

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 26.03.2014

+ **CCP (CO.) 10/2013 IN CO.PET.167/2011**

PROMINENT ADVERTISING SERVICES

.....Petitioner

versus

KOUTONS RETAIL INDIA LIMITED

.....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Samrat Nigam, Ms Ankita Mahajan &
Ms Aishwarya Chandar.

For the Respondent : Mr Hemant Sharma & Mr Ishan Sanghi.
Mr Karan Khanna for Indian Overseas Bank.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present petition has been filed by the petitioner under Section 12 of the Contempt of Court Act, 1971 (hereinafter referred to as the 'Act') read with Article 215 of the Constitution of India, *inter alia*, praying for punishing the respondents for committing Contempt of Court by violating the order dated 07.03.2012 passed by this Court in Company Petition No. 167 of 2011.

2. The petitioner had filed the Company Petition No.167 of 2011 seeking winding up of the respondent company as the respondent company had failed and neglected to pay its admitted debt of ₹4,88,64,593/- which was due and payable to the petitioner.

3. The petitioner submits that during the pendency of the petition the respondents and the petitioner agreed to reconnoitre a possibility to resolve

the matter. The matter was, thereafter, amicably resolved and the respondent agreed to pay the amount due to the petitioner in instalments. The terms of the settlement arrived at between the parties were reduced to writing by way of a Memorandum of Settlement (MOS) dated 03.08.2011. The said MOS was signed by both the parties. Statements of respondent nos. 2, 3 & 4 namely Mr. Devinder Pal Singh Kohli, Chairman-cum-whole time Director, Mr. Bhupender Singh Sawhney, Managing Director and Mr. Gurmeet Singh Sawhney, Deputy Managing Director, affirming that the settlement as recorded in the MOS would be duly honoured, were also taken on record. The said directors were authorised by respondent no.1 by a resolution dated 29.06.2011 passed by the Board of Directors to execute the said MOS.

4. As per the MOS dated 03.08.2011 entered into between the petitioner and respondents, the admitted debt of the respondent company was agreed to be discharged in 22 instalments. The schedule of payments as was agreed is quoted below:-

“Sr.No	AMOUNT	DATE OF PAYMENT
1.	Rs. 10,00,000/-	25.08.2011
2.	Rs. 10,00,000/-	25.09.2011
3.	Rs. 10,00,000/-	25.10.2011
4.	Rs. 10,00,000/-	25.11.2011
5.	Rs.15,00,000/-	25.12.2011
6.	Rs.15,00,000/-	25.01.2012

7.	Rs.15,00,000/-	25.02.2012
8.	Rs.15,00,000/-	25.03.2012
9.	Rs.15,00,000/-	25.04.2012
10.	Rs.15,00,000/-	25.05.2012
11.	Rs. 28,22,000/-	25.06.2012
12.	Rs. 28,22,000/-	25.07.2012
13.	Rs. 28,22,000/-	25.08.2012
14.	Rs. 28,22,000/-	25.09.2012
15.	Rs. 28,22,000/-	25.10.2012
16.	Rs. 28,22,000/-	25.11.2012
17.	Rs. 28,22,000/-	25.12.2012
18.	Rs. 28,22,000/-	25.01.2013
19.	Rs. 28,22,000/-	25.02.2013
20.	Rs. 28,22,000/-	25.03.2013
21.	Rs. 28,22,000/-	25.04.2013
22.	Rs. 28,22,593/-	25.05.2013
	TOTAL AMOUNT	Rs. 4,68,64,593”

5. Thereafter, an Addendum to the MOS was signed on 14.09.2011 by the petitioner as well as the respondents. Whereby, the respondents agreed that the advertisements in print media including News paper, magazines and publications for all their brands in India, would be released exclusively through the petitioner. The payments for the advertisements were to be

made in advance. The respondents further undertook that in case of any default in payment as mentioned in the MOS, the petitioner would be at liberty to proceed and prosecute the pending proceedings under Section 138 of the Negotiable Instruments, 1881 and also proceed for winding up of respondent no.1 .

