
(2019) 02 DEL CK 0592

In the Delhi High Court

Case No : Company Petition No. 924, 932 Of 2015

Narinder Nath Ahuja

APPELLANT

Vs

Innovative Infradevelopers Pvt. Ltd. & Ors

RESPONDENT

Date of Decision : 15-02-2019

Acts Referred:

Companies Act, 1956 — Section 433(e), 434(1), 439(b)
Indian Contract Act, 1872 — Section 73, 74

Citation : (2019) 02 DEL CK 0592

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Dheeraj Gupta, Sanam, Siddiqui, Diksha Arora, Ankur Bansal

Final Decision : Dismissed

Judgement

Jayant Nath, J

1. The Petition is filed under Section 433(e), 434(1) and 439(b) of the Companies Act, 1956 seeking winding up of the respondent company. The case of the Petitioner is that the respondent company was developing a very prestigious and high end commercial project by the name of 'Innovative Legend Heights' at Sector 80 Gurgaon. On 19.10.2011 the petitioner agreed to purchase a unit measuring 1530 Sq. Feet per super area in the said project/commercial tower @ Rs.6630 per sq.ft. The parties entered into a Builder Buyer Agreement for the said unit No. 720, located at 7th Floor of the commercial tower of the said project. The Petitioner paid the entire sale consideration of Rs. 96,36,705/-. It is the case of the Petitioner that the Respondent had agreed in terms of the Builder Buyer Agreement dated 19.10.2011 that a payment of Rs.62.99 per Sq. Feet super area, would be made to the Petitioner per month by the respondent as a committed return during the period of construction until the offer of possession is made to the Petitioner. It is also the case of the petitioner that the respondent undertook to get the said unit of the petitioner leased out within a period of 3 months to a bona fide lessee at a minimum rental of Rs.49.72 per sq.ft. per

month and in the event the respondent company is unable to finalize the leasing arrangements within a grace period of three months from the date of taking over possession by the petitioner the respondent will pay minimum rent @ Rs.49.72 per sq.ft. per month as minimum guaranteed rent for the first 36 months or till the date, the said unit would be put on lease; whichever is earlier. In case the rent is less than Rs.49.72 per sq.ft.per month then the respondent shall compensate the petitioner by providing the differential amount for a period of 36 months. The respondent is also said to have issued a bank guarantee for the sum which is however said to have expired.

2. The case of the petitioner is that the respondent company has paid the committed return for the duration of the construction of the project at the agreed rate. On 17.06.2014 a conveyance deed was executed for the area in question in favour of the petitioner. It is further stated that as the respondent failed to get the rent as per the said offer of the agreed minimum rental and hence the respondent became liable to pay the assured rentals at the stated rate of Rs.49.72 per sq.ft. per month. It is also the case of the petitioner that the assured monthly rental has been paid upto December 2014 whereafter the respondent has stopped making the necessary payment. Present winding up petition is filed accordingly for recovery of the balance dues. Legal notice was sent on 11.3.2015 where the petitioner has claimed a sum of Rs.4,56,432 as on 1st March 2015.

3. Learned counsel for the respondent has however, pointed out that several attempts were made to lease out the property. In fact by a communication dated 23.9.2014 a draft lease was sent seeking the permission of the petitioner to let out the property. Reminders were sent on 7.10.2014 and 17.12.2014. However, the petitioner did not respond and hence on account of the acts of misdeed by the petitioner the property could not be rented out.

4. I have heard learned counsel for the parties.

5. Learned counsel for the respondent also points out that the judgment of the Supreme Court in Rameshwar & Others vs. State of Haryana & Others, 2018(6) SCC 215. The entire project is taken over by HUDA/HSIDC. Further claims if any are to be made to HUDA/HSIDC.

6. Learned counsel for the petitioner denies that this order of the Supreme Court is applicable to the petitioner inasmuch as he states that the project regarding the petitioner is complete and a conveyance deed has also been registered in favour of the petitioner for the flat in question. Hence, since the petitioner continues to be the owner of the property respondent cannot wriggle out of its commitment to the petitioner.

