

(2008) 10 DEL CK 0136

In the Delhi High Court

Case No : C.A. No's. 560, 580, 583, 586, 589, 598 and 599 of 2008 and C.P. No. 238 of 2005

Manjit Kaur

APPELLANT

Vs

Durga Builders Private Limited and Another

RESPONDENT

Date of Decision : 03-10-2008

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24, 96, 99
Companies Act, 1956 — Section 433, 434, 435, 436, 439
Criminal Procedure Code, 1973 (CrPC) — Section 340
Land Acquisition Act, 1894 — Section 11, 18, 4
Penal Code, 1860 (IPC) — Section 120B, 420, 468, 471

Citation : (2008) 155 DLT 240 : (2009) 3 PLR 29

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : P. Narsimha, in C.A. No. 581-89 of 2008, Anil Sapra, for Okhla Plot Holders Association and for Sunil Magon, in C.A. No. 911 of 2008 and Sarat K. Chandra and Sachin Chandra, in C.A. No. 599 of 200 Sandeep Kumar, Keshav V. Hedge and Silpa Hedge, Rajeev Bahl, for the Appellant;

Judgement

Gita Mittal, J.—One Smt. Manjit Kaur claiming to be the sole proprietor of M/s Kumar Security Syndicate filed a petition u/s 433(e), 434 and 439 of the Companies Act, 1956 contending that she had contracted with M/s Durga Builders Pvt. Ltd.-the respondent herein, to provide security services and that bills raised by her upon the respondent company from September, 2003 onwards till 31st July, 2004 for the total sum of Rs. 9,35,800/- had not been paid. She had claimed this amount with interest at the rate of 18% as due and payable. It was further submitted that a legal notice dated 15th April, 2005 had been got served by her through counsel Sh. Vishesh Jain, Advocate whose address was shown as A-104, Lohia Nagar, Ghaziabad. The submission of the petitioner was that despite service of such notice the company had failed to pay the dues and consequently a prayer was made for the winding up of the respondent and appointment of an official liquidator in accordance with Section 433(e) of the

Companies Act, 1956.

2. Notice to show cause was issued in this petition. The respondent company had duly entered appearance. On 18th October, 2005 it was orally stated by learned Counsel appearing for the respondent that the respondent company admits the claim of the petitioner; however, as the company was undergoing some financial crunch, it was unable to make payment to the petitioner. It was further admitted that efforts would be made to make the payment. The next two dates record the submission that some constructive proposal for settlement had emanated between the parties. Further time was sought thereafter to amicably settle the case. In this view of the matter, the case was adjourned on several dates thereafter.

3. In the proceedings on 12th February, 2007, an amount of Rs. 25,000/- was tendered on behalf of the respondent to counsel for the petitioner by a cheque in favour of Manjit Kaur and it was stated that further amounts would be paid thereafter. Thereafter the order sheet records that an amount of Rs. 1 lakh had been agreed to be paid by the respondent. This amount was not paid. It is noteworthy that no reply to the winding up petition was filed on behalf of the respondent.

4. Finally on 18th January, 2008, this Court recorded that the company was unable to pay its financial debts and the petition was admitted. The official liquidator attached to this Court was appointed as the provisional liquidator with a direction to take over the assets and statutory records of the respondent company and submit the status report. The court also directed publication of citations in the newspapers of the order of admission in compliance with statutory provisions.

5. The copy of the citations which were published on 3rd February, 2008 in the Statesman (English edition) and Jansatta (Hindi edition) have been placed before this Court. Copy of the advertisement placed before this Court clearly shows that the advertisement was issued in compliance with the requirements of Rule 24, 96 and 99 of the Company Court Rules in Form 58 informing the members of the public about the admission of the petition and calling upon any creditor, contributory or other person desirous of supporting or opposing the making of a winding up order to send the opposition to the petitioner's counsel. Notice of such intention and to appear before this Court for the purposes of opposing the winding up order was mentioned in the publication.

