(2019) 02 DEL CK 0586

In the Delhi High Court

Case No : Company Petition No. 616 Of 2015, Civil Application No. 2457-2458 Of 2015

Sansys Exim Pvt.Ltd APPELLANT

Vs

Balprada Hotels & Hospitality Pvt. Ltd. And Anr RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 433(f), 434, 434 (l)(a), 434 (2), 439(1)(b)

Citation : (2019) 02 DEL CK 0586

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Rajendra Sahu, Sumit Gehlawat, Abhishek Bhardwaj

Judgement

Jayant Nath, J

1. This petition is filed under sections 433(e) & (f), 434 (l)(a), 434 (2) and 439 (l)(b) of the Companies Act, 1956 (hereinafter referred to as 'the Act') for winding up of respondent No.1 company.

2. It is the case of the petitioner that respondent No.1 company approached the petitioner to provide and lay Italian/equivalent imported marble in flooring, dado, wall cladding and counter top etc. at Sector-56, Golf Course road, JMD Hilton Hotel, Gurgaon. Both the parties agreed to terms and conditions of the work order and accordingly various work orders were issued to the petitioner. It is also the case of the petitioner that they completed the works relating to JMD Hilton Hotel, Gurgaon in the beginning of 2011. The said hotel started its full-fledged business in the year 2011. It is stated that despite the works being completed by the petitioner, respondent No.1 company, on one pretext or the other, started complaining verbally about one deficiency or the other regarding the works done by the petitioner company. Though being aggrieved by the said tactics of respondent No.1 company, the petitioner kept on following the orders of respondent No.1 company and rectified the works once again. It is stated that all

the work was done by the petitioner company to the entire satisfaction of respondent No.1 company and the Hilton Company. The quality and specifications of the materials and products were controlled and supervised by the said Hilton Company.

3. It is further stated that total measurements were verified by the respondents" project team and respondent No.1 company released part payments. Finally the petitioner company submitted the final bills on 15.02.2013 on the basis of measurements and quantities already verified by respondent No.1 in 16th R.A. bill for an amount of Rs.1,52,20,972/-. Respondent No.1 company after verifying the said bill and after making all sorts of deductions sent a Final Certified Bill dated 21.06.2013 stating that the balance payable amount due on the petitioner is Rs.24,98,137/-. Hence, it is pleaded that respondent No.1 company became liable to pay the said amount besides security deposit of Rs.6,83,132/-. The said Final Bill has been verified by the Billing Engineer and also by the Company Vice President (Technical) etc. Despite several reminders no payments were received. The petitioner company sent a legal notice on 21.04.2014. Another notice under sections 433 and 434 of the Act was sent on 30.06.2015. Thereafter, a vague reply has been received from respondent No.1 company.

Hence, the present petition.

4. The respondents have entered appearance and filed their reply. In the reply, the respondents pleaded that the petitioner company misled respondent No.1 company to award it works contract. The petitioner failed to complete the work which caused delay in completion of the project. Later on, the petitioner company, in fact, abandoned the work and never completed the allotted work. Respondent No.1 company was forced to engage another contractor for the remaining work and incurred expenses of Rs.20 lakhs. Certificates certifying the final bill are denied saying that the employee of respondent No.1 company Mr.I.C.Kalra colluded with Mr.Binay Sinha, the director of the petitioner company with mala fide intention and illegally got the certified RA Bills. It is claimed that the petitioner is liable to pay damages of Rs.26,87,050/- to respondent No.1 company.

5. I have heard the learned counsel for the parties.

6. The learned counsel for the petitioner has taken me through the calculation sheets of the 17th RA-cum-final bill which have been signed at bottom by Sh.Naveen Ambavata, Site Billing Engineer on 14.06.2013 stating that the full works have been completed. Similar is the position with regard to the certificate issued on 21.06.2013 which was signed by Mr.I.C.Kalra and Mr.Pragyan, Billing Engineer stating that the work is completed. Reliance is also placed on WCT challans and TDS certificate issued by the respondents.

7. The learned counsel for the respondents however has relied upon the communication sent by respondent No.1 company to the petitioner company. He has pointed out to the email written on 03.04.2014 where it was stated that the

petitioner failed to complete the work which caused delay in completion of the project. Reliance is also placed on a letter dated 07.06.2011 where it was stated that the work was awarded to a third party for the work which was not done by the petitioner company.

