

APHC010078192015



**IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI
(Special Original Jurisdiction)**

[3565]

THURSDAY, THE SEVENTH DAY OF MAY
TWO THOUSAND AND TWENTY SIX

PRESENT

**THE HONOURABLE SRI JUSTICE BATTU DEVANAND
THE HONOURABLE SRI JUSTICE SUBHENDU SAMANTA**

ORIGINAL SIDE APPEAL NO: 8/2015

Between:

1. BGR ENERGY SYSTEMS LIMITED, REGISTERED OFFICE AT
PLOT NO. A5 PANNAMGADU INDUSTRIAL ESTATE
RAMAPURAM POST SULLURPET (T), NELLORE DISTRICT
ANDHRA PRADESH - 524 401.

...APPELLANT

AND

1. M/S SANGHVI MOVERS LIMITED, Survey No. 92, Tathawade, Pune
- 411033, Represented by its Sr. Manager-Legal Mr. Vinayak
Shirgaonkar.

...RESPONDENT

Pleased to pass an order setting aside the order dated 13-04-2015
passed in C.P.No.157 of 2014 and pass

IA NO: 1 OF 2015(APPL 447 OF 2015)

Petition under Section 151 CPC praying that in the circumstances
stated in the affidavit filed in support of the petition, the High Court may be
pleased staying all further proceedings pursuant to the order dated 13-04-
2015 passed in C.P.No. 157 of 2014;

IA NO: 1 OF 2017(APPL 342 OF 2017)

Petition under Section 151 CPC praying that in the circumstances
stated in the affidavit filed in support of the petition, the High Court may be

pleased to vacate the Interim order granted in C.A.no. 447 of 2015 in O.S.A.No. 8 of 2015 dated 24.04.2015 in the interest of justice or pass

Counsel for the Appellant:

1.KARAN TALWAR

Counsel for the Respondent:

1.D S SIVADARSHAN

The Court made the following Judgment:

(per Hon'ble Sri Justice Subhendu Samanta)

1. This original side appeal was filed against the order of a learned Single Judge of this Court, dated 13.04.2015, passed in Company Petition being Company Petition No.157 of 2014. By impugned order, learned Single Judge admitted the Company Petition No.157 of 2014 and directed publication in two daily newspapers.

2. **Brief facts of the case, in a nutshell, are as follows:**

a) The present petitioner is a company incorporated under the provisions of the Companies Act, 1956. It has issued a service order on 27.02.2012 to the present respondent for the supply of a 600 MT crawler crane on hire for a sum of Rs.2,40,00,000/- for five months. Besides hire charges, the service order provided for payment of Rs.30,00,000/- towards mobilization charges and another sum of Rs.30,00,000/- towards demobilization charges. The present appellant, being the respondent, paid the mobilization charges but declined to pay the demobilization charges on the ground that, as

per trade practice with its customers, if the contract period is extended beyond the initial period of the contract, it is not liable to pay demobilization charges.

- b) The appellant herein, being the respondent, filed a counter before the learned Single Judge, which contained a contract extending the period beyond the initial period of five months. In this extended contract, the provision for demobilization charges was deleted. It is the contention of the present appellant before the learned Single Judge that the amendment of the service order was signed on 06.12.2012. The present respondent herein strongly disputed the receipt of such purported amended service order. Hence, the dispute arose and a Company Petition was filed under Section 433(e) read with Sections 434(1)(a) and 439(1)(b) of the Companies Act, 1956, before the learned Single Judge, after service of statutory notice under Section 433(e) of the Companies Act, for initiation of winding-up proceedings. Learned Single Judge of this Court is of the view that the dispute raised by the present appellant/respondent therein is not a bona fide dispute. Thus the Company Petition was admitted.

3. **SUBMISSIONS OF THE APPELLANT:**

- a) Learned counsel for the appellant raised three grounds in this appeal.

- i. The dispute is a *bona fide* dispute.
 - ii. The appellant company is economically solvent company.
 - iii. If it is held that the dispute is not *bona fide*, the winding-up petition is not maintainable. When the entire disputed amount is deposited with the registry, the respondent herein may be relegated to a civil suit.

- b) Learned counsel for the appellant emphasizes that the service order dated 27.02.2012 is not disputed by the respondent, which contains several clauses specifically mentioning demobilization charges. The said service order was accepted by the respondent company, wherein hiring of a 600 MT crawler crane for five months was extended for another period of 35 days. As per the service order, the hiring period ended on 15.12.2012. The above crane was required for the next 0.84 months (22 days), from 16.12.2012 to 07.01.2013. Learned counsel further argued that the dispute is obviously *bona fide* between the parties. Thus, the observation of learned single judge is illegal and improper, and the same is required to be set aside.

