

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CO.APP. 13/2006

% **Date of decision: 28.1.2008**

M/S MEDISPHERE MARKETING P.LTD Appellant
Through Mr.Arunabh Chaudhary with
Mr.Abhishek Ray, Advocates

versus

M/S MEDI TRADE MEDICAL TRADING Respondent
Through Mr.Sanjiv Sachdeva, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE REVA KHETRAPAL

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| 1. Whether reporters of local papers may be
allowed to see the Judgment ? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

DR. MUKUNDAKAM SHARMA, CJ : (Oral)

1. The present appeal is filed by the appellant challenging the findings and the conclusions arrived at by the learned Single Judge under the order dated 7th October, 2005. The aforesaid order came to be passed by the learned Company Judge in a petition filed under Sections 433, 434 and 439 of the Companies Act by the respondent contending, inter alia, that the appellant is indebted to the respondent and that the appellant is unable to

pay its debt.

2. When the said petition was filed, objections were raised regarding the maintainability of the petition on the ground that the affidavit annexed to the petition was not in the prescribed form and, therefore, the said petition could not have been entertained and was required to be dismissed on that ground alone. The second objection was also regarding maintainability of the petition on the ground that the power of attorney, on the basis of which the affidavit was filed by one Shri Pankaj Sachdeva, is not stamped and, therefore, no affidavit could have been filed in support of the Company Petition by a person on the basis of such unstamped document.

3. Both the aforesaid contentions were argued at length before the learned Company Judge. By the impugned order, however, the learned Company Judge held that so far as the issue with regard to the affidavit not being in accordance with the prescribed form is concerned, the same is only a curable defect and, therefore, could be cured by directing for amendment of the said affidavit.

4. So far as the second contention is concerned, the learned

Company Judge held that the said power of attorney if not duly and properly stamped, this could be subsequently rectified by resorting to the provisions of impounding a document and directing the concerned authority to pay the penalty in accordance with the prescribed law. With regard to the allegation of fraud on the part of Shri Pankaj Sachdeva in asserting in rejoinder that the power of attorney was duly stamped the Court held that there was no fraud but only a bona fide mistake and, therefore, the same was not fatal.

5. The said findings are under challenge in this appeal on which we have heard the learned counsel appearing for the parties.

6. So far as the contention with regard to power of attorney not being duly stamped and the affidavit being filed on the basis of an unstamped document is concerned, there is a statement made in rejoinder by Shri Pankaj Sachdeva that the power of attorney is duly stamped and registered as per law. The said statement on the face of it is incorrect, for the power of attorney admittedly was not stamped at all as on that date when the said statement was made. The rejoinder was filed on 7th January, 2004

and the said document came to be impounded and subsequently stamped on 19th/22nd April, 2004. Therefore, there is no doubt that the said document on the date of swearing of the affidavit by the deponent was not a stamped document and in fact was an unstamped one. However, we cannot lose sight of the fact that as and when such unstamped document is relied upon and referred to in any proceedings, there is a provision for impounding the same. In the present case also when an objection was raised about the said document on the basis of which affidavit was filed, relying upon the fact that there was valid authority given under the power of attorney executed in favour of Shri Pankaj Sachdeva, it was also the Court's obligation to see that the said document was properly stamped when the same is acted upon and referred to. Subsequently, by an order passed by the Court the said power of attorney was ordered to be properly stamped and the same was accordingly stamped on 19th/22nd April, 2004. Therefore, the decision rendered by the learned Company Judge that the aforesaid power of attorney being now stamped could be relied upon cannot be faulted.

7. So far as the issue with regard to fraud and

misrepresentation played by Shri Pankaj Sachdeva and, therefore, the petition being not maintainable is concerned, in our considered opinion, it cannot be said that it was a fraud or misrepresentation only on the basis of a statement made by Shri Pankaj Sachdeva to the said effect. There was no attempt or effort on the part of Shri Pankaj Sachdeva to derive any undue benefit by making the aforesaid statement, which was otherwise not available to the appellant. In our considered opinion also no prejudice was caused to the appellant by such an incorrect statement made by the power of attorney holder and, therefore, we find no error in the order passed by the learned Company Judge in respect of the aforesaid findings.

8. So far as the issue with regard to the affidavit not being in the prescribed form and the rule is concerned, the learned Company Judge has held that the same at the most is a curable defect and, therefore, could be ordered to be cured. We now proceed to consider the said finding and conclusion arrived at by the learned Company Judge.

9. In exercise of the powers vested under Section 643 of the Companies Act, the Companies (Court) Rules, 1959 have been

framed by the Supreme Court. The said Rules deal with the procedure as to how a company petition should and could be filed in the Court. Rule 21 thereof mandates that when a company petition is presented, such petition shall be verified by an affidavit made by the petitioner or by one of the petitioners, where there are more than one, and in case the petition is presented by a body corporate, by a director, secretary or other principal officer thereof and that such affidavit shall be filed along with the petition and shall be in Form No.3. The expression used in the said Rule is “**shall**” and, therefore, it is contended that the said provisions of the said Rules are mandatory.

