

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

% *Reserved on: 7th August, 2013*
Date of Decision: 13th August, 2013

+ CO.PET. 188/2010 & Co.Appl.824/2010

STORE ONE RETAIL INDIA LTD. Petitioner

Through: Mr. Prateek Dwivedi, Advocate.

versus

CENTURY 21 INFRASTRUCTURE LTD. Respondent

Through: Mr. Praveen Chauhan with Mr.
Vijay Kumar and Mr. Shravan
Sahny, Advocates.

CORAM:
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

In this petition filed under sections 433(e)/434(1)/439(1)(b) of the Companies Act, 1956 (“Act”), the only issue, which is a preliminary issue, which arises is whether the petition is maintainable against the respondent-company.

2. The petitioner, Store-One Retail India Ltd. (formerly known as Piramyd Retail Ltd.) entered into a term sheet on 10-1-2007 with the respondent-company, Century 21 Infrastructure Limited, hereinafter

referred to either as respondent or as “Infrastructure”, under which the respondent would provide the petitioner a chargeable area of approximately 56,250 sq.ft. in a mall named “Century 21 Mall”, situated at AB Road, Indore. The petitioner was to be the anchor tenant in the mall and according to the term sheet the mall was to commence operations in October, 2008.

3. The term sheet is annexed to the petition. It is not necessary to refer to its terms in detail and suffice to note that the cheque pursuant to the term sheet was to be drawn in favour of “Century 21 Town Planners Pvt. Ltd., Indore A/c”, hereinafter referred to as “Town Planners”, which was a company belonging to the same group as the respondent and was its marketing arm. The term sheet was signed by Piramyd Retail Ltd. and by Town Planners. It was not signed by the respondent, i.e., Infrastructure. It is to be noted that the name of the developer, as per the term sheet, was Infrastructure.

4. On the day when the term sheet was signed, the petitioner issued a cheque for Rs. 7,00,312 as interest-free refundable security deposit; the cheque was drawn in favour of Town Planners, the marketing arm of the respondent (i.e., Infrastructure).

5. On 8-2-2007, an e-mail was sent to the petitioner by one Amit Kumar, General Manager – Marketing, Century 21 Infrastructure Ltd., which read as under:

*“From: amitkumar@century21infrastructure.com
Sent: Thursday, February 08, 2007 1:33 PM
To: Vishal Singh
Subject: Re: Final Plans Drawings & Stamped & Signed Copy from your*

Dear Vishal,

Plz refer to our telecon and the agreement (duly signed and stamped by our director) recd by u yesterday we confirm that the front location has been reserved for your brand across three floors. The shop nos are G 28,127 and 227 on the GF, FF, SF respectively.

Will be finalising the other details shortly and then will mail the CAD files to u.

Kindly release the cheques today.

Thanz.

*Amit Kumar
General Manager – Marketing
Century 21 Infrastructure Ltd.
G-5, Chiranjeev Tower
Nehru Place
New Delhi – 110019
Ph Nos: 011 41716820, 21, 22, 24, 25
Fax: 011 41716823
Mobile: 09910002520
E-Mail: amitkumar@century21infrastructure.com”*

6. Since no action was taken by the respondent pursuant to the term sheet in the construction of the mall, the petitioner sent a notice on 29-8-2008 cancelling the term sheet and asking for the refund of the security deposit. According to the petitioner, it received no reply. Thereafter, it sent a statutory notice on 3-11-2009 to the respondent under sections 433(e)/434(1)(a) of the Act demanding the deposit back with interest at 18% compounded annually, starting from 10-1-2007 till 3-11-2009, which amounted to Rs. 11,18,416/-. No reply was received from the respondent. The petitioner thereupon filed the present petition in April, 2010.

7. It was contended on behalf of the petitioner that since the respondent was unable and neglected to repay the debt, it should be wound up. A preliminary objection was raised on behalf of the respondent to the effect that since the cheque was drawn by the petitioner in favour of Town Planners, the present petition against Infrastructure was not maintainable. It was submitted that the respondent did not receive any deposit from the petitioner and therefore the provisions of sections 433(e)/434(1)(a) of the Act were not applicable in its case. It was also pointed out that the term sheet was not

signed by the respondent, but was signed by Town Planners and the deposit was also made with it for which Infrastructure was not answerable.