6. The present applications have been filed before this Court thereafter by several persons claiming to be creditors of the company who have submitted that they had applied for and had made payments towards plots which were booked with the respondent company. Allegations of concealment by the respondent company of material facts have been made. It is pointed out that there are several judicial pronouncements against the respondent company which have not been disclosed. These judgments have been placed before this Court along with

the applications. The applicants have also contended that the challenge by the respondent company to the judgment which were passed against it stand rejected by the Apex Court long before the making of the order of admission in the present proceedings and that these facts were not placed before this Court with the mala fide intent to cause a collusive order of winding up to be passed.

7. My attention has also been drawn to proceedings in a suit registered as C.S. (OS) No. 1136/2005 entitled Vishesh Jain v. Arun Mehra which was filed on the original side of this Court against a person who was either the same person or the namesake of the counsel who has issued the legal notice on behalf of the present petitioner. The submission is that the petitioner Smt. Manjit Kaur as well as the lawyer Mr. Vishesh Jain are non-existent persons who have been set up by the respondent or its ex-directors in order to defeat the genuine and bonafide claims of the applicants.

8. The filing and the maintainability of the present petition has been vehemently opposed on grounds of malafide. It has been urged that the present proceedings were filed and the order dated 18th January, 2008 was caused to be passed with malafide intention to defeat genuine claims which had been recognised by courts and the litigation stood crystalised for implementation of the judgments.

9. Mr. Rajeev Bahl, learned Counsel representing the official liquidator has also opposed the maintainability of this petition on several grounds. It has been pointed out that even the petitioner is not interested in the continuance of the present proceedings and has not cared to put in appearance. Learned Counsels have placed the envelopes in original containing copies of notices which were issued to the petitioner on the applications pursuant to orders passed by this Court on record. These stand returned with postal remarks that no such person exists at the given address.

10. I have heard learned Counsel for the parties at length.

11. So far as the conduct of the proceedings by the respondent in the present case is concerned, the record reflects a complete admission of the claim of the petitioner. There was no defence at all raised. On the other hand, in purported admission of the claim set up, a part payment has been apparently effected. Thereafter the winding up petition has been conceded on the ground that the company does not have the funds to pay the petitioner.

12. Learned Counsel representing the applicants have urged that the bills relied upon by the petitioner to support its claim are fabricated. My attention is drawn to the fact that no statutory deduction in the nature of provident fund, ESI or service tax have been reflected in these documents. These compliances would have supported the authenticity of the claim of the petitioner.

13. It is further pointed out that the petitioner has placed before this Court 11 bills all of which have been issued from one single book bearing No. 4. The bills run in seriatim and have been numbered from serial No. 1190 to 1200 without a

break. These documents relate to the period September, 2003 to July, 2004.

14. Mr. Vijay Agarwal, learned Counsel representing Mr. Arun Mehra applicant in CA No. 472/2008 has pointed out that these facts by itself belie the claim of the petitioner inasmuch as an investigation by a detective agency has shown that there is no security agency by the name of Kumar Security Syndicate existing at the address given either on the petition or the bill book. A report dated 26th March, 2008 of M/s Den Detection and Security Services Pvt. Ltd. has been filed along with CA No. 472/2008 wherein a categorical statement is given that no firm by the name of Kumar Security Syndicate or person by the name of Manjit Kaur had ever existed at the given addresses. It has further been pointed out that the bills are, at the face of the record, concocted and reflect that there was no real business being transacted. It was pointed out that the serial number of the bills would show that there was no business other than the purported claim of providing security services to the respondent company alone was being done by this firm. It is also noteworthy that in the bills, the same number of personnel have been apparently assigned to discharge the services to the respondent. The number of such personnel in the bills is identical without variation of even a single person for a period of almost 11 months. The same is most unrealistic and certainly difficult to believe.

15. My attention has been drawn to a sale deed dated 9th July, 2007 executed by Durga Builders Pvt. Ltd. in favour of Ravinder Promoters Pvt. Ltd. and Sh. Ravinder Kumar Nanda in favour of 13 persons whereby land has been sold by the respondents. These thirteen vendees have effected payments by cheques to the tune of Rs. 90 lakhs to the Durga Builders Private Limited in July, 2007. The sale deed reflects receipt of an amount of Rs. 5,25,000/- by the respondent herein between 4th July, 2007 and 9th July, 2007.

