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(2013) 11 DEL CK 0328

In the Delhi High Court

Case No : Company Petition No. 478 of 2011

M.R.A. Associates India P. Ltd. — APPELLANT

Vs

Seven Seas Hospitality P. Ltd. — RESPONDENT

Date of Decision : 08-11-2013

Acts Referred:
Companies Act, 1956 — Section 433(e), 434, 434(1)(a)

Citation : (2013) 181 CompCas 282 : (2014) 1 CompLJ 561 : (2013) 205 DLT 26

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

Bench : Single Bench

Advocate : Subhiksh Vasudev and Srivats Kaushal, for the Appellant; S.C. Singhal, for the Respondent

Final Decision : Allowed

Judgement

R.V. Easwar, J.—This is a petition filed u/s 433(e) of the Companies Act, 1956, seeking winding up of the respondent-company for non-payment of the dues of Rs. 21,20,232. The petitioner is a company engaged in rendering integrated services relating to infrastructure development. The respondent-company had planned to build a five star Hotel in Rohini, Delhi and sought the assistance of the petitioner to provide management services for the project. On December 17, 2010, a techno-commercial proposal was submitted by the petitioner which explained the scope of "construction management services" at pre-construction, post-construction and during the construction phases. The proposal towards the end, enumerated the terms of engagement. The fees payable for the provisional services was Rs. 6,00,000 per month or part thereof; in addition thereto, the travel expenses, boarding and lodging, etc., site office and pantry expenses were also payable. The payment terms were that one month professional fees is to be paid in advance and the invoice payment shall be made within 7 days of the submission thereof. The engagement could be terminated by either side after giving 2 months'' advance notice.

2. On December 18, 2010, an e-mail was sent by the respondent to the

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petitioner accepting the proposal and mentioning that a sum of Rs. 1 lakh was given in cash as advance. It was also stated that the duties of the petitioner would start at December 20, 2010 and the petitioner shall meet Mr. Sachdeva and Mr. S. C. Gupta, who were deputed by the respondent to show to the petitioner the site and for meeting the contractors. The mobile number of Sachdeva was also given.

3. It is not clear what exactly happened between the petitioner and the respondent thereafter, but it would appear that the arrangement between them was soon terminated. According to the petitioner, invoices were raised by it as per following details:

4. In addition to the above the petitioner also issued receipt for Rs. 1 lakh received by it on December 16, 2010, as advance. The invoices were not paid by the respondent.

5. Reminders were, therefore, issued by the petitioner on March 1, 2011, March 21, 2011, March 25, 2011 and April 1, 2011. In these reminders, the respondent was asked to pay Rs. 21,20,232 as detailed below:

MRAFL/Seven Seas/Fees

Date : 1-03-11

To,

M/s. Seven Seas Hospitality P. Ltd.,

Lawrence Road,

New Delhi.

Kind Attn : Mr. Jagannath

Sub :-Bill for project management services for hotel at Mangalam Place, New Delhi.

Ref: E-mail dated 30th December, 2010

(Rupees twenty one lakh twenty thousand two hundred thirty two only)

For M.R.A. Associates India P. Ltd.,

Sd/-

(Aroon Kumar Aggarwal)

IT PAN No. : AAFCM3239H,

Service Tax No. : AAFCM3239HST001

6. Since no reply was received from the respondent the petitioner sent a reminder by e-mail on April 6, 2011. Since there was no response to this also, a further reminder was sent by e-mail as well as by registered post. Even these did

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not evoke any response. Therefore, the petitioner sent a demand notice on August 9, 2011, u/s 434(1)(a) of the Act calling upon the respondent to pay the amount of Rs. 21,20,232 with interest at 18 per cent. per annum from April, 2011 till July 31, 2011, with further interest at 18 per cent. per annum till actual payment. The notice was served on the respondent but did not evoke any response. The service of notice is not denied by the respondent.

7. The petitioner, therefore, filed the present winding up petition on the ground that the company is unable to pay its debts.