- c) Learned counsel further submits that the appellant is economically solvent company. The winding-up petition cannot be accepted merely on the statement of the respondent company. He submits

that the material papers submitted along with the appeal does not dispute the fact that the respondent company is solvent. Moreover, commercial insolvency of the respondent company was never pleaded or proved before the learned single judge. In these circumstances, a company petition filed solely as a means to enforce payment of a debt is not permissible.

- d) Lastly, it is the submission of learned counsel for the appellant that even if it is admitted that there is no *bona fide* dispute, if the principal amount in dispute is deposited with the registry of the Hon'ble High Court, then the respondent has to be relegated to a civil suit.
- e) It is further submitted that the impugned order is liable to be set aside, as the learned Single Judge did not consider the additional affidavit dt.07.04.2014, wherein the appellant made an undertaking for payment of the disputed amount with the registry to the credit of the party that may succeed in suit to be filed by the respondent. In support of the contention, learned counsel relied upon the judgment of the Hon'ble Supreme Court in **M/s.Nishal Enterprises v. Apte Amalgamations Ltd.**, (Civil Appeal No.720 of 1999 arising out of SLP(C) No.14096 of 1998).

4. SUBMISSIONS OF THE RESPONDENT:

- a) It is the contention of the respondent that the major issue which considered by the learned Single Judge regarding non-

communication of the service order dated 06.12.2012 is well proved. Thus, the observation of the learned Single Judge cannot be said to be perverse.

- b) Learned counsel further submits that the revised order dated 06.12.2012 does not contain demobilization charges and that the same was communicated to the present respondent through e-mail dated 03.01.2013. On the face of it, it is evident that the dispute was not bona fide, but false and an afterthought. The alleged service order dated 06.12.2012 of the present appellant was filed for the first time along with the counter filed in the Company Petition.
- c) Learned counsel further submits that the e-mail dated 03.01.2013, attached appellant's conduct seeking management approval dt.18.12.2012, which clearly establishes that a note was put up by the employees of the present appellant for management approval, seeking extension of hiring period of crane at Krishnapatnam site. The proposal was only for extending the period of crane hire for 0.84 months for a total amount of Rs.55,00,500/-. On the other hand, the purported service order relied upon by the present appellant is dated 06.12.2012. Thus, the question of existence of any service order, dated 06.12.2012, does not arise. Learned counsel further submits that learned Single Judge has specifically perused the material

papers and correctly opined that the dispute raised by the present appellant before the Company Court is not a *bona fide* dispute.

- d) It is further contended by the respondent that commercial solvency is neither an embargo nor a sole ground to dismiss a winding-up petition. He submits that examination of a company's insolvency may be useful in deciding whether refusal to pay is a result of a *bona fide* dispute as to liability or not, but, if a company refuses to pay on non-genuine or unsustainable substantial grounds, it should not be able to avoid statutory liability.
- e) Learned counsel further submits that where debt is admitted and there exists no *bona fide* dispute as to liability or quantum thereof, the creditor is legally entitled to pursue remedies available under law. He further submits that the remedy of filing a civil suit for recovery of money and the remedy of initiating winding-up proceedings operate in distinct field and are neither mutually exclusive nor inconsistent. While a civil suit is a remedy in personam, winding-up of the company is a remedy in rem, intended to test commercial solvency of the company and protect the interests of creditors at large. It is a trait law under the Companies Act that when there is no *bona fide* dispute, but the company admittedly has not remitted the debt, the creditor is entitled to file winding-up proceedings.

5. **FINDING:**

- a) Heard learned counsel for parties. Perused the documents and written notes placed on behalf of the respective parties. The only relevant question before this Court is, as to whether the order passed by the learned Single Judge is justifiable regarding admission of the company petition, solely on the ground that there is no *bona fide* dispute.
- b) To determine as to whether the dispute raised by the company is a *bona fide* dispute, the Company Court should follow the following principles:
- i) The defence of the company is in good faith, bona fide, and one of subsistence;
 - ii) The defence is likely to succeed in point of law;
 - iii) The company adduces prima facie proof of the facts on which the defence depends;
- c) In this particular case, learned single judge is of the opinion that the service order of the appellant company dt.06.12.2012 was not communicated to the present respondent company. Moreover, no proof of communication of the amended service order was placed on record. By thorough perusal of the e-mail dated 03.01.2013, it appears that the proposal for extension of the hiring period of crane for 0.84 months for a total amount of Rs.55,00,500/- was put up

before the management of the appellant company for approval on 18.12.2012. The service order which was relied by the present appellant company is dt.06.12.2012. Hence, the very existence of the amended service order dated 06.12.2012 raises serious doubt. Moreover there are no evidences before learned single judge to accept that the amended service order dt.06.12.2012 was communicated to the respondent company. In the absence of such fundamental element or material document, it is clear and unambiguous that the appellant company has neglected to pay its admitted debts.

