

IN THE HIGH COURT OF DELHI AT NEW DELHI

COMPANY JURISDICTION

COMPANY APPLICATION (C) NO. 7/2010
(Previously numbered as Company Application (M) No. 54/2002)

IN

COMPANY PETITION NO. 191 OF 1997

Reserved on: 03-08-2010

Date of pronouncement : 15-09-2010

M/s CRB Capital Markets Ltd.

.....Petitioner

Through : Mr. Bhuvan Gugnani, Advocate

Versus

M/s Arcon Engineering Co. Ltd. & Anr.

.....Respondent

Through : Mr. N.K.Kantawala, Advocate

Mr. Rajiv Bahl & Ms. Manisha
Tyagi, Advocates for the Official
Liquidator.

CORAM :

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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

SUDERSHAN KUMAR MISRA, J.

1. This is an application by the Official Liquidator under S.446 of the Companies Act, 1956 for the recovery of an amount of ₹ 56,51,107 with interest @ 24% per annum, from the respondent M/s Arcon Engineering Co. Ltd.

2. Pursuant to a petition filed on 21st May, 1997, M/s CRB Capital Markets Ltd. was directed to be provisionally wound up on 22nd May, 1997. The Official Liquidator attached to this Court was appointed as its provisional liquidator.

3. The company in provisional liquidation was in the business of finance, hire-purchase, leasing, advancing loans and accepting deposits under various Schemes.

4. On an examination of the records available with his office, the applicant/Official Liquidator discovered that the respondent company had taken an inter-corporate loan of ₹ 50 lakhs on 14th September, 1996 from the company in provisional liquidation. It was further discovered that, for the purpose of payment of the aforesaid amount to the respondent, the company in provisional liquidation had issued a demand draft No. 9248 drawn on Bank of Baroda for an amount of ₹ 50,03,000, in favour of the respondent. This amount of ₹ 50 lakhs is also reflected in the trial balance of the Ahmedabad office of the company in provisional liquidation, for the period 1st April, 1996 to 31st December, 1996. It is further submitted by the applicant that the respondent company reimbursed a sum of ₹ 3,000/- to the company in provisional liquidation by way of a demand draft bearing No.366764 dated 28th November, 1996, in respect of the bank charges incurred by the company in provisional liquidation. In addition, it is also submitted by the applicant that the respondent company paid interest @ 24% from 14th September, 1996 to 31st March, 1997 against the aforesaid loan, which amounted to ₹ 6,51,107, and that, consequently, the trial

balance of the company in provisional liquidation for the period 1st April, 1996 to 31st March, 1997 reflects an amount of ₹ 56,51,107, which includes the debited interest. A notice of demand dated 25th April, 2001 was issued by the applicant on behalf of the company in provisional liquidation, calling upon the respondent to pay the outstanding amount within 15 days of receipt of the aforesaid notice. This notice was followed by communications dated 8th June, 2001 and 24th September, 2001, reminding the respondent of its liability to pay the outstanding amount. It is submitted that despite service of the aforesaid communications, the respondent failed to make any payment. The applicant has, therefore, moved this application praying for an order of recovery of the aforesaid amount, along with interest @18% per annum till its realization, in favour of the applicant and against the respondent.

5. In the reply filed on 14th January, 2003, the respondent denied having taken an inter-corporate loan, as alleged, or at all. Instead, the respondent contended that this amount of ₹ 50 lakhs was a payment made by the company in provisional liquidation to purchase shares in the respondent company and was, therefore, share application money. It is also alleged by the respondent that equity shares were subsequently allotted to the company in provisional liquidation. However, at the time of filing the reply, no document in support of this contention was filed by the respondent along with the reply. In July 2007, counsel for the respondent sought time to file an appropriate application for production of certain documents on which he was relying. Subsequently, CA No.135/2008 was filed by the CA(C) No. 7/2010

respondent on 13th December, 2007, seeking to place on record a photocopy of a share application form dated 14th September, 1996, purported to have been duly executed by the company in provisional liquidation, which had allegedly accompanied the demand draft for Rs.50 lakhs.

6. CA No.1266/2009 was thereafter filed by the ex-management of the company in provisional liquidation, which, inter alia, sought directions to the respondent to place on record the original share application form, on the ground that the photocopy that had been filed by the respondent was indecipherable in certain material particulars, with regard to the signature of the person who allegedly signed the form, as also the authority of that person to do so on behalf of the company in provisional liquidation. Further, as regards the respondent's contention that equity shares were also issued to the company in provisional liquidation pursuant to the alleged application, details of the share certificates issued by the company in provisional liquidation and particulars of the delivery thereof, were also sought. No reply was filed to CA No.1266/2009. However, on 18th May, 2010, an opportunity was granted to Mr. Kantawala, counsel for the respondent, to place on record the original share application form, or any other covering letter or document sent by the company in provisional liquidation to the respondent, in support of his contention. This was not done. On 3rd August, 2010, counsel for the respondent stated that he had no further instructions from his client in this regard. On the same date, arguments were completed and orders reserved.

