

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

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Date of decision: 31st October, 2012

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CO.APP. NO.87/2012

A. ENTERTAINMENT PVT. LTD. Appellant

Through: Mr. Sandeep Agarwal & Mr. K.A. Singh, Advs.

Versus

APPLAUSE ENTERTAINMENT PVT. LTD. Respondent

Through: Mr. Anish Dayal with Mr. Siddharth Vaid & Mr. Ranabir Datta, Advs.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal under Section 483 of the Companies Act, 1956 challenges the order dated 19.09.2012 of the learned Company Judge of this Court admitting Company Petition No.321/2010 filed by the respondent under Sections 433(e), 434 and 439 of the Act read with Companies (Court) Rules, 1959 for winding up of the appellant, though deferring the publication of the citation for four weeks to give a chance to the appellant to pay the sum of ₹2,26,05,872/- in which the appellant has been found to be indebted to the respondent along with interest at 9% per annum, to the respondent. We have

heard the counsel for the appellant for a considerable length at the admission stage itself. The respondent being on caveat, appears through counsel.

2. The appellant Company had let out Flat No.101, Nisarg Building 1340-41, Pali Hill, Bandra (West), Mumbai belonging to it to the respondent and had written a letter dated 10.10.2005 to the respondent containing the terms and conditions on which the flat was so offered to the respondent. It was *inter alia* mentioned in the said letter that the flat was to be for use as a Guest House of the respondent on a rent of ₹1,50,000/- per month for a period of three years with effect from 01.12.2005 and the respondent would pay security deposit of ₹2,00,00,000/- and Extra Deposit equal to rent of 36 months i.e. ₹54,00,000/- refundable by the appellant to the respondent at the rate of ₹1,50,000/- per month. It was also mentioned in the said letter that 'the arrangement' could be terminated by giving advance notice of 12 months from either side.

3. It is not in dispute that in terms of the aforesaid letter dated 10.10.2005, the flat was let out by the appellant to the respondent with effect from 01.12.2005 and on the terms and conditions contained therein and that

the appellant received security deposit of ₹2,00,00,000/- and extra deposit of ₹54,00,000/- from the respondent.

4. The respondent claims to have written a letter dated 12.07.2007 to the appellant in pursuance of the 'mutual discussions' regarding the said flat, vacating the flat with immediate effect and waiving the notice period; the respondent in the said letter also sought refund of the amounts deposited with the appellant. The respondent further claims to have written another letter dated 12.12.2008 to the appellant demanding refund of the remaining security deposit of ₹2,26,05,872/- with interest at 36% per annum from July, 2007 till the date of payment.

5. The respondent ultimately got issued a legal notice dated 07.05.2010 to the appellant demanding the aforesaid sum of ₹2,26,05,872/- with interest and further notifying the appellant that upon non-payment thereof appropriate proceedings including for winding up of the appellant shall be taken. Reply dated 24.05.2010 was given by the appellant to the said notice and in which reply the appellant *inter alia* stated that the real transaction between the appellant and the respondent was something else which was within the personal knowledge of Mr. Kumar Mangalam Birla (of the

respondent) alone and denied the demand of the respondent. A rejoinder dated 06.07.2010 was sent by the respondent to the appellant.

6. Upon the appellant not complying with the notice aforesaid, the petition aforesaid for winding up was filed. The appellant contested the petition pleading that Mr. Anshumaan Swami, Director of the appellant was the Chief Executive Officer (CEO) of the respondent since the year 2002 and had in fact set up the respondent Company as the Entertainment Division of the Aditya Birla Group and engaged in the business of Television, Feature Films etc.; that the respondent Company had also produced the film 'Black' which was not only a commercial success but also was critically acclaimed; that Mr. Birla, in appreciation for Mr. Swami, sanctioned an unconditional amount of ₹2,50,00,000/- to be paid to Mr. Swami; even otherwise, the said Mr. Swami, as per terms of his employment letter with the respondent, was entitled to 10% of the profits in excess of targeted profits for each year; however in order to save tax for the respondent, the respondent proposed routing the payment of the said sum of ₹2,50,00,000/- by taking the flat aforesaid of the appellant on rent in which Mr. Swami was already living; that though under the terms of letting, the

sum of ₹2,54,00,000/- aforesaid was paid, out of which ₹54,00,000/- was refundable by the appellant to the respondent at the rate of ₹1,50,000/- per month, the respondent, against the amount of ₹1,50,000/- so refunded by the appellant to the respondent per month, issued cheques of ₹1,16,340/- per month after deduction of Tax at Source (TDS) in favour of the appellant; that the said arrangement continued till July, 2007 when Mr. Swami resigned from the respondent Company. The appellant denied receipt of letters dated 12.07.2007 and 12.12.2008 supra. The appellant further pleaded that the amount of ₹2,00,00,000/- and the balance out of the Extra Deposit of ₹54,00,000/- was not refundable to the respondent since the same was received on account of ₹2,50,00,000/- sanctioned by Mr. Birla to Mr. Swami.