- d) In order to justify whether the commercial solvency of a company is a sole ground to dismiss a winding-up petition; it appears the same issue has been time and again raised before the Hon'ble Supreme Court as well as this Court in different occasions. A coordinate Bench of this Court in ***PL Shipping and Logistics Pvt. Ltd. vs. Aga Publications Ltd. (MANU/0286/2012, Company Petition No. 34 of 2011)*** held that commercial solvency could be seen as relevant as to whether there was dispute as to debt, not as ground in itself, that means it could not be characterized as stand-alone ground while the respondent was entitled to rebut statutory presumption under Section 434(1)(a) of Act, of its inability to pay its debts, by producing evidence to show that it was solvent, commercial solvency was not

stand alone requirement and must be examined in context of whether or not *bona fide* dispute exists. Paragraph 29 of the said judgment is set out hereunder:

“29. On the question whether commercial solvency would justify refusal to exercise discretion under Section 433(e) of the Companies Act this Court, in Venkateswara Flexo Pack (P) Ltd. v. Sampre Nutritions Ltd (2011) 4 Comp. Law. J. 90 (AP), held that, in order to raise a presumption of a company's inability to pay its debts, it is not enough merely to show that the company has omitted to pay the debt despite service of the statutory notice; it must be further shown that the company omitted to pay without reasonable excuse, and conditions of insolvency in the commercial sense exist; the petition must disclose the assets of the company, and whether they are insufficient to meet the liabilities including contingent and prospective liabilities, and it must further disclose the position of the fixed assets as well as valuation of plant and machinery of the company; the question is not whether at a given time the company can pay all its debts whether presently due or only in future and still continue to function, but the question is whether it is able to meet the current demands; it would be insolvent if it cannot do that even if it has assets not presently available, but more than ample to pay its debts; when the court is called upon to wind up a company, under clause (e) of section 433, what is to be considered is not whether the company, if it converted all its assets into cash, would be able to discharge its debts but whether, in a commercial sense, the company is insolvent and whether it is unable to meet its current demands although the assets when realised may exceed its liabilities; the petitioner has to place, prima facie, evidence that the company is commercially insolvent, its existing assets and probable assets are insufficient to meet the existing liabilities, and the company is heavily indebted to various creditors; if, from the material on record, it cannot be made out that the company is commercially insolvent, then the petition should be dismissed even before issuing notice regarding admission; there is a responsibility and duty on the Courts to find out whether the concerned company has become commercially insolvent for the purposes of winding up; at the initial stage the Court would be circumspect and judicious in exercising discretion; and it should take all relevant facts and circumstances into consideration before even issuing process regarding admission.”

e) Following the law laid down by this Court supra, we are of the view that commercial solvency of a company cannot be a sole ground to dismiss the winding up petition.

f) In deciding as to whether the appropriate remedy is to file a civil suit and not a winding-up petition, we are of the view that when admittedly the dispute raised by the respondent is not a *bona fide* dispute, the aggrieved company or the creditor may initiate a company petition under Section 433(e) of the Companies Act. The remedy available before the civil court and the remedy available before the company court are of separate perspective. Time and again different High Courts as well as the Hon'ble Supreme Court has held that when respondent company had shown a *bona fide* dispute, the Company Court may direct the petitioner to file a suit and may pass necessary directions to deposit the entire disputed amount along with interest in the Court. Reliance was placed by the appellant on the judgment of the Hon'ble Supreme Court in **M/s. Nishal Enterprises v. Apte Amalgamations Ltd., (Civil Appeal No.720 of 1999 arising out of SLP (c) No.14096 of 1998)**; in the cited case it appears that the dispute between the respondent and the petitioner's company was *bona fide* in nature. Reasons thereby, the Hon'ble Supreme Court relegated the parties to approach civil court. In the present case, the learned Single Judge has properly appraised that no *bona fide* dispute exists, hence admitted the Company Petition.

6. Considering the entire aspect and reasons stated hereinabove, we find that the impugned order passed by learned Single Judge admitting the company petition suffers no illegality and is based on reasonable findings. Thus, it is not at all perverse.
7. Reasons thereby, we find no scope to interfere with the impugned order. Hence, the instant original side appeal is dismissed. No costs.
- g) Miscellaneous petitions, if any, pending in this appeal shall stand closed.

JUSTICE BATTU DEVANAND

JUSTICE SUBHENDU SAMANTA

Dt. .05.2026.

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