

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 21st March, 2012

+ CO.APP. No.23-24/2011

% **SRM EXPLORATION PVT. LTD.** Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Sandeep Khurana, Mr. Dinesh
Rastogi & Mr. Ravneet Singh Rai,
Advs.

Versus

N & S & N CONSULTANTS s.r.o. Respondent

Through: Mr. Manoj K. Singh & Mr. Arpan
Behl, Advs.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The appellant appeals against the judgment dated 4th March, 2011 of the Learned Company Judge in the Co.Pet.No.248/2009 preferred by the respondent under Section 433(e) r/w Section 434 of the Companies Act, 1956 whereby Provisional Liquidator of the appellant Company has been appointed and the Directors and officers of the appellant Company have been restrained from selling, parting with possession or creating third party interest in respect of moveable and immovable properties/assets of the appellant Company. Notice of this appeal was issued and on 13th September, 2011 the counsel for the respondent gave an assurance that further hearings

11

of the company petition before the Learned Company Judge would be got adjourned and the Official Liquidator may not takeover charge of the assets of the appellant till the disposal of this appeal.

2. The respondent, in the company petition aforesaid, averred the appellant to be unable to pay its debts of 215,375,000 - CZK (Two hundred and fifteen million three hundred and seventy five thousand Czech crowns) equivalent to about ₹70 crores due by it to the respondent under a Guarantee Declaration dated 15th March, 2007 and Promissory Notes for the said amount. It was the case of the respondent, incorporated under the laws of Czech Republic that it had entered into an agreement dated 15th March, 2007 with M/s Newco Prague s.r.o., also a Czech Republic company for sale of the 100% equity interest owned by it in SP of W, a.s. also a Czech Republic company for a total sale consideration of CZK 230,000,000 and the appellant herein had guaranteed payment of the full price by M/s Newco Prague s.r.o. to the respondent. It was further the case of the respondent in the winding up petition that M/s Newco Prague s.r.o. failed and defaulted in payment to the extent of CZK 215,375,000 demand wherefor was made on the appellant vide notice dated 1st May, 2009 under Section 433(e) r/w Section 434 (supra).

3. The Stock Purchase and Sale Agreement dated 15th March, 2007 between the respondent and M/s Newco Prague s.r.o. *inter alia* provided as under:-

“3.2. Guarantees

3.2.1. Corporate Guarantee. The Purchaser shall procure the irrevocable Corporate Guarantee issued by the company

12 ✓

SRM Exploration Private Limited headquartered at D-146, Saket, New Delhi – 110 017 India in favour of the Seller for the aggregate amount of the Purchase Price i.e. the amount of 230,000,000 – CZK (two hundred thirty million Czech Crowns) (hereinafter the “Corporate Guarantee”). The Corporate Guarantee in the wording as enclosed as Schedule 3 of this Agreement will be issued before the Signing date and handed over to the Seller against the hand over of the Shares of the Company as described in section 3.4. of this Article.

3.2.2. Promissory Notes. The Purchaser shall issue the Promissory Notes in the amounts of the particular instalments of the purchase price in order to the Seller provided with aval of the company SRM Exploration Private Limited headquartered at D-146, Saket, New Delhi – 110 017 India. The Promissory Notes will be deposited by into the deed-box at Komereni banka a.s. subsidiary Benesov and handed over to the Seller according to the terms of the Escrow Agreement concluded between the contracting Parties and JUDr. Miloslav Jindrich, notary acting as a trustee, provided the purchase price has not be paid by the Purchaser duly and in time. The Escrow Agreement will be signed before the signature of the hand-over minutes according to the Sec.3.4. of this Article.

3.2.3. Bank declaration. The Purchaser is obliged to ensure before the signature of this Agreement the statement of the Canara Bank, India with the declaration regarding the good standing of the company of the Guarantor.

