

# Semindia Systems Private Limited vs Tata Elxsi Limited on 10 October, 2013

**Bench: Dilip B.Bhosale, B.Manohar**

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IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 10TH DAY OF OCTOBER 2013

PRESENT

THE HON'BLE MR.JUSTICE DILIP B.BHOSALE

AND

THE HON'BLE MR.JUSTICE B.MANO HAR

OSA.NO.41/2010

BETWEEN:

Semindia Systems Private Limited,  
A company incorporated under the Companies Act 1956  
Having its registered office at  
SemIndia Systems (Private) Limited,  
No.302, Embassy Square 148 Infantry Road,  
Bangalore - 560 001,  
Karnataka  
Represented by its Director  
Mr.Rajendra Manikonda. ...Appellant

(By Sri.M.Dhyan Chinnappa, Adv. For M/s. Crest Law  
Partners)

AND:

TATA ELXSI LIMITED.,  
A Company incorporated and registered  
Under the Companies Act 1956  
Having its registered Office at ITPL Road,  
Whitefield, Bangalore - 560 068,

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Represented by its  
Authorised Representative. .... Respondent

(By Sri.P.M.Vasudev & Co., Advs (absent))

This appeal is filed under Section 483 of the Companies Act, 1956 r/w Section 4 of the High Court Act, against the order dated 21-10-2010 passed by the learned Single Judge in Company Petition No.138/2009.

This appeal coming on for hearing this day, B.MANO HAR J., delivered the following:

#### JUDGMENT

This original side appeal is directed against the order dated 21-10-2010 passed in Company Petition No.138/2009 by the learned Single Judge admitting the petition filed by the respondent.

2. The respondent filed a petition under Section 433(e) of the Companies Act, 1956 seeking for winding up of the appellant-company. In the company petition it was contended that the appellant had placed a letter of intent for procurement of offshore service for "Open TV Core 2.0 Indeto CAS Integrations and Certification"

project with the respondent. Accordingly, the respondent had to duly provide the service required by the appellant. As per the Memorandum of Understanding (for short 'MOU') dated 26-09-2008 entered into between the appellant and respondent, the respondent raised an invoice dated 30th September 2008 for an aggregate sum of Rs.2,03,61,879/-. However, the appellant-company did not make any payment as per the MOU and requested time to make payment. In spite of repeated requests, the appellant has neglected to pay the amount. On persistent requests and the reminders made by the respondent, the respondent issued a cheque for Rs.1,01,80,940/- on 30-04-2009 drawn on ICICI Bank, BTM Layout Branch, Bangalore. However, the appellant requested not to present the cheque since there was no sufficient fund in the account. On the request of the appellant-company, the cheque was presented on 17-07-2009, however, the same was dishonored with an endorsement 'insufficient fund'. Even after dishonor of the cheque, on persistent requests made by the respondent, the appellant failed to pay the dues. Accordingly, a notice was issued under Section 434 of the Companies Act, on 27-07-2009 calling upon the appellant to pay the over-dues. In spite of the same, the appellant failed to pay the amount. On filing of the proceedings under Section 138 of the Negotiable Instruments Act, the appellant paid a sum of Rs.20,00,000/- on 11-09-2009. However no balance payment was made. The appellant-company is not in a position to pay the over-dues. In view of that, a petition was filed invoking section 433(e) of the Companies Act, 1956 and the Company Court issued notice to the appellant.

3. The appellant entered appearance and filed statement of objections contending that company petition itself is not maintainable. The respondent has failed to fulfill their part of obligations in supplying deliverables. Further, as per the agreement, if there is any dispute between the parties, the same has to be referred to the Arbitrator under the Arbitration and Conciliation Act as per the

agreement entered into between the parties. The appellant-company is a profit making company, it has the assets of Rs.74,57,13,897/- and had earned the profit of Rs.4,64,44,171/- after taxation for the year 2008-09. Since there is a dispute regarding payment, the company petition for recovery of money is not maintainable. It was further contended that as per the letter of intent, the respondent agreed for porting Open TV Core 2.0 Middleware and Indeto CAS into Celestial Chipset Based DTH Set Top Box developed by the appellant-company. As per the Non-Disclosure Agreement entered into between the parties on 29-10-2007, a commercial document containing the scope of work, technical proposal, project plan, commercial terms like warranty term, duration, payment schedule, validity quota etc., was exchanged between the parties. The payment schedule was also specified in the said document. As per the said agreement, a sum of 75,000 USD was paid on 8-2-2008 for the purpose of Open TV & CA Certification and a further sum of 75,000 USD was paid on 1-8-2008. The appellant-company was required to pay the balance due in 10 monthly installments. It was agreed that beyond successful production of one million units of Set Top box by the company, a mutual agreement regarding royalty was to be entered into between the parties. For that purpose, the appellant-company was required to furnish Library License from Open TV and Indeto and other Software documents to the respondent to execute their work. Since there was delay in obtaining the license, the project was delayed. Taking advantage of the delay in obtaining the license, the respondent- company forced the officials of the appellant-company to enter into a Memorandum of Understanding for revised payment. The respondent suppressing the material fact regarding payment of the amount, filed a petition seeking for winding up. The payment made is not disclosed in the petition. In spite of repeated requests to the respondent not to present the cheque unless they supply all the deliverables, the respondent presented the cheque, though they have not supplied the deliverables. Immediately after dishonor of the cheque, the appellant paid a sum of Rs.20,00,000/- as full and final settlement and not to press the proceedings initiated under Section 138 of the Negotiable Instruments Act. In spite of the payment of all the dues, the respondent has filed the petition under Section 433(e) for winding up of the appellant-company and sought for dismissal of the company-petition.

