

(2012) 10 BOM CK 0110

In the Bombay High Court

Case No : Company Petition No. 86 of 2012

Meghraj Capital Advisors Private Limited (formerly known as Meghraj SP Corp) **APPELLANT**

Vs

Samira Constructions Limited **RESPONDENT**

Date of Decision : 17-10-2012

Acts Referred:

Companies Act, 1956 — Section 434

Citation : (2013) 1 ALLMR 51

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Varun Mamniya along with Mr. Chirag Balsara instructed by M/s. Rajani Associates, for the Appellant; Kersi Dastoor instructed by y M/s. Phoenix Legal, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—Heard finally. The Petitioner has filed this winding up petition under Sections 433 and 434 of the Companies Act, 1956 for winding up the Respondent Company.

2. On March 24, 2007 the Financial Advisor Agreement was entered into between the parties for the project on the terms and conditions mentioned therein. This was a consultancy agreement. It was modified on 22.10.2007. Monthly invoices were raised regularly. The part payments were made, lastly on March 2, 2009. The balance remained to be unpaid. The statutory notice was accordingly issued for Rs. 32,78,443/-. The Company simply denied the liability in all respects. There is nothing on record that at any point of time, the Company has admitted the liability.

3. The clauses of the agreement were read and referred by both the counsel. The Agreement itself shows that both the parties are required to comply with their respective obligations. The Consultancy Agreement itself means the reciprocal obligation and the performance of their individual part at every stage. This

Agreement was admittedly for the particular project. The Financial Advisor Agreement, therefore, required to act upon continuously till the completion of the project and in a given case, even thereafter. The clauses in the Agreement itself provide the detailed obligations of the Petitioner which required to be followed by the regular payment to be made by the Company.

4. The claim of Rs. 34,71,577/- raised by the Petitioner, based upon 15 invoices till October, 2008. The balance, according to them, remained of Rs. 18,96,344, including 18% interest per annum from 16.1.2012.

5. Mere denial to the statutory notice may not be sufficient to accept the defence of oral settlement, as tried to be contended for the first time in the reply affidavit. It is clear that even after going through the averments made by the parties nothing pointed out that the Respondent/company at any point of time confirmed and/or admitted the liability.

6. In reply to the Company Petition, though by the rejoinder the Petitioner denied, the following averments are made:

11 Pursuant to execution of the Revised Mandate, as per understanding between the parties, the Respondent was clearing invoices of the Petitioner on ad-hoc basis. However, the Invoice dated March 26, 2008 for Rs. 16,85,400/- towards raised by the Petitioner allegedly towards milestone fee was incorrect and thus no payment was made by the Respondent in that regard. I say that the question of achieving any milestone does not arise as the investment size as per Revised Mandate has yet not been achieved by the Respondent and thus any payment to be made towards achieving milestone does not arise. I further say that the Petitioner failed to carry out any work strictly in terms of the said Revised Mandate letter and failed to render any professional services in relation to SPV structuring. Pre Due Diligence and Definitive Documentation strictly in accordance with the terms of Revised Mandate. The said fact was brought to the notice of concerned person at various occasions however, despite the same, the Petitioner defaulted and failed to perform its obligation strictly in accordance with the Revised Mandate and it is on that basis that the Respondent withheld the payment of Rs. 10,11,240/- towards the last three invoices raised by the Petitioner for the months of July to September 2008. The payment of invoice dated March 26, 2008 for Rs. 16,85,400/- was wrongly raised by the Petitioner and thus unpaid. Thereafter, several meetings took place between the parties to amicably resolve the issue. Accordingly, on the basis of oral understanding between the parties, the Respondent made payment of Rs. 14,87,662/- to the Petitioner in first week of March, 2009 towards full and final settlement of all amounts payable to the Petitioner.

7. The above averments in reply to the Company Petition are relevant factor which cannot be decided/adjudicated for the first time in the Company Petition. The dispute so raised, I am inclined to observe, is bonafide and genuine.

8. The Apex Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., ,

while dealing with the concept of bonafide dispute, referring to winding up Petition observed as under:

20 ...It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action. Lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt.

22. The abovementioned decision was later followed by this Court in Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.,]. The principles laid down in the abovementioned judgment have again been reiterated by this Court in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , wherein this Court held that the defence raised by the appellant Company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The abovementioned judgments were later followed by this Court in Vijay Industries Vs. NATL Technologies Limited, .

23. The principles laid down in the abovementioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433 (1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability u/s 433(e) read with Section 434 (1) (a) of the Companies Act, 1956.

9. The submission was also made by the Petitioner that mere simple denial itself is not sufficient. The Respondent/company ought to have raised specific pleas while denying the statutory notice. Having failed to do so, the Company based upon the averments made, should be wound up. I am not inclined to accept this for simple reason that the purpose and the object of statutory notice is to demand from the Company to make payment of admitted and/or crystallized amount. The requirement is that undisputed, and/or acknowledged liability and the amount, so due and payable, be paid within reasonable time. The mandate of statutory notice, therefore, if not complied with, in a given case, the Court, under such circumstances, may pass order of winding up. That is always additional factor while considering the merit of the matter, as observed in Focus Management Consultants (P) Ltd. vs. Second Foundation India (P) Ltd., 2007 (3) Company Cases 127 (Delhi), referring to ramification of not replying the statutory notice (para 25).

10. This is not a case where no demand notice was replied. The Single liner denial, in my view, just cannot be treated as no defence, basically when there is nothing on referred and/or relied to point out that the amount so claimed was admitted and/or crystallized and/or there is acknowledgment of the liability. The

moment there is a denial, the burden lies upon the Petitioner to show on record that the amount was due and payable, even on the date of the demand.

11. In the present case, the foundation is the Consultancy Agreement between the parties, where it was agreed, as per the Petitioner, that the Petitioner would get a guaranteed fee of Rs. 50 lacs, which was payable on a monthly basis at the rate of Rs. 3 lacs per month, at least for 12 months, or at the time when the investment size is achieved and/or if the agreement is revoked at Samira's violation, whichever is earlier, the outstanding balance will be paid as a lump sum. As per the Petitioner, after 12 months from the date of agreement i.e. 22.10.2007, apart from lump sum amount of Rs. 5 lacs, the amount claimed, according to this agreement, was outstanding. This clause itself cannot be read in isolation. The revised clause and the obligation on the part of the Petitioner as referred in other part of the Agreement, just cannot be overlooked. There are no averments to show that they have complied with their part in full and, therefore, they are entitled to claim this full consultancy guaranteed amount as agreed. The Respondent/company in the affidavit has denied and made a positive statement that there were no full compliances by the Petitioner.

12. The Petitioner failed to perform their part as alleged. The parties, therefore, in view of change of circumstances, agreed to settle the matter and, therefore, the lump sum amount was paid as alleged. No amount was paid after March 2009. Though the Petitioner is denying the oral settlement, yet considering the facts and circumstances read with the documents on which strong reliance has been placed, I am inclined to observe that there is a bonafide dispute raised by the Respondent/company. The dispute, unless settled, through the Arbitration proceedings, as there exists an arbitration clause in the agreement, I am not inclined to accept the case of the Petitioner that the amount is crystallized and, therefore, due and payable and the Company neglected to pay. The disputed facts are not speculative and illusory, unless adjudicated finally, there is no question of passing the order of winding up as prayed. Resultantly, the Company Petition is dismissed. No costs.