3.3. Shares. The Seller shall hand-over 100% of the SPW Shares (i.e. 940 documentary shares in the total nominal value 940,000,000 CZK) to the Purchaser in the procedure as described in the section 3.4. of this Article.”

though was not signed by the appellant.

4. The Guarantee Declaration also dated 15th March, 2007 is as under:-

“GUARANTEE DECLARATION

13

SRM Exploration Private Limited

with registered office at D-146, Saket, New Delhi – 110 017,
India represented on power of attorney by Mr. Ravi Chilukuri

hereinafter the Guarantor

hereby declares to

N & S & M Consultants s.r.o.

Company no.482 92 583

with registered office at Budovatelů 2830, Most, postal code
43401 Czech Republic

represented by the executive Mr. Ing. Miloslav Soldat

hereinafter the Seller

that

1. It has been acquainted with the obligation of the company **NEWCO PRAGUE s.r.o.** with registered office at Litvňov – Janovů Pratelstvi 81, postal code: 435 42 Czech Republic, which ensues from the Stock Purchase and Sale agreement concluded on 15.3.2007 between **N & S & N Consultants s.r.o.** as the Seller, and **NEWCO PRAGUE s.r.o.**, as the Seller, and **NEWCO PRAGUE, s.r.o.**, as the Purchaser under the terms of which **NEWCO PRAGUE s.r.o.** is obliged to pay the Seller a purchase price for the shares transferred of CZK 230,000,000 (to wit: two hundred and thirty million Czech crowns) by 30.04.2009 at the latest.
2. It here by assumes the duty to pay the Seller specified above for the claim ensuring from the Stock Purchase and Sale agreement of 15.03.2007 a maximum amount of CZK 230,000,000 (to wit: two hundred and thirty million Czech crowns), on condition that the claim or part

thereof specified hereinabove is not satisfied by the Purchaser within the deadline agreed on nor within a reasonable additional deadline specified in the written request sent by the Seller for payment of an particular installment.

3. The Guarantee undertakes to satisfy the claim of the Seller to the extent of the appropriate unpaid installment in accordance with the Stock Purchase and Sale agreement of 15.3.2007 referred to above. within a deadline of 30 days of being delivered an announcement from the Seller that its claim has not been satisfied by the Purchaser within the deadline specified or to the specified extent and that the Seller requests settlement in accordance with this Guarantee Declaration.
4. This Guarantee is valid until 15.5.2009 and its validity will expire automatically if it is not enforced within this deadline. The Seller is entitled to apply the rights ensuing from the Guarantee Declaration within a deadline no shorter than 15 days prior to its expiry.
5. This Guarantee Declaration is not transferable to third parties.
6. The Seller accepts the Guarantee's declaration to the extent specified above.

Prague, March 15, 2007

Sd/-

Guarantor

Sd/-

Seller"

5. The respondent also relied, on a Resolution of the Board of Directors of the appellant as under:-

“SRM EXPLORATION PRIVATE LIMITED

Regd. Office : D-146, Saket, New Delhi – 110 017.

**CERTIFIED TRUE COPY OF THE EXTRACT OF
PROCEEDINGS OF THE BOARD MEETING HELD ON
MARCH 2, 2007.**

“Resolved that the consent of the Board be and is hereby accorded to Mr. Mohinder Verma and Mr. Ravi Chilukuri to sign, verify, execute documents, applications, deeds, agreements, contracts etc. on behalf of the company.

Resolved further that the Board hereby ratifies any action taken by above persons in accordance with resolution.”

For S R M Exploration Private Limited

Director”

besides on the Promissory Notes executed at Prague Czechoslovakia on 15th March, 2007 whereunder M/s Newco Prague s.r.o. promised to pay the amount aforesaid to the order of N & S & N Consultants s.r.o and which Promissory Notes are also signed on behalf of the appellant. The respondent also relied on a letter dated 2nd March, 2007 of Canara Bank as to the financial soundness of the appellant and its promoters.