7. Needless to state, the respondent controverted the aforesaid pleas of the appellant.

8. The contention of the appellant before the learned Company Judge was that its defence aforesaid raised disputed questions of fact which could not be adjudicated in winding up jurisdiction and there could not be said to be any debt due from the appellant to the respondent.

9. The learned Company Judge however in the impugned judgment has *inter alia* held the defence aforesaid of the appellant to be wholly illusory and moonshine and in conflict with the undisputed documentary evidence on record and thus not entertainable and raised only to ward off the winding up petition. The aforesaid defence of the appellant, in contravention of the written documents, was also held to be not entertainable and barred by Sections 91 and 92 of the Evidence Act, 1872.

10. The counsel for the appellant has at the outset impugned the judgment of the learned Company Judge as suffering from non-application of mind for the reason of the learned Company Judge having in one paragraph of the judgment observed that no reply had been given by the appellant to the demand notice preceding the filing of the winding up petition and the defence taken in the reply to the winding up petition being thus an afterthought. Though undoubtedly, the said error has crept in the judgment of the learned Company Judge, inasmuch as the reply was admittedly given by the appellant to the notice preceding the petition, however, merely for the said reason, the judgment cannot be set aside if otherwise found to be in accordance with law.

11. The counsel for the appellant has next contended that though at an earlier stage in the proceedings before the learned Company Judge, on the appellant disputing the receipt of letters dated 12.07.2007 and 12.12.2008 supra, directions had been issued to the respondent to produce the receipts showing dispatch / delivery of the said letters on the appellant and also to show the documents under which the flat aforesaid taken on rent by the respondent from the appellant had been placed at the disposal of Mr. Swami aforesaid, but inspite of the same no documents having been filed, the impugned judgment believes delivery of the letters dated 12.07.2007 and 12.12.2008 on the appellant.

12. The counsel for the appellant, on merits, has again urged that the defence aforesaid raised by the appellant to the winding up petition was a valid and tenable defence and could not be said to be illusory or moonshine and raised disputed questions of fact which could not have been adjudicated in winding up jurisdiction.

13. We have bestowed due consideration to the arguments aforesaid of the appellant. The appellant Company is an income tax assessee and was admittedly filing the Income Tax Returns (ITR) during the relevant period.

We have enquired from the counsel for the appellant as to how the appellant Company had shown the receipt aforesaid of ₹2,00,00,000/- and ₹54,00,000/- in its Books of Accounts and in its ITRs i.e. whether as Security Deposit / Advance Rent / Extra Deposit or as Incentive Receipt on behalf of its Director Mr. Swami. Though the counsel for the appellant first stated that the said payments in the Books of Accounts and in the ITRs were shown as having been received towards Security Deposit / Extra Deposit / Advance Rent but subsequently retracted by saying that there is no plea on record in this regard.

14. We have next enquired from the counsel for the appellant that if the case of the appellant was that the sum of ₹2,00,00,000/- and ₹54,00,000/- aforesaid, instead of being the Security Deposit / Extra Deposit / Advance Rent, was towards Incentive Payment due to Mr. Swami, Director of the appellant in terms of his employment with the respondent, whether Mr. Swami in his ITRs (he of course must be an income tax assessee since as per the appellant, he was earning a monthly salary in excess of ₹90,000/-) had shown the same as his income. The answer again is that no such plea has been taken by the appellant.

15. The very fact that the appellant has not taken any such plea and which the appellant would have taken had it been so, shows that the amounts aforesaid of ₹2,00,00,000/- and ₹54,00,000/- admittedly received by the appellant from the respondent were entered and reflected by the appellant in its Books of Accounts as Security Deposit / Extra Deposit / Advance Rent only i.e. in consonance with the case of the respondent and not in consonance with the case set up by the appellant in defence to the winding up petition. The question which arises for consideration is, whether the appellant is entitled to do so i.e. for the purpose of Income Tax and compliance of other laws, take one stand and before the Court, another. We are unequivocally of the opinion that the appellant cannot be permitted to do so. If we allow the appellant to do so, we will make this Court privy to illegalities including as to tax evasion.