10. In this connection we may refer to a decision of the Supreme Court in the case of **Associated Journals Ltd. v. Mysore Paper Mills Ltd.** reported in (2006) 6 SCC 197, wherein the Supreme Court had occasion to deal with the provisions of Rule 21 and Form No.3, which pertain to defect and irregularity in filing an affidavit. In the said decision, the Supreme Court has held that substantial compliance should be enough. Rules are undoubtedly statutory and the forms are to be adopted wherever they are applicable. The Supreme Court, however, held that the

rules relating to the affidavit and the verification cannot be ordinarily brushed aside, but then what is required to be seen is whether the petition substantially complies with the requirements and, secondly, even when there is some breach or omission, whether it can be fatal to the petition.

11. Reference may be also made to the decision in **Mrs.Roma Deb & Ors. v. M/s R.C. Sood & Co. Pvt. Ltd.** reported in (1986) 1 ILR (Delhi) 498, wherein a learned Single Judge of this Court dealt with the provisions of Rule 21 and Form No.3 while dealing with a petition filed under Section 433 read with Section 439 of the Companies Act, 1956 which was not supported by an affidavit duly verified as per Form No.3 stipulated under the Companies (Court) Rules and held that the defect in the petition could be rectified by filing an amended petition in terms of Rule 21 of the Rules.

12. Another decision, which may have some relevance to the contentions raised, is the decision of the Supreme Court in **F.A. Sapa etc. etc. v. Singore and others etc.** reported in AIR 1991 SC 1557. The said case, of course, deals with a petition filed under the Representation of the People Act, whereunder it is

mandatory that an election petition, if any, should be presented within 45 days of the date of the commencement of the election. There is also no power for condonation of delay applicable to the provisions of the said Act, as it is a special Act. In the context of the aforesaid facts, the Supreme Court in paragraph 28 held that while the result of a defective verification or a defective affidavit must be fatal, the High Court should ensure its compliance before the parties go to trial, so that the party required to meet the charge is not taken by surprise at the actual trial. Paragraph 27 of the said decision, which may have some relevance to the legal position, which arises for our consideration in the present case as well, reads as follows:

“27..... It clearly emerges (i) a defect in the verification, if any, can be cured (ii) it is not essential that the verification clause at the foot of the petition or the affidavit accompanying the same should disclose the grounds or sources of information in regard to the averments or allegations which are based on information believed to be true, (iii) if the respondent desires better particulars in regard to such averments or allegations, he may call for the same in which case the petitioner may be required to supply the

same and (iv) the defect in the affidavit in the prescribed Form 25 can be cured unless the affidavit forms an integral part of the petition, in which case the defect concerning material facts will have to be dealt with, subject to limitation, under Section 81(3) as indicated earlier.....”

13. Reference may also be made to the decision of a learned Single Judge of this Court in **Greaves Fesesco Ltd. v. Ratlam Ispat Ltd.** reported in (1997) 88 Company Cases 155 (Delhi), wherein the effect of the provisions of sub-section (2) of Section 441 of the Companies Act was considered in juxtaposition with the provisions of Sections 446, 447 and 537 of the Companies Act. In terms of the provisions of the Companies Act, a winding up petition is required to be filed within the period of limitation, as prescribed. Section 441 of the Companies Act deals with the provisions with regard to commencement of winding up proceedings. Sub-section (2) of Section 441 states that the winding up of a company will be deemed to commence at the time of the presentation of the winding up petition. The said provision reads as follows:

“441. Commencement of winding up by

Tribunal.– (1) Where, before the presentation of a petition for the winding up of a company by the Tribunal, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the winding up.”

14. A company petition for an order of winding up thus relates back to the date of presentation of the petition and if the period of limitation is in any manner affected, Rule 21 and Form No.3 may have some relevance in the context of the provisions of sub-section (2) of Section 441. In the event of dealings by the Company with its assets between the date of presentation of the winding up petition and the date when a valid petition comes into existence after re-verification of the same, third parties may have

acquired valuable rights in the company's assets, which, it may be difficult to assail or set aside. The winding up order would come into existence on the date of such re-verification and this would create a good deal of confusion regarding the assets of the company and rights of third parties. In each case it would be a question of fact. These aspects, in our view, are required to be considered by the learned Company Judge on the basis of the facts and the pleadings before the learned Company Judge and, therefore, to the aforesaid extent we set aside the order passed by the learned Company Judge in respect of the affidavit and remand back the matter to the learned Company Judge to consider the same in accordance with law. Since the aforesaid aspect was not noticed by the learned Company Judge including the issue with regard to limitation, the same may be considered in accordance with law by the learned Company Judge.

15. We would also mention here that while coming to the aforesaid conclusions we have recorded our views and opinions which are tentative in nature. So far as the merit of the case is concerned, it shall be open to the learned Company Judge to consider the issue with regard to limitation and other issues in

the light of the facts as available on the basis of the pleadings of the parties and nothing said herein shall be construed as final and binding.

16. The appeal stands disposed of accordingly.

CHIEF JUSTICE

JANUARY 28, 2008
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REVA KHETRAPAL, J