6. The appellant contested the winding up petition pleading:-

A. that though the Guarantee Declaration claimed the signatory thereof to be power of attorney holder of the appellant but no power of attorney in favour of the signatory of the Guarantee Declaration namely Mr. Ravi Chilukuri had been produced. It was thus pleaded that the Guarantee Declaration though

purported to be on behalf of the appellant, was without any authority from the appellant in favour of the signatory thereof. With respect to the Resolution of Board of Directors it was stated that it was a general resolution intended for day to day business activities and not intended for incurring any financial liability which was in the exclusive domain of the Board of Directors;

- B. that the financial liability under the Guarantee Declaration was 600 times the total paid up share capital of the appellant company at the relevant time; that such a liability could not have been undertaken without a Special Resolution of the Board of Directors;
- C. that Mr. Ravi Chilukuri who had executed the Guarantee Declaration was at the relevant time neither the Director nor a shareholder of the appellant company;
- D. that under the Stock Purchase and Sale Agreement the purchaser M/s Newco Prague s.r.o. was obliged to pay the purchase price latest by 30th April, 2009; though the Guarantee Declaration was valid till 15th May, 2009 but the liability to pay thereunder was to be within 30 days of being put to notice of default by the purchaser M/s Newco Prague s.r.o.; however the demand in the notice dated 1st May, 2009 was for payment within three weeks and not within 30 days; that by the time the period of 30 days would have expired the Guarantee Declaration would have ceased to be valid;

- 17
- E. No such contingent liability had been shown by the appellant in its books of accounts;
 - F. that the Guarantee Declaration was for payment in foreign currency which could not be made without the requisite permission of the Reserve Bank of India (RBI) and hence the very execution of the Guarantee Declaration was bad;
 - G. that disputed questions of law and fact arose and the remedy of winding up petition was not appropriate;
 - H. that the appellant did not owe any liability to the respondent and hence the question of giving a guarantee did not arise;
 - I. that the notice dated 1st May, 2009 was a demand notice and not a notice under Section 433(e) r/w Section 434 of the Companies Act;
 - J. that the winding up petition had not been filed by a duly authorized person. The existence of the Stock Purchase and Sale Agreement and other averments with respect thereto were denied;
 - K. that the appellant had not authorized anyone to sign the Guarantee Declaration on its behalf;
 - L. that the address of the registered office of the appellant was changed from D-146, Saket, New Delhi – 110 017 to 21, Basant Lok Complex, Vasant Vihar, New Delhi on 1st February, 2007 and notice thereof given to the Registrar of Companies; the statutory notice dated 1st May, 2009 sent at the

address of D-146, Saket, New Delhi – 110 017 had not been received by the appellant Company.

7. The Learned Company Judge in the judgment impugned before us has observed/found/held:-

- (i) that no disputed questions of fact arose;
- (ii) that the appellant had assumed the duty to pay under the Guarantee Declaration and the Promissory Notes;
- (iii) that Mr. Ravi Chilukuri who had signed the Guarantee Declaration and executed the Promissory Notes on behalf of the appellant was authorized to do so vide Resolution of the Board of Directors aforesaid;
- (iv) even otherwise the principle of internal management prohibited the appellant from taking the defence of Mr. Ravi Chilukuri not having the power of attorney;
- (v) that after the purchaser M/s Newco Prague s.r.o. had defaulted in making payment in installments agreed, the respondent had periodically sent letters/notices to the appellant keeping the appellant posted of the default and reminding it of its obligations under the Guarantee Declaration;
- (vi) if the Guarantee Declaration had been executed by the appellant in breach of the provisions of Foreign Exchange Management Act (FEMA) or Foreign Exchange Regulations Act (FERA), the appellant can be prosecuted for the same but it cannot be said that the Guarantee is null, void or unenforceable

on this ground;

- (vii) Guarantee Declaration was enforceable under the law;
- (viii) that the Board Resolution aforesaid was in the widest language;
- (ix) reliance was placed on *Ram Bahadur Thakur & Co. v. Sabu Jain Ltd.* (1981) 51 Comp. Cases 301 (Delhi) and on *IBA Health (India) Private Ltd. V. INFO-DRIVE Systems SDN. BHD.* (2010) 10 SCC 553.