7. An affidavit of Shri Dinesh Chand, Deputy Official Liquidator, was filed on 3rd March, 2004 by way of evidence in support of this application. Ex.P-1 is a copy of the bank statement issued by Bank of Baroda, as on 10th September, 1996, evidencing the issue of demand draft No. 9248 for an amount of ₹ 50,03,000 by the company in provisional liquidation. Ex.P-2 are copies of the trial balance of the Ahmedabad office of the company in provisional liquidation for the period 1st April, 1996 to 31st December, 1996, indicating reimbursement of an amount of ₹ 3,000 against the loan amount, and the trial balance for the period 1st April, 1996 to 31st March, 1997, indicating the total amount owed by the respondent company as ₹ 56,51,107. Ex.P-3 are copies of the demand notice dated 25th April, 2001, calling upon the respondent to pay the outstanding amount, and of the communications dated 8th June, 2001 and 24th September, 2001 reminding the respondent of its outstanding liability. Ex.P-4 are copies of the AD receipts for the abovementioned communications, evidencing that they were duly served on the respondent. Ex.P-5 is a copy of the ledger maintained by the company in provisional liquidation pertaining to the account in respect of the respondent, that indicates the principal amount that is due and payable by the respondent, as on 31st March, 1997.

8. Share application money is the money an investor is asked to pay with an application for a new issue of shares. On the basis of the prospectus issued by the company concerned, i.e. the offer document, investors may decide whether they wish to apply for shares in the company. The prospective investor is to submit the

prescribed application form, as well as the appropriate share application money. This money is usually paid by cheque. It is not necessary that a demand draft should be tendered. In the present case, a demand draft for an amount of Rs.50 lakhs was tendered by the company in provisional liquidation. The company in provisional liquidation spent an amount of ₹ 3,000 in having the demand draft prepared in favour of the respondent company. However, the respondent then reimbursed this amount of ₹3,000 to the company in provisional liquidation. The fact that, in this case, a demand draft was tendered and that the company in provisional liquidation had taken the trouble and expense of having the demand draft made, can only mean that the purpose for which that draft was prepared was not a mere application to purchase shares. Normally, when shares are applied for, the reason why a simple cheque is accepted by companies intending to allot shares is that the allotment comes to be made only after the cheque is duly encashed. This method of completing such a transaction is universally accepted and is reasonably sound, both from the point of view of the company issuing the shares as well as the person applying for allotment of the same. To my mind, if this was merely a transaction for the purchase and allotment of shares, then, in that case, there would have been no requirement for the respondent to refund the additional expense incurred by the company in provisional liquidation in having the draft prepared. This is because in a transaction for the purchase of shares, as far as the company issuing the shares is concerned, the purchaser is obliged to pay the full amount to the company, and the company thereafter allots the shares

after the purchaser's application is processed. It is inconceivable that the expenses of the purchaser, in making the share application money available to the company, are refunded by the company issuing the shares. The only defence that the respondent has raised in these proceedings, apart from denying that a loan was taken from the company in provisional liquidation at any date whatsoever, is that the aforesaid money received from the company in provisional liquidation is in the nature of share application money, pursuant to which shares were allotted to the company in provisional liquidation. There is no credible reason why, in the instant case, the parties would have wanted to put the company in provisional liquidation to extra cost in firstly getting a demand draft prepared and then putting the respondent company who is to allot the shares, to the trouble and expense of refunding the money spent by the company in provisional liquidation in having the draft prepared. To my mind, the explanation sought to be given by the respondent with regard to the receipt of the aforesaid amount of ₹ 50 lakh does not hold water for all the above reasons. Furthermore, as noted above, despite an opportunity to do so, the respondent has failed to produce the original share application form. Nor has he disclosed any details of the shares allegedly allotted by it to the company in provisional liquidation. He has also failed to produce any other document, such as a covering letter or other communication from the company in provisional liquidation that would bear out its stand. The amount claimed, therefore, stands proved.

9. Consequently, the respondent is directed to pay an amount of ₹ 56,51,107 to the applicant, along with interest @ 6% per annum

from the date of the application till the date of realization of the amount in favour of the applicant.

10. The application is disposed of in the above terms.

SUDERSHAN KUMAR MISRA, J.

SEPTEMBER 15, 2010.