8. I may first see the documents relied upon by the learned counsel for the petitioner. The petitioner has raised 17th running and final bill. Thereafter on the forwarding letter of final bill dated 21.06.2013 Site Engineer Sh.Navin Ambawat has clearly written "against the above work orders, the works have been 100% completed". Similarly, the certificate for RA bill-cum-final bill is signed by the senior officers of respondent No.1 company, namely, Mr.Pragyan, Billing Engineer on 21.06.2013 and Mr.I.C.Kalra, Vice President (Technical).

9. It is a matter of fact that WCT challans and TDS certificate have also been issued by respondent No.1 company for the final bill amount.

10. In contrast to this, the respondents seek to rely upon some emails including email dated 03.04.2014. This email is written by the same gentleman Mr.I.C.Kalra, Vice Present (Technical), who has one year after signing the final bill stated that all the work executed by the petitioner were delayed resulting in delay in handing over the projects. Because of delay the email states that the respondent intend to take action to forfeit the security deposit. Similarly, reliance is also placed by the respondents on communication dated 07.06.2011, which is a letter written to M/s Sehrawat Marbles making some amendments in the work order for Kotah Stone work in corridors and other miscellaneous areas. Hence, it is claimed that on 07.06.2011 as the balance works were abandoned by the petitioner company the work was awarded to another contractor.

11. As far as the first plea is concerned, namely, reliance by the respondent on the communication dated 03.04.2014, the same appears to be an afterthought. This is also apparent from the fact that this communication was written by Mr. I.C. Kalra, Vice President (Technical) who had himself signed the final running bill. The same person is now turning around and giving a completely different story. I may also note that the respondents in their reply have made allegations that Mr. I.C.Kalra has acted in connivance with the director of the petitioner Company to sign and approve the final running bill. The respondents are clearly taking contrary stands regarding the authority of Mr.I.C.Kalra to take decisions on behalf of the respondent company.

12. Coming to the second plea of the respondent regarding the communication dated 07.06.2011 written to Sehrawat Marbles. It is claimed that this order was placed on Sehrawat Marbles as the petitioner failed to complete the work and abandoned the same. However, a perusal of the said letter shows that the order pertains to Kotha Stones which are different from Italian Stones/equivalent imported marbles for which the petitioner was granted the above order. In fact, the learned counsel for the petitioner in court on instructions had clarified that the petitioner does not deal in Kotha Stones. Clearly, this communication/the

alleged order relied upon by the respondents is make belief and cannot be relied upon.

13. In my opinion, it is manifest that the certificate which is dated 21.06.2013 has been validly issued by the designated officers of respondent No.1 company who have certified that an amount of Rs.24,98,137/- is payable to the petitioner company. Taking into account the security deposit of Rs.6,83,132/- the total outstanding dues come to Rs.31,81,269/-.

14. The defence raised by the respondent company is moonshine. The Company is unable to pay its dues. In IBA Health (I) Pvt. Ltd. vs. Info-Drive Systems Sdn.Bhd., (2010) (4) CompLJ 481 (SC) 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."

15. The settled legal position is that where the respondent company raises a bona fide dispute then no winding up petition would lie. As noted above, in the facts of the above case the respondent company has failed to show any bona fide dispute.

16. Accordingly, I admit the present petition. The Official Liquidator attached to this Court is appointed as the Provisional Liquidator. He is directed to take over all the assets, books of accounts and records of the respondent-company forthwith. The citations be published in the Delhi editions of the newspapers ? Statesman" (English) and ?Veer Arjun" (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing.

17. Petitioner company shall deposit a sum Rs.75,000/- towards cost of the publication with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete inventory of all the assets of the respondent-company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he

may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the respondent-company. The OL will also seize all the bank accounts of the respondent.

18. However, I suspend the above order appointing the OL as the provisional liquidator for a period of four weeks to enable respondent No.1 company to make necessary payments to the petitioner company. In case, the said payment of Rs.31,81,269/- along with simple interest @ 6% per annum w.e.f. 21.04.2014, i.e., when the legal notice was sent till the date of payment is not made to the petitioner company within four weeks from today, the above order appointing OL as the provisional liquidator shall stand recalled.

19. List on 27th May, 2019.