8. During the pendency of this appeal the appellant was on 29th April, 2011 directed to file an affidavit disclosing the position held by Mr. Ravi Chilukuri in the appellant Company as well as in group companies, namely M/s Cals Refineries Ltd. and M/s Spice Energy Pvt., Ltd. In response thereto it has been disclosed that Mr. Ravi Chilukuri has never held the position of a Director in the appellant Company; however he had applied and was allotted 7,80,000 shares of the appellant Company on 5th December, 2007 and which he continues to hold. It was further disclosed that Mr. Ravi Chilukuri was appointed as Director of M/s Cals Refineries Ltd. on 23rd July, 2007 and so remained as Director till 24th January, 2011. It was yet further disclosed that Mr. Ravi Chilukuri was appointed as a Director in M/s Spice Energy Pvt. Ltd. on 5th May, 2008 and continues to be so. On enquiry it was further disclosed that the shareholding of Mr. Ravi Chilukuri in the appellant Company is of 30% .

9. The senior counsel for the appellant Company has contended that the Guarantee Declaration describes Mr. Ravi Chilukuri as holding power of attorney from the appellant Company but no such power of attorney has

been produced; that the Board Resolution is not to execute such a Guarantee Declaration; that even otherwise the same authorized Mr. Ravi Chilukuri to act jointly with Mr. Mohinder Verma and not severally; that the Promissory Notes relied upon are unstamped; that neither the Guarantee Declaration nor the Promissory Notes bear the seal of the appellant Company; that the letter aforesaid of Canara Bank does not refer to the transaction in question; attention is invited to Section 35 of the Stamp Act, 1899 and reliance is placed on *Avinash Kumar Chauhan v. Vijay Krishna Mishra* (2009) 2 SCC 532 and *Mannalal Khetan v. Kedar Nath Khetan* (1977) 2 SCC 424; it is contended that in the absence of the principal debtor before the Court, no evidence of default exists and the appellant being not a party to that transaction cannot be expected to give such evidence.

10. Per contra, the counsel for the respondent with reference to Section 13 of FEMA has argued that there was no bar to the appellant executing said Guarantee Declaration and the same is not voided and the appellant for the violation of not obtaining prior permission of the Reserve Bank of India before executing the Guarantee Declaration is only liable for penalty; that in any case the appellant cannot take advantage of its own default in not obtaining the permission; attention is invited to Section 47 of the Companies Act to contend that implied authority is sufficient. Reliance is placed on *The Oriol Industries Ltd. v. The Bombay Mercantile Bank Ltd.* AIR 1961 SC 993 and *Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala* (2009) 9 SCC 478; it is also contended that as per the terms of the Guarantee Declaration the respondent was not required to go to the principal debtor before invoking the claim under the Guarantee.

11. The senior counsel for the appellant in rejoinder has further contended that the imposition of penalty under the FEMA implies the act requiring permission being prohibited without such permission. Qua FEMA, the senior counsel for the appellant Company has relied on para 8 B 1 of the Foreign Exchange Manual titled "Guarantees for non-residents". The same also provides for approval of the RBI.

12. We have perused the provisions of FEMA, 1999 Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA namely FERA 1973 vide Section 47 prohibited entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However the legislature while re-enacting the law on the subject has chosen to do away with such a provision. We are of the view that the same shows a legislative intent to not void the transaction even if in violation of the said Act. Thus we are of the opinion that the plea of the appellant Company in this regard is without any force.