4. Learned counsel for the appellant contended that the learned Single Judge had not taken into consideration the contention raised by the appellant in the written statement, solely on the ground that the appellant has failed to pay the amount mentioned in the invoice and cheque dated 30-4-2009 issued by the appellant-company for Rs.1,01,80,940/- was dishonored, as against which, Rs.20,00,000/- has been paid. During the pendency of the company petition, the parties could not settle the matter amicably. During the pendency of the proceedings, respondent-company filed a memo dated 9-6-2010 specifying the details of deliverables. In spite of the same, the appellant has failed to make payment. Accordingly, the learned Single Judge by an order dated 21-10-2010 admitted the petition, however deferred the advertisement for a period of two months. Being aggrieved by the order dated 21-10-2010 made in Company Petition No.138/2009, the appellant has filed this appeal.

5. Sri.Dhyan Chinnappa, learned counsel appearing for the appellant contended that the order passed by the learned Single Judge is contrary to law and materials available on record. The respondent has failed to fulfill their part of obligations. Hence, the question of payment of dues by the appellant does not arise. It was further contended that the appellant entered into an agreement

with M/s. Sun Direct TV Private Limited for supply of One million pieces of Set Top box to be used for reviewing TV programme through satellite. The hardware pertaining to the Set Top box to be procured from its investors M/s.Flextornics and the respondent has to supply the software. However, as per the letter of intent for porting Open TV Core 2.0 Middleware Indeto CAS Into Celestial Chipset based DTH Set Top Box, an agreement was also entered into between the parties. The project was time bound to be completed within a period of five months as desired by the Sun TV. In terms of the commercial contract, out of a sum of \$3,64,000, the appellant has paid two installments of \$75,000 each (\$75000 = 33,70,800/-), total \$1,50,000 as per the invoice dated 31-12-2007. Since there was delay in obtaining the license by the appellant, the respondent-company was required to complete the work and to supply duly tested Set Top box to the appellant and the appellant was required to make the balance payment. In spite of the same, the respondent insisted the appellant to pay the balance amount. On an undertaking given by the respondent that they will complete the balance work, a cheque for sum of Rs.1,01,80,940/- was issued on 30-04-2009 with a clear understanding that the cheque will be presented only after supply of deliverables by the respondent- company. In spite of the said understanding, the respondent presented the cheque and got it dishonored on 17-7-2009; proceedings was initiated under Section 138 of the Negotiable Instruments Act to pressurize the appellant to make payment. In order to avoid, legal complications, the appellant paid a sum of Rs.20,00,000/- vide pay order dated 11-09-2009 with a condition that the respondent will not take any legal course and they will fulfill their part of the contract as per the commercial contract entered into between the parties. There was exchange of email between the parties. In spite of the same, the winding up petition has been filed. There is serious dispute with regard to the dues. Hence, the winding up petition itself is not maintainable.

6. The appellant has further contended that the appellant-company was incorporated under the Companies Act, 1956 in the year 2005-06 having its registered office at Bangalore. Its turnover for the financial year ending 2009 is Rs.104,17,47188/-. It is engaged in the business and trade of providing various hardware and software services in the electronic and media sectors. For the assessment year 2008-09, the company earned profit of Rs.4,64,44,171/- after taxation and is financially viable to pay the dues. The respondent-company has not supplied all the deliverables. Hence, the question of payment of dues does not arise. Even during the pendency of the company petition, on 9-6-2010 along with the memo, the respondent handed over some of the deliverables and CDs. However, CDs are not in workable condition and they are incomplete. That itself shows that the respondent has not fulfilled their part of the obligation. The learned Single Judge, without considering all these aspects of the matter admitted the appeal which is contrary to law. Since there is substantial dispute as to the liability and the dispute is bonafide, the Company Court ought not to have admitted the appeal. The appellant relied upon the judgments reported in (2010)10 SCC 553 (IBA HEALTH (INDIA) PRIVATE LIMITED v/s INFO-DRIVE SYSTEMS SDN. BHD); (2005) 7 SCC 42 (MEDIQUIT SYSTEMS (P) LTD. v/s PROXIMA MEDICAL SYSTEM GMBH; and (1971) 3 SCC 632 (M/S.MADHUSUDAN GORDHANDAS & CO. v/s MADHU WOOLLEN INDUSTRIES PVT. LTD.). Hence sought for setting aside the order dated 21-10-2010 passed by the learned Single Judge by allowing this appeal.