16. The principle of public policy is, *ex dolo malo non-oritur action* i.e. no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the litigants own stating or otherwise, the cause of action appears to arise *ex turpi causa* or in transgression of a positive law of the country, the Court will refuse to

render its assistance to such a litigant. The Supreme Court in ***Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander*** AIR 1968 SC 1165 held that in a case in which a litigant must rely upon his own illegality, the Court may refuse him assistance. Similarly in ***Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar*** AIR 1965 SC 1364 also it was held that if the litigant seeks the assistance of the Court to effectuate an illegal transaction, the Court will refuse to assist him. In ***Sita Ram Vs. Radha Bai*** AIR 1968 SC 534 it was held that the principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim *in pari delicto potior est conditio defendentis*. Similarly in ***Kedar Nath Motani Vs. Prahlad Rai*** AIR 1960 SC 213 it was held that where a party rests its case upon an illegality, then public policy demands that it should not be allowed to take advantage of the position. Mention in this context may also be made of ***S.P. Chengalvaraya Naidu Vs. Jagannath*** (1994) 1 SCC 1 holding that the Courts of law are meant for imparting justice between the parties; that a person whose case is based on falsehood has no right to approach the court and can be summarily thrown out at any stage of litigation. It was also noted that the process of the court is being

abused - property grabbers, tax evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely.

17. We are also tempted to refer to *Ram Sewak Vs. Ram Charan* AIR 1982 Allahabad 177. It was a case of concealment of profits; the parties had been keeping double set of accounts for evading payment of income tax and sales tax. The Lower court reported the matter to the Taxation Authority. The High Court held that the Courts should have refused to entertain the suit on the ground of public policy, as it involved directing the recovery of an amount found to be due to either party as a share of the profits which had been deliberately concealed by the parties from the books of account in order to evade the payment of taxes. It was held that no Court can countenance a deliberate evasion of tax laws of the country and to lend the aid of the court for recovering an amount which had been deliberately kept concealed by the parties in order to evade payment of taxes due thereon. It was further held that if the courts were to do so, it would amount to aiding and abetting evasion of the laws by the court itself. It was further held that since the object of the parties was found to be that the profits will be earned in such a way or retained in such a manner as to evade the payment of taxes

which was forbidden by law and which defeats the provision of the tax laws, therefore the object of the agreement was forbidden by law and is opposed to public policy. The agreement between the parties to earn concealed profits being void, it was held that the court could not enforce the agreement by directing an inquiry into that amount or the destination of the concealed profits in order to enforce the recovery of the share therein of one party from another.

18. The defence of the appellant to the winding up petition is steeped in illegality and not entertainable and the appellant cannot be allowed to, on the basis of said defence, withhold dues of the respondent.

19. We entirely agree with the reasoning given by the learned Company Judge of the defence of the appellant to the winding up petition being in contravention of the written documents and being unsustainable in view of Sections 91 and 92 of the Evidence Act, 1872 which prohibit the Court from taking evidence in contravention of written documents. Reference in this regard can be made to ***Roop Kumar Vs. Mohan Thedani*** (2003) 6 SCC 595 laying down that it is a general and most inflexible rule that wherever

written instrument are appointed to be repositories and memorials of truth, any other evidence is excluded.

20. The counsel for the appellant has argued that Mr. Swami being an employee of the respondent could not have rejected the modus aforesaid suggested by the respondent for payment of ₹2,50,00,000/- promised by Mr. Birla of the respondent to Mr. Swami of the appellant. We are however not convinced on this aspect either. Mr. Swami was not a menial workman but is stated to be the CEO of the respondent earning a salary in excess of ₹90,000/- per month and for whose accommodation, the respondent was paying monthly rent of ₹1,50,000/-. Moreover, we fail to see as to how the modus aforesaid of payment of ₹2,50,00,000/- if due to Mr. Swami as an employee of the respondent could be beneficial to the respondent. The counsel for the appellant states that it was to save the tax payable by the respondent. We are however of the view that had the respondent paid the sum of ₹2,50,00,000/- to Mr. Swami as an employee, the said amount would have been a deductible expenditure out of the income of the respondent and it was Mr. Swami who would have paid tax thereon. However by payment as Security Deposit under the Lease Deed, the same could not constitute

expenditure of the respondent and on the contrary became non taxable in the hands of Mr. Swami through the appellant. It was thus Mr. Swami / appellant who stood to evade tax by adopting the modus aforesaid and the respondent does not appear to have gained anything therefrom. The counsel for the appellant is unable to argue to the contrary. There is thus no merit in the plea that it was the respondent who would be interested in paying ₹2,50,00,000/- if due to Mr. Swami in terms of his employment, in the form of Security Deposit under a Lease Deed.