13. The pleadings of the appellant Company are conspicuously silent as to why Mr. Ravi Chilukuri who has a substantial stake in the appellant Company and who from the documents filed by the respondent is the

22 ✓

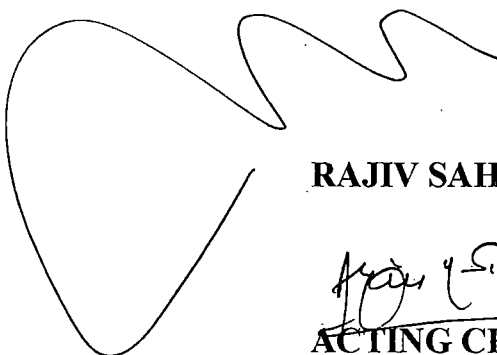
face/promoter of the appellant Company and/or of the Group of Companies to which the appellant Company belongs signed the Guarantee Declaration, Promissory Notes and as to how the Resolution aforesaid of the Board of Directors of the appellant Company landed with the respondent. Similarly though it is contended that comfort letter aforesaid issued by the Bankers of the appellant Company does not refer to the transaction in question but there is no explanation as to for which transaction it was obtained from the bank. The appellant obviously had a stake in the Stock Purchase and Sale Agreement (supra), for the appellant Company to stand guarantee for the same. The world is a shrinking place today and commercial transactions spanning across borders abound. We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies. We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions.

14. As far as the argument of appellant Company of the purchasers under the aforesaid Stock Purchase and Sale Agreement being not before this Court and of denial of the knowledge of default, is concerned, certainly the appellant Company which had stood guarantee for the purchaser i.e. M/s Newco Prague s.r.o. would be in the know as to whether the purchaser has paid the price or not. If the purchaser was not in default, that would have been the first plea of the appellant Company against the petition for winding

up. No such plea has been taken. On the contrary advantage is sought to be taken of technicalities and which cannot be permitted. We are also of the view that the appellant Company by allowing Mr. Ravi Chilukuri to be shown in all its material available on the internet as a promoter of the appellant Company, cannot now be heard to deny his authority. The Resolution of the Board of Directors executed in his favour is of the widest possible amplitude. If the Board of Directors of the appellant Company were intending to confer restricted authority on Mr. Ravi Chilukuri it was for them to in the Resolution so clearly restrict his authority. On the contrary by passing the Resolution in such a manner it was conveyed to all concerned that the appellant Company would be bound by the actions of Mr. Ravi Chilukuri. Similarly the plea that Mr. Ravi Chilukuri was authorized to act jointly with Mr. Mohinder Verma is devoid of any merit. The language of the Resolution, if that had been the intention, would have been different. Also, though a lip service is sought to be paid by filing a copy of the complaint lodged with the Police against Mr. Ravi Chilukuri but no serious action for the folly if any committed by him has been taken. There is nothing to show that the Board of Directors of the appellant Company has dealt with the matter. Mr. Ravi Chilukuri who continues to be associated with the appellant Company has not come forward to explain the transaction. The Supreme Court in *N. Rangachari v. BSNL* (2007) 5 SCC 108 has held that a person normally having business or commercial dealing with a company will satisfy himself about its credit worthiness and reliability by looking at its promoters and Board of Directors and nature and extent of its business; other than that he may not be aware of arrangements within the company in regard to its management etc.

15. As far as the argument of Stamp Act is concerned, the same is again only concerned with recovery of penalties and the documents even if unstamped can be read on penalty being paid. The same is thus no absolute bar to this Court acting on the basis of the said documents. It cannot be lost sight of that both the documents i.e. Guarantee Declaration as well as Promissory Notes were executed outside the country.

16. We are thus unable to find any error in the judgment of the Learned Company Judge and dismiss the appeal with costs of ₹25,000/-



RAJIV SAHAI ENDLAW, J

for & S. L.
ACTING CHIEF JUSTICE

MARCH 21, 2012

'pp'