6. Thereafter, on 06.03.2012 the parties agreed to revise the schedule of the payment of the dues of the petitioner and another Addendum to the MOS referred to as the Second Amendment was agreed and entered into between the petitioner and the respondent. As per the Second Amendment dated 06.03.2012, the payments were to be made as under :-

“Sr.No	AMOUNT	DATE OF PAYMENT
1.	Rs. 10,00,000/-	07/02/2012
2.	Rs. 10,00,000/-	07/03/2012
3.	Rs. 10,00,000/-	07/04/2012
4.	Rs. 10,00,000/-	07/05/2012
5.	Rs.15,00,000/-	07/06/2012
6.	Rs.15,00,000/-	07/07/2012
7.	Rs.15,00,000/-	07/08/2012
8.	Rs.15,00,000/-	07/09/2012
9.	Rs.10,00,000/-	07/10/2012
10.	Rs.15,00,000/-	07/11/2012
11.	Rs.15,00,000/-	07/12/2012

12.	Rs.15,00,000/-	07/01/2013
13.	Rs. 20,00,000/-	07/02/2013
14.	Rs. 20,00,000/-	07/03/2013
15.	Rs. 20,00,000/-	07/04/2013
16.	Rs. 20,00,000/-	07/05/2013
17.	Rs. 20,00,000/-	07/06/2013
18.	Rs. 20,00,000/-	07/07/2013
19.	Rs. 20,00,000/-	07/08/2013
20.	Rs. 20,00,000/-	07/09/2013
21.	Rs. 20,00,000/-	07/10/2013
22.	Rs. 20,00,000/-	07/11/2013
23.	Rs. 20,00,000/-	07/12/2013
24.	Rs. 20,00,000/-	07/01/2014
25.	Rs. 18,94,098/-	07/02/2014
26.	Rs. 18,94,098/-	07/03/2014
27.	Rs. 18,94,098/-	07/04/2014
28.	Rs. 18,94,098/-	07/05/2014
29.	Rs. 18,94,098/-	07/06/2014
30.	Rs. 18,94,098/-	07/07/2014
	TOTAL AMOUNT	Rs. 4,88,64,593/-”

7. A joint application (being Co.Appl. 502 of 2012 under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 read with Rule 9 of the

Company (Court) Rules, 1959) was filed by the parties, enclosing the MOS, Addendum, Second Amendment and Undertakings by way of Affidavits of the Directors of the respondent Company *inter alia* praying for disposing of the said company petition. The joint company application, indicated that it was agreed between the parties that in the event the respondent fails to honour its obligations made under the MOS, its Addendum and Second Amendment the petitioner would be at liberty to initiate winding up of the company.

8. The respondents admitted that the amount of ₹4,88,64,593/- was, admittedly, due and payable by the respondent company to the petitioner and further submitted that the agreement made in the MOS and its Amendments would be binding and honoured by the respondent as well as by the Directors. The respondent also submitted that in the event the respondent failed to honour its obligations made in the MOS, the petitioner would have the right to wind up the respondent Company.

9. Thereafter, a Demand Draft bearing No.027552 dated 23rd February, 2012 drawn on SBI, Mehrauli Road, Gurgaon for an amount of ₹10,00,000 was handed over by the learned counsel for the respondent to the learned counsel for the petitioner, towards the first instalment. The same was taken on records and by an order dated 07.03.2012 the joint company application no.502 of 2012 was allowed and the company petition and other pending applications were disposed of in terms of the MOS, Addendum and the Second Amendment to the MOS. The undertakings of the respondents nos. 2, 3 and 4 (Directors) that the dues of the respondent would be discharged as agreed were accepted and it was specified that in case of any breach of

the above mention terms the parties so aggrieved would be at liberty to initiate proceedings for contempt of Court.

10. The learned counsel for the petitioner has submitted that the undertakings by way of affidavits dated 27.02.2012 were executed by the respondents only for the purposes of avoiding orders for winding up respondent no.1 company. The said undertakings were filed with the knowledge that the respondent company may not have the funds to honour the same. It is submitted that the respondent company owed large amounts of debts and the same were within the knowledge of respondents when they furnished the undertakings. The respondents were thus aware that the respondent company would not have the resources to adhere to the payment schedule undertaken by them, yet the respondents furnished the undertaking to take an immediate advantage of avoiding the admission of the winding up petition. An order admitting another winding up petition (Co.Pet. 330/2013) was passed on 13.05.2013, however, the respondent had already defaulted in making the payments in August 2012 much prior of passing the said order and thus the order dated 13.05.2013 cannot be an excuse for not performing the obligations undertaken by the respondents. It is submitted that the respondent furnished the undertakings as a matter of chance to avoid an immediate order despite being aware that the company may not be able to adhere to the schedule of payment as agreed therein. It is submitted that this act of the respondent is contumacious as it affects the administration of justice. The winding up petition filed by the petitioner had been disposed of on the basis of the undertakings furnished by the respondents and in this manner the respondents had secured for themselves

an immediate advantage by providing the necessary undertakings. This Court while passing the order had also indicated that non-adherence could entail initiation of contempt proceedings. It is submitted that despite being so cautioned, the respondents had not withdrawn the undertakings and had persuaded the Court to dispose of the winding up petition by an order dated 07.03.2012.

