(2013) 12 DEL CK 0280

In the Delhi High Court

Case No : Co. Petition 294 of 2012

John Smedly Ltd. APPELLANT

Vs

Blues Clothing Company Pvt. Ltd. RESPONDENT

Date of Decision : 20-12-2013

Acts Referred:

Companies Act, 1956 — Section 433(e), 434(1)(a), 454
General Clauses Act, 1897 — Section 27

Citation : (2014) 183 CompCas 273

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

Bench : Single Bench

Advocate : Uttam Dutt, for the Appellant; Siddharth Dutta, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Easwar, J.—This is a petition filed by M/s. John Smedly Ltd. of Derbyshire, England u/s 433(e) of the Companies Act, 1956 seeking winding up of Blues Clothing Company Pvt. Ltd. of New Delhi, India for non-payment of GBP 87,240 as per its accounts, for supply of ready-made garments. The petitioner (UK company) which is in the business of manufacture of knitted garments supplied garments to the respondent-company (Indian company) under an agreement dated 23-10-2009, valid for one year. The UK company supplied garments to the Indian company during the period from 12-11-2009 to 25-11-2010 under six invoices for a total sum of GBP 114,999. The goods were undisputedly received by the Indian company, which made a part payment of GBP 27,759 towards the invoice dated 12-11-2009, which was for GBP 30,420. The balance amount of GBP 87,240 was, as per the accounts of the UK company, due and payable.

2. Despite several demands, the balance amount was not paid. A series of e-mails were exchanged between the two companies, in one of which (i.e., 19-8-2011) it was proposed on behalf of the UK company that the outstanding dues can be settled by payment of GBP 32,240 in three equal instalments of GBP 10,746 each, payable on 15-9-2011, 15-10-2011 and 15-11-2011. The e-mail

sent by Mr. Jamie Tunnicliffe on behalf of the UK company is as follows:

Dear Rajni,

Thank you for the response.

Please do not let me down because I truthfully take a great risk in my own position at JS by supporting you internally if you let me down again.

Based on BCC adhering to your proposed schedule above I will honour the agreement made with Abhay when I was in India as below.

Outstanding balance ?87,240.12

Markdown contribution ?30,000.00

Marketing support ?25,000.00

Balance to pay ?32,240.12

This means that I am expecting 3 x payments of ?10,746.71 on Sept 15, Oct 15 and Nov 15.

If John Smedly do not receive payment by the said dates they will immediately proceed with legal action for the total outstanding balance.

I will liaise internally and inform the solicitor of your response today.

Thank you and look forward to resolving this situation very soon.

Regards,

Jamie

The Indian company sent a reply e-mail thanking Mr. Jamie Tunnicliffe for the support and assuring him of honouring the payment. However no payment was made as accepted by the Indian company and hence the present petition.

3. The main contention of the Indian company, respondent herein, is three-fold. It first contends that as per the terms and conditions of the contract, the UK company can have recourse only under the English law in case of disputes and the Indian courts have no jurisdiction. The following clause in the contract is relied upon:

20.8. The formation, existence, construction, performance, validity and all aspects of the contract shall be governed by English law and any disputes shall be resolved exclusively in the English Courts.

The second contention is that under the Indian Contract Act, 1872, in case of breach of settlement, the UK company can only file a suit for specific performance and cannot have recourse to winding-up proceedings. It is finally contended that the demand notice required to be served u/s 434(1)(a) of the Act was not served.

4. None of the three contentions can be accepted.

5. So far as service of notice is concerned, the same was addressed to the registered office of the Indian company under registered post acknowledgement due on 9-4-2012. Neither the acknowledgment card nor the registered cover is stated to have been received by the UK company. It is not denied that the notice was addressed to the registered office of the Indian company which is G-9, South Extension-I, New Delhi 110049. If neither the acknowledgement card nor the registered cover is received back by the UK company, the provisions of section 27 of the General Clauses Act come to the aid of the petitioner. In such a case, there is a presumption of service. It was however pointed out on behalf of the respondent-company that in CA No. 715/2013 this court had recalled the order of admission of the winding-up petition on the ground that "there does appear some merit in the contention regarding service of notice on the Respondent". I have gone through the order dated 24-5-2013 passed by this court in CA No. 715/2013. I am inclined to hold that it was only a prima facie or tentative view of this court, limited only for the purpose of recalling the order of admission and not a final view, which would be taken when the winding-up petition is taken up again for hearing after recall. This court did not categorically rule that there was no service of the demand notice on the respondent-company; had that been the case, the winding-up petition would have in all probability been dismissed at that stage. I therefore see no merit in the argument that the demand notice was not served.