8. Faced with the preliminary objection, the learned counsel for the petitioner submitted that the respondent was the developer and it was at its directions that the deposit-cheque was issued in favour of Town Planners which had signed the agreement and thus the two companies were in reality one. My attention was drawn to the e-mail (reproduced supra) in which Infrastructure had referred to the director of Town Planners, who signed the agreement, as “our director”. It was submitted that it may be for purposes of business convenience that the developing arm and the marketing arm were formed as separate corporate entities, but for all practical purposes they were one and the same and hence the petition against Infrastructure (developer) was maintainable. It was argued that the relationship between Infrastructure and Town Planners was that of principal and agent and hence the petition against Infrastructure was maintainable. These contentions were vehemently contested by the learned counsel for the respondent whose objection was that this is a new point raised in the course of the arguments without any

factual basis and without any averment being made in the petition or the rejoinder. The learned counsel for the petitioner however points out that in paragraph 9(c) of the petition the basic facts have been given which can legitimately form the basis of this argument (that the two companies are in reality one). It was further submitted that the respondent has not adequately dealt with this point in its reply.

9. The learned counsel for the petitioner cited *Castrol Ltd. Vs. Admiral Shipping Ltd.* (2006) 132 Comp. Cas. 241 (Bom.) and *Cravatex Ltd. & Ors. Vs. Vitta Mazda Ltd. & Ors.* (2001) 103 Comp. Cas. 189 (Guj.), in support of his arguments, whereas the learned counsel for the respondent cited *Punjab State Industrial Development Corporation Ltd. v. PNFC Karamchari Sangh and Another* (2006) 4 SCC 367.

10. The only basis for the argument of the learned counsel for the petitioner is the fact that Town Planners is the marketing arm of the respondent and therefore the payment to the former amounts to payment to the latter. This argument is sought to be supported by reference to the statement of Infrastructure (in the e-mail) acknowledging that payment was made to “our director”. It would be improper and unsafe to draw the

conclusion, merely from the statement of the General Manager (Marketing) of Infrastructure, that both the companies are one and the same. It must be remembered that it is not uncommon or unusual for businessmen to form separate corporate entities to carry out different aspects of the same business. Such a practice, driven by business exigencies must be recognised and given effect to, so long as there is no motive of evasion of lawful liabilities. Employees working in such companies may have a sense of affinity or of belonging to the same group and that is perhaps the reason why the General Manager (Marketing) of Infrastructure referred to the director of Town Planners as “our director”. This does not, per se and without anything more, necessarily mean that both the companies are one and the same. It was not also shown that the amount paid to Town Planners was transferred by it to the respondent, indicating inter-mingling or dovetailing of the finances of the two companies. Transfer of funds might have perhaps indicated the existence of a principal-agent relationship. In the Bombay case (supra), the respondent-company was admittedly acting as an agent for an undisclosed principal, which is not the case herein. There is no other material to which my attention was drawn to hold that the

corporate veil must be lifted and I should see Infrastructure through the prism of Town Planners or vice versa.

11. Though the submission of the learned counsel for the respondent that this is a new point raised by the petitioner, not in the pleadings, but only in the course of the arguments and that too after being confronted with the preliminary objection is not without force, I have still permitted the petitioner to raise the point and have examined the facts stated in paragraph 9(c) of the petition which refers to the e-mail as the basis for the argument that both the companies are one and the same. This is because of the judgment of the Supreme Court in ***Ram Sarup Gupta (decd.) by LRs, (appellants) v. Bishun Narain Inter College and others (respt.)*** (AIR 1987 SC 1242). In this case it was held that though the general principle is that in the absence of pleadings, no party shall be permitted to travel beyond the pleadings and raise a new point and that the necessary and material facts should be pleaded specifically, it is necessary to have the object of this principle in mind, which is that the opposite party should not be taken by surprise; having regard to this object and with a view to ensuring a fair trial, however, a pedantic approach should not be adopted to defeat justice or hair-splitting

technicalities. It was further held that undue emphasis on the form, sacrificing the substance of the dispute, should be avoided. Having regard to this judgment, to which my attention was drawn in the course of the arguments, I have examined the contention of the learned counsel for the petitioner based on paragraph 9(c) of the petition. It is another matter that I do not find merit in the same, as discussed in the preceding paragraph.

12. In view of the foregoing discussion, I dismiss the company petition as not maintainable against the respondent. The connected application is also dismissed. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

AUGUST 13, 2013
//vld