7. I may look at the communications which have been sent by the respondent for leasing of the area.

8. Reference may be had to the letter dated 23.9.2014. Perusal of the letter

shows that the company Matrix Valves Private Limited had written to the petitioner pointing out that they wish to take the unit on rent @ Rs.26 per feet super area for a period of nine years. Proposed lease deed was also attached to the said communication which was to be executed between the petitioner and the said Matrix Valves Private Limited. The petitioner failed to respond to the said communication. A reminder was sent to the petitioner by the respondents on 7.10.2014 and 17.12.2014. The said reminder dated 17.12.2014 categorically states that in case of non acceptance of the offer the respondent will not be liable to pay any assured rental/compensation on the ground that the property is lying vacant. Subsequently, on 18.1.2017 the respondent sent another communication being a cancellation notice regarding the assured leasing in respect of the unit. The communication states that as the respondent failed to execute the lease deed with the proposed tenant the respondent cancelled the assured leasing for the unit. The petitioner was requested to take over physical possession of the unit forthwith.

9. I may also note that the respondents in response to the legal notice dated 17.7.2015 sent by the petitioner had written a reply dated 22.8.2015 where reference is made to the said communication dated 23.9.2014 by the intending lessee and the subsequent communications dated 7.10.2014 and 17.12.2014.

10. I may note that the learned counsel for the petitioner in the course of arguments denied receipt of these communications from the respondent. I may, however, note that the categorical submissions made by the respondent in the reply and also the reply to the legal notice dated 17.7.2015 about these communications have gone unrebutted. The petitioners have failed to file a rejoinder to the reply. In the light of these facts it appears that there is prima facie merit in the contention of the respondents.

11. Learned counsel for the petitioner has also pointed out that the aforementioned communications relied upon by the respondents are superfluous in terms of the agreement between the parties including clause N of the buyer agreement where it is stated that the developer, namely, the respondent agrees that the petitioner has authorized the respondent to enter into any agreement with the third party for leasing of the said unit and presenting the same before HUDA or any other competent authority. It is pleaded that no approval from the petitioner was required by the respondent to lease out the property and hence the communications relied upon by the respondent are superfluous. It has also been pleaded that on 3.9.2015 the respondent has proposed to adjust the lease rentals as per clause N of the builder buyer agreement from January 2015 to January 2017 against unit No.720 where additional unit was offered to the petitioner.

12. Learned counsel for the respondent has refuted the contentions of the petitioner. He states that communication dated 3.9.2015 was made without prejudice to the rights and contentions of the parties as is apparent from a perusal of the communication. It was an attempt to settle the dispute between

the parties.

13. I may note that these are clearly disputed questions of fact which arise. The proposed lease which was to be entered into with Matrix Valves Private Limited was for a period of 9 years. It was obvious that such a long tenure lease should have been entered into between the parties and the lease deed necessarily had to be executed by the owner/petitioner inasmuch as there was no proper power of attorney in favour of the respondent to warrant the respondent executing the lease with the prospective tenant for and on behalf of the petitioner.

14. That apart, in my opinion, as is claimed by the petitioner the property remained vacant for a period of three years the issue would arise about mitigation of damages. If the property was lying vacant the petitioner would also have to make efforts that the property is rented out so that the claim for loss and damages stands mitigated in terms of section 73 and 74 of the Contract Act. These are clearly disputed questions of fact which had to be adjudicated upon by an appropriate civil court or any appropriate forum and not by the company court.

15. It is settled legal position that it is not the function of the company court to enter into an adjudication of disputed facts which should have been the subject matter of the Civil Suit.

16. Reference in this context may be had to the judgement of the Supreme Court in IBA Health (I) Pvt. Ltd. vs. Info-Drive Systems Sdn.Bhd., (2010) (4) CompLJ 481 (SC) where the Supreme Court held as follows:-

"17. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. 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."

17. As I have already concluded that the above winding up petition is not maintainable on account of the disputed questions of fact, I need not deal with the plea of the learned counsel for the respondent that in view of the judgment of the Supreme Court in the case of Rameshwar & Others vs. State of Haryana & Others(supra), the petitioner would have no case against the respondent.

18. This petition is accordingly dismissed. Liberty is granted to the petitioner to approach appropriate forum for adjudication of his claims. In case such proceedings are commenced, the concerned civil courts/forum may deal with the contentions of the petitioner uninfluenced by any observations made by this court.