6. The contention that the dispute is governed by the English law and only the English courts have jurisdiction must fail, the reason being that it has not been shown by the Indian company that this was one of the terms of the contract between the parties. The clause relied upon by the respondent is actually part of the contract governing internet sales by the UK company; this aspect has been brought out in paragraph 1 of the para-wise reply in the rejoinder filed by the petitioner. The respondent has not filed the contract governing its transactions with the UK company which was available to it on demand as specifically stated in the invoice issued to the respondent-company. Thus, the respondent-company has failed to prove that clause 20.8, which was part of the terms and conditions of the internet sales, was also part of its contract with the UK company. The claim based on the said clause is specifically denied in the rejoinder, contrary to what the learned counsel for the respondent-company contended in the course of his arguments. Since no such clause has been proved to have been part of the contract between the parties, the objection to the jurisdiction of Indian courts is devoid of merit.

7. The last contention is that for breach of the settlement, the UK company can only sue for specific performance and cannot institute proceedings for winding-up. A close reading of the e-mail dated 19-8-2011 of Mr. Jamie Tunnicliffe shows that the settlement was dependent on the payments of GBP 10,746 each on 15-9-2011, 15-10-2011 and 15-11-2011. If there was default, and "if John

Smedly do not receive payment by the said dates they will immediately proceed with legal action for the total outstanding balance". The total outstanding balance was GBP 87,240. There was thus no substitution of any new contract in the place of the earlier contract; it was made clear that if the time-bound settlement is not adhered to, the earlier contract would revive and the whole outstanding balance would become payable. The respondent-company defaulted in honouring the settlement and thus became liable to pay the entire balance of GBP 87,240. There is therefore no question of the UK company being entitled only to sue for specific performance.

8. A Division Bench of the Bombay High Court in SBI Global Factors Ltd. Vs. M/s. K. Sera Sera Production Ltd., dealt with a similar contention. In that case, the consequence of the failure to adhere to the terms and conditions of the restructuring of the loan was made evident in the sanction letter, the consequence being that the bank reserved its rights in relation to the original facility granted to the company. The company defaulted in honouring the restructuring proposal. D.Y. Chandrachud, J (as he then was), speaking for the Division Bench, held that once there was default in complying with the terms and conditions of the letter of sanction, the bank was justified in recalling the amount due under the original facility granted by it and that amount became due and payable and thus there was a debt due and payable, fulfilling the mandatory requirement for the institution of proceedings for winding-up. Dealing specifically with the contention of the company, identical to the one addressed before me, the learned judge observed:

There is no merit in the contention that the debt of the Appellant stands replaced by a contractual settlement and that the remedy of the Appellant must lie in an action for breach of contract either by a way of a suit for specific performance or a claim for damages. In the present case, there was no discharge of the debt. What the letter of sanction dated 17 September 2009 did was to restructure the debt subject to compliance by the Respondent of the terms and conditions stipulated therein. The debt was never extinguished. On a breach by the Respondent of the terms and conditions governing the sanction for restructuring, the Appellant was entitled to institute a proceeding for winding up on the basis of the inability of the Respondent to pay the debt.

9. In view of the foregoing discussion, none of the contentions is found to be of any merit. It seems to me to be a case where the Indian company (respondent), having received the goods and perhaps also turned them into profit, seeks to wriggle out of the liability to pay the dues to the UK company by taking specious pleas and also by placing an untenable interpretation on the settlement proposal by which the original dues of GBP 87,240 was brought down generously to GBP 32,240. It also appears to me to be a case where the respondent has the ability to pay, but does not choose to pay; in such a case, the court will not come to its defence, as held by the Supreme Court in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., .

10. The winding-up petition is admitted. The official liquidator (''OL'') attached to this court is appointed as the Provisional Liquidator (''PL''). Complete set of the petition and this order be served on the OL by the petitioner within five days from today.

11. The OL is directed to take over all the assets, books of accounts and records of the Respondent forthwith. The OL shall also prepare a complete inventory of all the assets of the Respondent before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

12. The Directors of the Respondent are directed to strictly comply with the requirements of Section 454 of the Companies Act, 1956 and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from today. They will also file affidavits in this Court, with advance copies to the OL, within four weeks setting out the details (including their value and location) of all the assets, both movable and immovable, of the Respondent company and enclose therewith the balance sheets and profit and loss accounts for the past three years and copies of the statements of all the bank accounts for the last one year. The respondent is also directed to furnish the names, address and telephone number etc. of its directors including the Managing Director, Chairman, if any, to the official liquidator along with the statement of affairs. The respondent shall also furnish the name, address and telephone number of its company secretary. It shall also file the details of its debtors and creditors with their complete address and the details of its workmen and other employees and the amount, if any, outstanding to them. All these shall be filed with the OL.

13. A report be filed by the OL before the next date of hearing. Renotify for further proceedings on 14th April, 2014.