16. The present winding up petition was filed on 27th July, 2005. A statement was made on 18th October, 2005, and repeated thereafter that the balance amounts would be paid before the next date of hearing. Even as late on 25th October, 2007 time was sought to make payment of the amount of Rs. 1 lakh when this Court directed payment of the sum of Rs. 2 lakh. From the above, it is apparent that despite availability of liquidity with the respondent company, even if the debt of Rs. 9,35,800/- claimed by the petitioner was really due, a false facade of non-availability of funds to clear such dues was created. It is evident that the same was done only in order to support the winding up petition. The conduct of the respondent reflects manifestation of its collusion with the petitioner. There are several other reasons which would support such a conclusion by this Court.

17. I find that so far as C.A. No. 589/2008 filed by the Okhla Enclave Plot Holders (Allottee) Forum (Regd.), New Delhi is concerned, it has been pointed out that this applicant had filed a writ petition being W.P.(C) No. 3311/2001 before the Punjab and Haryana High Court seeking directions against the respondent company in respect of plots which had been fully paid up by the

members of the applicant association. The writ petition was heard and disposed of by a detailed judgment passed on 19th May, 2006. By the judgment dated 19th May, 2006, the Division Bench of the Punjab and Haryana High Court directed the respondent company herein to execute sale deeds and hand over possession within a period of three months from the passing of the judgment apart from certain directions to the Director, Town and Country Planning, Chandigarh. The petitioners in the writ petition who are the applicant herein were directed to pay a sum of Rs. 50 per sq. yards as an additional amount as the registration of the sale deed before the sub-registrar. A direction was also issued to the Director of the Town and Country Planning Deptt. to file reports of the petitioner if not implemented within a period of three months from the date of the judgment.

18. The respondent company assailed this judgment before the Supreme Court of India by way of SLP No. 14843/2006 which was dismissed by an order passed on 4th January, 2008.

19. It is pointed out that the applicants in the other applications before me had also prayed for identical directions in writ petitions which were filed before the High Court of Punjab and Haryana. The submission on behalf of all the applicants is that the present winding up petition has been got filed collusively by the respondent through a fictitious person in respect of a non-existent debt. A malafide and fraudulent shield of a debt and inability to pay the same was maintained before this Court to establish satisfaction of the requirement of law which persuaded the court to pass the order of admission of the petition.

20. It has been submitted that all these material facts relating to the passing of the judgments against the respondents had been deliberately concealed causing the order of admission dated 18th January, 2008 to be passed.

21. It certainly cannot be contended in the instant case that the judgment of the Division Bench dated 19th May, 2006 as well as the order dated 4th January, 2008 of the Supreme Court were not material facts. It is trite that a person in possession of the best evidence is bound to place the same before the court irrespective of the onus of burden of proof. In the instant case the company was possessed of all material facts and documents which it has deliberately concealed from this Court. The execution of the sale deed dated 9th July, 2007 as also the amount of consideration received was certainly adequate to meet the liability of the petitioner, if it really existed. The Division Bench of the Punjab and Haryana High Court had considered the claims made by the applicants and had issued specific directions directing the respondent company to hand over plots to the applicants which has been suppressed.

22. Today a plea is put forth by Mr. Shared Agarwal, learned Counsel representing the respondent company that valuable rights of the company have been impacted by the orders passed by this Court and that winding up proceedings have serious consequences. In the given facts of the case, this plea

has to be tested against the applicable legal principles and on the touchstone of equitable considerations as well as the balance of convenience. The applicants before this Court are all persons who have contested several years of litigation for plots after having made almost full payment towards them to the respondent company as promised. There is no challenge to the existence of the land as well as to the rights of all these applicants. The compliance with specific judgments of the court is being denied by the respondent on the sole ground that the present proceedings are pending. Certainly a company which has conducted itself in this manner before the court cannot be permitted to defeat the rights of these genuine applicants or be permitted to abuse court process or to take refuge under the statutory provisions of Section 433 to 436 of the Companies Act, 1956.