7. Though the contesting respondent is served with notice, they remained unrepresented

8. We have carefully considered the arguments addressed by the learned counsel for the appellant and perused the order impugned and other relevant records.

9. The records clearly disclose that the appellant entered into an agreement with M/s.Sun Direct TV Pvt. Ltd., for supply of one million pieces of Set Top box to be used for reviewing the TV programme through satellite. For supply of the software, the appellant issued a letter of intent for procuring offshore services for Open TV Core 2.0 Indeto CAS Integration and Certificate Project. Thereafter a MOU was also entered into between the parties on 26-9-2008. The case of the appellant is that respondent has failed to supply the deliverables. Apart from supplying the deliverables, the respondent also has to train the personnel of the appellant. The respondent was also required to deliver all documentation associated with the software including test cases to the satisfaction of the appellant. The commercial contract contains the scope of work, technical proposal project plan, commercial terms like warranty terms, duration, payment schedule, validity quota etc. The total value of the commercial contract agreed between the parties is \$3,64,000 to be paid as per the schedule of the payment. It is not in dispute that \$75000 each was paid on 8-2-2008 and on 1-8-2008 respectively. Further, another sum of Rs.20,00,000/- was paid on 11-09-2009 to withdraw the case filed under Section 138 of the Negotiable Instruments Act. The payment made by the appellant- company has not been mentioned in the company petition filed by the respondent and that payment has been suppressed. Further, a cheque of Rs.1,01,80,940/- was issued with a clear understanding that it shall be encashed only after the deliverables are supplied to the appellant. Without fulfilling their part of obligations, the respondent presented the cheque and got it dishonored and proceedings have been initiated against the appellant under the Negotiable Instruments Act. In order to avoid legal complications, the appellant has paid Rs.20,00,000/- with an understanding that the legal proceedings has to be terminated by the respondent. In spite of the same, the petition for winding up of the appellant-company has been filed. There is a serious dispute with regard to the claim made by the respondent in respect of dues. Further as per the MOU entered into between the parties, in the event of any dispute between the parties, the same shall be referred to the Arbitrator under Arbitration and Conciliation Act 1996. An Arbitrator shall be appointed upon the consent of both the parties. When there is an arbitration clause in the agreement entered into between the parties, the respondent cannot invoke Companies Act to claim alleged dues. Hence, the company petition filed by the respondent is not maintainable. The Hon'ble Supreme Court in various judgments, more particularly, in a recent judgment reported in (2010)10 SCC 553 (supra) clearly held that "An order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this Section must be determined or a definite sum of money payable immediately or at a future date and the inability referred to in the expression "unable to pay its debts" in Section 433(e) of the Companies Act should be taken in a commercial sense. The machinery for winding up will not be allowed to be utilized merely as a means of realizing the debts due from a company. If the debt is bonafide disputed and the defense is a substantial one, the Court will not wind up the company. The principles on which, the Courts Act are:

- (i) the defense of the company is in good faith and one of the substance

- (ii) the defense is likely to succeed in point of law; and
- (iii) the company adduce prima facie proof of the fact on which, the defense depends."

Further, the Hon'ble Supreme Court in the case of MADHUSUDHAN GORDHANDAS (supra) case at paragraphs 20 and 21 has held as under:

20. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon. and the sum demanded by the, creditor was unreasonable (See London and Paris Banking Corporation (1). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company When the company contended that the work had not been done properly was not allowed. (See Re. Brighton Club and Norfolk Hotel Co. Ltd.

21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See Re. A Company 94 S.J. 369). Where however 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 (See Re.

Tweeds Garages Ltd. (3) The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

10. The learned Single Judge without taking into consideration the financial capacity of the appellant and the defense set up by the appellant has admitted the appeal which will have serious repercussion on the financial position of the company. There is serious dispute with regard to the handing over of deliverables. Some of the CDs handed over by the respondent were not in workable condition. Apart from that respondent themselves has agreed to withdraw the proceedings initiated under Section 138 of the Negotiable Instruments Act. All these facts are not disclosed in the company petition. Hence, we are of the view that the order passed by the learned Single Judge cannot be sustainable. Accordingly, we pass the following:

ORDER The appeal is allowed. The order dated 21-10-2010 passed by the learned Single Judge admitting the appeal is set aside. Co.P. 138/2009 filed by the respondent is dismissed reserving liberty to the respondent to work out their rights and remedies before the appropriate forum.

Sd/-

JUDGE Sd/-

JUDGE mpk/-\*