8. According to the petitioner, the respondent was liable to pay the aforesaid amount for the services rendered by the petitioner and since there was no reply either to the statutory notice or to the reminders issued earlier it must be taken that the respondent has admitted the debt. It is stated that the conduct of the respondent shows that its defence is not bona fide or substantial but is mere moonshine. It is further argued that there is sufficient evidence on record to show that the petitioner rendered services for which payment is due.

9. The respondent, however, states that there is no admission of any liability and that though there were certain negotiations between the parties, but no concluded agreement ever came into existence and the terms and conditions were not settled. It is submitted that the petitioner never rendered any consultancy services to the respondent and it has failed to point out as to in what manner the consultancy services were rendered.

10. On a careful consideration of the facts, the material on record and the rival contentions, I am satisfied that the petitioner has made out a case for admitting the winding up petition. The proposal of the petitioner was accepted by the respondent and the fact that there was no contract which was reduced into writing cannot lead to the conclusion that the petitioner did not render any services. The respondent paid an advance of Rs. 1,00,000 to the petitioner and stipulated that the duties of the petitioner would start from December 20, 2010, on the site. The petitioner was also directed to meet Mr. Sachdeva and Mr. Gupta deputed by the respondent to show the site and meet the contractors. Thereafter, there is a series of correspondence which would prima facie show that the petitioner did commence the rendering of the services for which it was engaged. At page 26 of the petition, there is a letter written by Ahluwalia Contracts (India) Ltd. (hereinafter referred to as "AHLCON") to the respondent AHLCON was the company which was engaged by the respondent for construction of the hotel. A copy of this letter which is dated December 29, 2010, is seen marked to the petitioner for information. The letter speaks of corporate guarantees for performance and mobilisation advance to be given by AHLCON to the respondent. This shows that the petitioner was kept in the loop. Another letter written by AHLCON to the respondent on the same day in connection with the execution of a power of attorney was also marked to the petitioner. On February 2, 2011, AHLCON wrote a letter to the respondent regarding requirement of steel. A copy of this letter was marked to the petitioner for

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information and necessary action. Enclosed to this letter is a comparative statement of steel reinforcement for the approval of the respondent. On February 4, 2011, another letter was written by AHLCON to the respondent with a copy thereof marked to the petitioner for information and necessary action. The subject of this letter was "progress of work". More specifically, the letter dealt with the problem concerning dewatering. There appears to have been a problem due to collection of sub-soil water. AHLCON was complaining to the respondent about the evasive conduct of the dewatering contractor. The photographs of the site were attached to this letter, to explain the problem. On February 8, 2011, a similar letter was written by the AHLCON to the respondent on the same subject, a copy of which was marked to the petitioner.

11. On February 14, 2011, AHLCON wrote another letter to the respondent on the subject of anti-termite treatment. A copy of this letter was also marked to the petitioner. This letter appears to be a sequel to an earlier letter written by AHLCON to the petitioner itself on January 10, 2011, requesting the petitioner to arrange the material in advance so that the anti-termite work can start in time. Another letter of the same date written by AHLCON to MRA Associates, the petitioner, relates to the subject of extending the commencement date of the project. AHLCON has stated in the letter that they have not received the structural drawings which was delaying the construction and procurement Schedule. A request was made to the petitioner to extend the commencement date of the project. On January 14, 2011, another letter was addressed by AHLCON to the petitioner regarding quotation for cement. The petitioner was requested to approve the quotations for cement and procure the cement as early as possible. There are letters dated January 18, 2011, on the subject of control points and architectural drawings. These letters were addressed to the petitioner by AHLCON. On January 25, 2011, AHLCON again wrote to the petitioner, the subject being the problems due to dewatering. The complaint in the letter is that due to the inefficiency of the dewatering contractor, there is a delay in the schedule which should be considered and extension of the commencement date should be given. A reply seems to have been written by the petitioner on the same day. In this reply there is reference to a verbal discussion on January 21, 2011, on the subject of the dewatering. The letter states that AHLCON had excavated more than 1,500 m.m. resulting in the sub-soil water coming up. They were advised not to excavate more than 1,000 to 1,500 m.m. The petitioner blamed the lack of supervision of the work by AHLCON pointing out that no engineer was available to check the excavation which was being done at night.

