPELLANT

Vs

Transfer Services Ltd.

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Citation : (2011) 07 GUJ CK 0025

Hon'ble Judges : R.M. Chhaya, J; Jayant M. Patel, J

Bench : Division Bench

Advocate : Dhaval N. Vakil and Maulik N. Shah, for the Appellant; Bharat T. Rao, for the Respondent

Final Decision : Allowed

Judgement

Jayant Patel, J.—The present appeal is directed against the order dated 13.11.2009 and 02.07.2010 passed by the learned Company Judge, whereby the advertisement was ordered to be published in the newspaper as well as in the Official Gazette after admission but before winding up of the Petitioner company.

2. The relevant facts are that there was an operating lease agreement entered into between the Appellant and the Respondent on 20.08.2007, copy of the agreement is at page 33 at Annexure-C in the compilation.

3. As per the Respondent-original Petitioner, in spite of the agreement, the Appellant herein violated the condition and did not pay the rental amount. The cheques were also given but dishonoured. The statutory notice was issued on 31.10.2008, which remained unanswered. Thereafter, the Company Petition was preferred before the learned Company Judge. Initially after service of notice, none appeared on behalf of the Appellant-Respondent therein. Again, the attempts were made but nobody appeared. Ultimately, the impugned order has been passed, against which, the present appeal.

We have heard Mr. Y.F. Mehta with Mr. Dhaval Vakil and Mr. B.T. Rao for Respondent No. 2.

4. It appears that the matter proceeded ex parte before the Company Judge, but it is also a fact that the opportunity was given by the learned Company Judge, but the Appellant herein did not avail of the same. Under the circumstances, the learned Company Judge exercised the power for issuance of the advertisement. We may record that this Court when entertained the OJ Appeal on 22.07.2010, following order was passed below OJ CA No. 310/10-

NOTICE returnable on 29.07.2010. By way of ad-interim relief, operation and implementation of the impugned order dated 02.07.2010 is stayed on the statement being made and it being made a condition that the applicant shall deposit in the Court an amount of Rs. 21 lakhs by demand draft in the name of Registrar, High Court of Gujarat and an undertaking of Director of the applicant-company shall be filed latest by 23.7.2010 to state, on oath, that the amount as aforesaid shall be deposited by 29.07.2010. Direct service today.

5. Thereafter, the amount of Rs. 21,00,000/- has already been deposited and the amount is lying with this Court. Therefore, against the amount which is the subject matter of the statutory notice, the Appellant has also deposited the amount.

6. Today, when the matter is further heard, Mr. Y.F. Mehta, learned Counsel for the Appellant declared before the Court that the Appellant is ready to deposit the additional amount as may be found fit by this Court considering the facts and circumstances of the case, in case if this Court is inclined to relegate the matter to the learned Company Judge for considering the defence of the Appellant and the subsequent steps to be taken in the Company Petition including that of recalling of the earlier order or otherwise and thereafter, to pass a fresh order on the aspect of winding up of the Company or otherwise.

7. Whereas, Mr. Rao, learned Counsel appearing for the Respondent declared before the Court that the order of the learned Company Judge as such is already complied with for issuance of advertisement and the advertisements were published on 22.10.2010 in Sandesh, Vadodara edition and in Indian Express, Vadodara edition and therefore, it was submitted that when the order is already implemented, this Court may not interfere under the appellate jurisdiction. However, he submitted that in the event this Court is inclined to relegate the matter to the learned Company Judge, the Appellant should deposit the entire amount as per the statutory notice and the Respondent should be put to the liberty of withdrawal of the amount and thereafter only, the matter may be relegated to the learned Company Judge and it was also submitted that additional cost of advertisement which has been borne by the Respondent Company of Rs. 25,000/- may also be directed to be paid by the Appellant and the cost of the litigation.

8. If the amount of statutory notice is taken into consideration, the same is about Rs. 33,79,564/-. Out of the said amount, as observed earlier, the amount of Rs. 21,00,000/- has already been deposited. Considering the facts and

circumstances, when on behalf of the Appellant, has shown readiness to deposit the additional amount, we find that the said bonafide can be taken into consideration for exercising the discretion. On the aspect of amount, as the learned Counsel has left it to the Court, we find that additionally, the Appellant should be put to the condition of depositing Rs. 10 Lakhs within reasonable time. It is on account of the default on the part of the Appellant in not responding to the notice of the present proceedings as they were before the learned Company Judge, the Respondent is dragged into the litigation and has also incurred expenses of advertisement. Hence, we find that they should pay such amount of cost of the advertisement and of the litigation borne by the Appellant in the event the Appellant is desirous to have examination of their defence before the learned Company Judge. As the learned Company Judge had no opportunity to examine the merits of the defence, since no defence was raised before the learned Company Judge by the Appellant, we find that we need not express any view on the aspect of genuineness of the defence or otherwise and the same be kept open to be decided by the learned Company Judge. If the learned Company Judge finds that the defence is genuine, the matter may be required to be considered accordingly. However, if the defence is found as moonshine or not valid defence, the petition may be required to be examined accordingly for further action. However, both the aspects; the factum of amount already deposited shall be required to be taken into consideration including on the aspect as to whether the withdrawal should be permitted or not to the Respondent-original Petitioner.

9. The learned Counsel appearing for both the sides made statement at the bar that in response to the advertisement issued no other creditor has come forward for supporting or opposing the winding up of the Appellant Company.

10. In view of the aforesaid, we find that following directions shall meet with the ends of justice -

11. The order passed by the learned Company Judge for admission and issuance of the advertisement is quashed and set aside on condition that the Appellant -

12. Deposits the additional amount of Rs. 31 Lakh with this Court. As the amount of Rs. 21 Lakh has already been deposited, the same shall be adjusted and the remaining amount of Rs. 10 Lakh shall be deposited with this Court within a period of two months from today.

13. Pays the cost of Rs. 25,000/- towards expenses of the advertisement and Rs. 10,000/- towards the present litigation to the Respondent within one month from today.

14. After the conditions are complied with, it would be open to either side to move the learned Company Judge for considering the question of admission of the Company Petition and further orders and the learned Company Judge shall give opportunity of hearing to both the sides and shall pass fresh order in Company Petition No. 92/09 for admission or otherwise as may be permissible in

law. At that stage, rights and contentions of both the sides shall remain open.

15. Appeal is allowed to the aforesaid extent.

16. In view of the order passed in the main appeal, interim application, if any pending, shall stand disposed of accordingly.