21. We may also notice that save for the bald plea that Mr. Birla had promised ₹2,50,00,000/- to Mr. Swami, there is nothing to show the same. The letter of employment of Mr. Swami with the respondent lays down procedure for calculation and payment of incentive of 10%. The appellant has been unable to show that any incentive was due. Rather the plea is that it was to be paid by way of appreciation.

22. Once we see the matter in the aforesaid light, the dispute raised by the appellant about non receipt of the letters dated 12.07.2007 and 12.12.2008 is irrelevant. We may however state that at least the letter dated 12.07.2007, even if there is nothing to show dispatch / delivery thereof, is in consonance

with the contemporaneous events. Mr. Swami had admittedly 'in continuation to our discussions' on 11.07.2007 submitted his resignation to the respondent and which was immediately accepted. The appellant in its reply to the winding up petition also admitted that the arrangement between the parties with respect to the flat continued till July, 2007 only. The counsel for the appellant admits that thereafter no rent as was earlier being paid, was paid by the respondent and no demand therefor was also raised by the appellant on the respondent. This is in consonance with the letter dated 12.07.2007 whereunder the respondent claims to have vacated the flat with immediate effect and demanded refund of security deposit. In this regard, it may also be mentioned that the respondent in its legal notice preceding the winding up petition had expressly referred to the letter dated 12.07.2007 whereunder the flat was vacated and though the appellant had in its reply thereto generally denied the contents of the legal notice but had not expressly denied the receipt of the letter dated 12.07.2007. In fact the appellant in the said reply evaded to even set out as to on what account the amounts aforesaid had been received if not as Security Deposit / Extra Deposit and vaguely stated that they were under some other arrangement known to Mr. Birla only. Such conduct of the appellant also is indicative of

the appellant surely building up its defence and the same being not based on true facts.

23. The payment by the respondent to the appellant of ₹1,16,340/- per month till July, 2007 was towards rent of ₹1,50,000/- per month, less TDS as agreed and not in reimbursement of ₹1,50,000/-, admittedly refunded by appellant out of extra deposit of ₹54,00,000/-, in terms of letter dated 10.10.2005 supra.

24. Yet another contention of the counsel for the appellant is that letting was for three years terminable prior thereto by a 12 months notice and which had not been given; that the respondent is thus not entitled to refund of Security Deposit. Though as aforesaid, the letter dated 12.07.2007 records that 12 months notice as agreed had been waived but we may further state that if such be the plea of the appellant then it would amount to the tenancy of the respondent of the flat in question continuing; if the respondent is still a tenant and Mr. Swami upon resignation from employment of the respondent having lost the right to occupy the said flat, we have enquired from the appellant whether the appellant is willing to vacate the flat to let the respondent enjoy the same as a tenant. No answer is forthcoming. The

appellant has to sail or sink on his pleas and cannot on the one hand contend that the tenancy has not been determined by the respondent and on the other hand also deny enjoyment of the flat as tenant to the respondent. Even otherwise, a Lease for three years could be created by a registered document only and which admittedly does not exist. The Lease in the present case is by delivery of possession on the terms proposed by the appellant itself a couple of months prior to letting and such a Lease would be a month to month Lease and would not require a notice of determination of 12 months notwithstanding a stipulation to the said effect in the letter of offer of the premises. Such a lease is terminable by a 15 days notice and the maximum claim which the appellant can have on the said account can be for 15 days rent only.

25. We may finally observe that in law, the appellant Company is a distinct entity from its Directors and the payment due to its Director could not have been received by the appellant Company. This is yet another illegality in the defence of the appellant.

26. Seen in this light, it is obvious that the defence of the appellant to the winding up petition indeed was a moonshine and illusory and unsustainable

in law and has been rightly rejected by the learned Company Judge. Once we find the appellant to be having no defence to the refund of the amounts admittedly received by the appellant, the power of winding up has been correctly exercised and no ground in opposition thereto has been urged.

27. We thus do not find any merit in this appeal and dismiss the same. We however refrain from imposing any costs on the appellant.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

OCTOBER 31, 2012
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