12. The aforesaid correspondence between the petitioner and AHLCON and copies being marked to the petitioner in respect of the initial correspondence entered into between AHLCON and the respondent indicate that the petitioner did render some services to the respondent for which payment was due. As to what exactly was the amount due to the petitioner for the services may be in dispute but the fact that there was a dispute does not in all cases mean that no amount was due by the respondent. In Madhusudan Gordhandas and Co. Vs. Madhu

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Wollen Industries Pvt. Ltd., , it was held by the Supreme Court that where there is no doubt that the company owes the creditor a debt entitling him to a winding up order, but the exact amount of the debt is disputed, the court will make a winding up order without requiring the creditor to quantify the debt precisely.

13. The defence taken by the respondent is not of substance. Having accepted the proposal of the petitioner and having paid an advance of Rs. 1,00,000 and also having invited the petitioner to start work from December 20, 2010, there was no justification on its part to dispute the claim that the petitioner rendered services merely on the ground that no formal contract was concluded between the parties. The respondent could not have been unaware that copies of the letters written by AHLCON to it were marked to the petitioner. If no formal contract had been concluded and if the respondent had not engaged the services of the petitioner, the respondent ought to have told AHLCON that the petitioner had nothing to do with the hotel project and, therefore, copies of the correspondence need not be marked to the petitioner. Moreover, AHLCON could not have possibly come to know that the petitioner was engaged as consultant of the hotel project except on being informed by the respondent. An advance of Rs. 1,00,000 was given to the petitioner with a request to start the work on site from December 20, 2011. All this leads to the reasonable inference that the petitioner''s services were engaged by the respondent. For the services, the petitioner has to be paid and merely because the amount payable is disputed and is not acceptable to the respondent, it cannot be said that mere is no case for winding up the respondent.

14. Learned counsel for the respondent in the course of the arguments submitted that the petitioner did not submit a list of the various services it had claimed to have rendered, as stipulated in the proposal submitted by the petitioner. The rendering of services is quite different from the submission of the list of the services to the respondent as stipulated in the proposal. The fact that the petitioner did not submit a list of the services rendered by it in terms of its proposal does not take away anything from the fact that the services were actually rendered, if such services can be otherwise proved to have been rendered. Moreover, the conduct of the respondent does not bear scrutiny. It did not reply to the statutory notice sent by the petitioner u/s 434. Before the issue of the statutory demand notice, the petitioner sent several reminders through registered post, e-mail, etc.; however, the respondent did not care to reply to any of these. The respondent also does not deny the receipt of the statutory demand notice. All the objections/defences to the petitioner''s claim are taken only in the counter affidavit for the first time. If the respondent really thought that there was no concluded contract and that the petitioner was not engaged for rendering any consultancy services, it ought to have responded to the reminders issued by the petitioner at the earliest. In Resham Singh and Co. P. Ltd. Vs. Daewoo Motors India Ltd., , Vikramjit Sen, J. (as he then was, of this court) held that where there is no response to the statutory notice, the respondent-company runs the risk of the winding up petition being admitted for hearing at the

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threshold stage itself. In the judgment of the Supreme Court Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., it has also been held that the defence of the company should be in good faith and one of substance and not mere moonshine.

15. Learned counsel for the respondent, in the course of his arguments, disputed the claim of the petitioners mat the bills/invoices were acknowledged by one Shefali, an employee of the respondent. He submitted that the said person was not in the employment of the respondent-company at the relevant dates and her signatures were forged. This defence was not taken by the respondent at any earlier point of time, though the petitioner had referred to the invoices and the reminders in its e-mails sent prior to the sending of the demand notice. There was no response to any of them, even the statutory notice. It is also not clear why, if no contract was concluded between the parties and no services were rendered by the petitioner, the respondent did not even ask for refund of the advance of Rs. 1,00,000 paid to the petitioner. Thus, the contention of the respondent in paragraph 5(a) of the counter affidavit to the effect that the terms and conditions were not settled between the parties and that the petitioner never provided any consultancy services to the respondent appears to me to be mere moonshine and not bona fide.

16. For the above reasons I admit the winding up petition. List on March 20, 2014, for further proceedings.

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