23. The present petition must fail for yet another reason. One Mr. Arun Mehra (Applicant in C.A. No. 472/2008) has claimed to have entered into a shareholder agreement dated 19th May, 1997 with Mr. R.K. Nanda and Promila Nanda, the directors of the company. This person was permitted by the order dated 2nd May, 2008 to be impleaded as respondent No. 2 before this Court. Mr. Vijay Agarwal learned Counsel representing the applicant has drawn my attention to an order dated 4th April, 2008 passed in C.S. (OS) No. 1136/2005 entitled Sh. Vishesh Jain v. Sh. Arun Mehra and Ors. Mr. Vijay Agarwal (representing the applicants in C.A. No. 471/2008) has submitted that this suit had been got filed by Mr. R.K. Nanda. The modus operandi appointed to file this suit was similar to that adopted in the instant case. It is urged that the same had been got filed in the name of a person who does not exist. The applicant had filed an application u/s 340 of the Code of Criminal Procedure in C.S. (OS) No. 1136/2005 which was registered as LA. No. 5596/2006. On this application, the court had passed an order dated 4th April, 2008 wherein the court had noted that the statement of Shri R.K. Nanda (director of the respondent company) which had been recorded prima facie showed collusion between them and Shri Vishesh Jain. A specific finding has been recorded that there was conspiracy and collusion between the plaintiff and the defendant No. 4 namely Durga Builders Pvt. Ltd. and that the matter needed thorough investigation. The matter was sent by the court for investigation to the Crime Branch of Delhi Police to ascertain the identity and location of Sh. Vishesh Jain. It appears that pursuant to the investigation which was conducted, the Crime Branch has registered the complaint as F.I.R. No. 246 dated 7th August, 2008 u/s 420/468/471/120B of the Indian Penal Code, 1860. This case is pending investigation by the police.

24. It has further been pointed out that an investigation officer appointed by the police station Tilak Marg has recorded statement of Mr. B.L. Wali, learned Counsel who represents the petitioner in the instant case. The extract of the copy of the statement has been placed before this Court wherein it appears that Mr. Wali, learned Counsel has submitted that Mr. Vishesh Jain was referred to him by learned Counsel representing the respondent company in this Court. Mr. Shared Agarwal, learned Counsel representing the respondent company denies having introduced Sh. Vishesh Jain to Mr. Wali, Advocate. It has further been submitted

by Mr. Vijay Agarwal, learned Counsel for the applicant that the legal notice dated 15th April, 2005 has been purportedly issued by some one claiming to be an advocate by the name of Shri Vishesh Jain.

25. Inasmuch as this aspect of the matter is pending investigation with the police station Tilak Marg, it may not be appropriate to make any further observations in the matter. Mr. Shared Agarwal, learned Counsel representing the respondent company has submitted that a writ petition has been filed by the applicant in C.A. No. 589/2008 before the Apex Court as well wherein certain orders for handing over possession of plots by the respondent have been made and for this reason, hearing of the application has to be deferred. Copy of an order dated 24th September, 2008 placed before this Court would show that this order was passed in a W.P. (C) No. 876/1996 entitled Okhla Enclave Plot Holders Welfare Assn. (Regd) against the UOI and others. Certainly the hearing of an application seeking recall of an order of admission of a winding up petition would not stand interdicted only because a writ petition stands filed by the same applicant seeking allotment of a plots.

26. Mr. Adarsh Priyadarshi, learned Counsel submits that in the writ petition before the Supreme Court, inter alia, prayers for appointment of a receiver in respect of the plots in question; a CBI inquiry into the affairs of the respondent and allotment of land to the original allottee have been made. These are certainly not the prayers which are being considered by me nor the scope of the present consideration.

27. Mr. Sarat Chandra, learned Counsel representing the applicant in C.A. No. 599/2008 has submitted that a similar petition against Nanda Tourim Corporation Limited, a sister concern of the respondent has been filed by Manjit Kaur being C.P. No. 234/2005 which was listed on 26th September, 2008 . This position is vehemently disputed by Mr. Sharad Agarwal, Advocate. In any case this petition would have no bearing on the present consideration.

28. Mr. P.V. Narisimhan, Advocate representing the applicants in C.A. Nos. 580, 583 and 586/2008 has handed over the original envelopes in which notices which were sent to Ms. Manjit Kaur pursuant to directions by this Court by the DTDC, which is the approved courier service of this Court. The three envelopes which have been sent to Ms. Manjit Kaur have returned back with the report that no such security agency exists at such address nor was it ever located at that address.

29. There is no appearance on behalf of the petitioner in this matter today. There has also been no appearance in the proceedings after the passing of the orders dated 18th January, 2008.

30. The foregoing facts and circumstances placed by the applicants before this Court would clearly evidence the fact that present proceedings have been initiated malafide and that even if petitioner existed, she has no interest whatsoever in prosecution of the present case. The plea of the respondent that it

was not possessed of the funds and the resources to satisfy the claim of the petitioner, if actually due, is falsified by the documents which have been noticed hereinabove. Even otherwise, in the given facts, the opposition to the recall of the order of admission is clearly malafide and collusive. The same was also intended to defeat judgments passed against the respondent by the Division Bench of the High Court of Punjab and Haryana in several writ petitions and sustained by the apex Court.

31. So far as the impact of the present proceedings is concerned, the only advertisement which was published on 3rd February, 2008 has called upon objections from those opposing the winding up order. The applicants have all opposed the making of a final winding up order.

32. In the light of the above discussion, I find that the present case is not a case where the company is unable to pay its debts. Certainly in the facts brought on record, it is neither just nor equitable that the company should be wound up. The respondent cannot be permitted to utilise the shield and device of a winding up petition to avoid compliance with judgments of the courts or its contractual liabilities. The respondent is bound to comply with all judgments which have been passed against it.

33. It is submitted by Mr. Rajeev Bahl, learned Counsel representing the official liquidator that the official liquidator has initiated the proceedings and has taken possession of Devli Road and Scindia House properties. It has been submitted that the directors of the company are yet to furnish the complete and credit statement of affairs and to hand over records to the official liquidator in statutory compliance. In this background the official liquidator is directed to hand over possession of the premises situated at Devli Road and Scindia House to the directors Mr. R.K. Nanda and Promila Nanda.

34. Mr. Bahl, learned Counsel has submitted that the official liquidator has found that an amount of Rs. 1,33,473.37 as on 30th September, 2008 is lying in the account of the company maintained by the official liquidator.

35. It has been submitted that the directors of the company have not disclosed any sale deed which have been entered into or where the accounts of the company is lying till date. There is no dispute that Shri R.K. Nanda and Smt. Promila Nanda were controlling the company. At their instance, a winding up order against it almost came to be passed. Material facts and documents have been deliberately concealed by the management. Valuable time of the court has been wasted while compliance of the judgments of several courts and discharge of liability to several persons has been unfairly delayed. In this view of the matter, Sh. R.K. Nanda and Smt. Promila Nanda, directors of the respondents, shall deposit costs of Rs. 50,000/- each for conniving and concealing material facts and documents which would have enabled this Court to pass appropriate orders without the necessity of this elaborate adjudication today. The costs shall be deposited by these ex-directors within a period of two weeks from today with

the official liquidator which shall go to the Common Pool Fund.

36. I find that the matter however cannot end with the disposal of the present petition. Inasmuch as the Crime Branch of the Delhi police is already investigating into the existence of Mr. Vishesh Jain who had also lodged claims against the respondent company, I issue a direction to the Crime Branch to conduct an investigation into the existence/address/whereabouts, of Ms. Manjit Kaur D/o Sh Gian Singh as well as M/s Kumar Security Syndicate having its address at E-208, Kavi Nagar Indl. Area, Ghaziabad 201001 U.P.

37. Copy of the present winding up petition and the order passed today shall be forwarded to the Crime Branch. The Crime Branch shall also investigate this matter from the aspect of a conspiracy between Ms. Manjit Kaur and Durga Builders Pvt. Ltd. as well as its ex-directors Mr. R.K. Nanda and Promila Nanda.

38. The company shall stand restrained from transferring, alienating or parting with possession of its Immovable assets other than in compliance of court judgments for a period of four weeks or till compliance of court judgments for a period of six weeks, whichever is later.

A report be placed before this Court as well.

C.A. No. 703/2008 (by Shakuntala Devi)

List on 15th December, 2008