11. The learned counsel for the petitioner placed reliance on the decision of the Supreme Court in the case of **Rama Narang v Ramesh Narang & Anr.**: 2009(16) SCC 126, in support of its contention that a deliberate and wilful disobedience of an undertaking would amount to contempt of Court. The learned counsel also placed reliance on the decision of the Supreme Court in **Babu Ram Gupta v. Sudhir Bhasin**: 1983 SCC 47, in support of his contention that obtaining orders on the basis of an undertaking, which is subsequently breached would amount to a fraud on court. In such cases the contemnor would be liable to be punished for contempt of court as obstructing the course of justice.

12. The learned counsel for the respondent at the outset submits that the respondents sincerely regret the breach of the undertakings and tender their unqualified apology for the same. He, however, submitted that the breach of the undertakings was not willful and deliberate and the same had occurred for reasons beyond the control of the respondents. He submitted that subsequent to the order dated 07.03.2012 the financial affairs of the company had deteriorated to the extent that it was not possible for the company to make the payments undertaken by the respondents. He further submitted that the breach of undertaking was not intentional and, therefore,

would not amount to contempt of court as defined under Section 2(b) of the Contempt of Courts Act, 1971. The learned counsel has also placed reliance on the decision of the Supreme Court in the case of Niyaj Mohammad & Anr. v. State of Haryana: 1994 (6) SCC 332, in support of his contention that before a contemnor is held to be guilty and punished, the Court has to be satisfied that disobedience was willful and intentional. Disobedience as a result of compelling circumstances which made it impossible for the contemnor to comply with an order of a Court would not amount contempt of court. He further submitted that the standard of proof required to be applied were similar to that as applied in criminal proceedings.

13. I have heard the learned counsel for the parties.

14. The question that is to be addressed is whether the conduct of the respondents and the breach of undertakings given by the respondents in the present case would amount to contempt of court. In order to address this question, it would be necessary to examine the circumstances in which the said undertakings had been furnished.

15. The petitioner had filed a petition for winding up of the respondent company (being Co. Pet. No. 167/2011) alleging that the respondent no.1 was liable to be wound up as it had been unable to discharge the debt of ₹4,88,64,593/- payable to the petitioner. In order to avoid an adverse order the respondents agreed to discharge the amount due to the petitioner. A Memorandum of Settlement dated 03.08.2011 recording the manner in which the dues of the petitioner would be discharged was executed between the parties and also filed in this Court. As per the said settlement, the dues

of the petitioner were liable to be paid in 22 installments. Apparently an Addendum to the said Memorandum of Settlement was entered into and filed on 14.09.2011. Indisputably, the payments as agreed under the Memorandum of Settlement as modified by the said Addendum, were not made by the respondent. In the circumstances, the parties agreed to a new schedule of payments on 06.03.2012 and the same was treated as a Second Amendment to the earlier Memorandum of Settlement dated 03.08.2011. It is apparent that the respondent company was already in financial difficulty and had not been able to discharge its debts as agreed. In these circumstances, an order for winding up of the respondent company was imminent. In order to avoid the winding up of the respondent company, its Directors: Mr. Devinder Pal Singh Kohli, Mr. Bhupender Singh Sawhney and Mr. Gurmeet Singh Sawhney (respondents no.2 to 3) executed undertakings by way of affidavits dated 27.02.2012. It is on the basis of these undertakings that this Court was persuaded to dispose of the petition filed by the petitioner.

16. This Court while accepting the undertaking passed the following order:-

“Accordingly, present application is allowed and present petition and pending applications are disposed of in terms of the MOS, Addendum and Second Amendment to MOS as well as undertakings. In case of breach of MOS and undertakings, the aggrieved party shall be at liberty to seek revival of the present petition and also initiating contempt of Court proceedings.”

17. Admittedly, the respondent could not adhere to the payment schedule as undertaken and did not make any payment to the petitioner after August

2012. The petitioner was thereafter constrained to revive the petition for winding up of the respondent company and has also preferred the present petition alleging that the respondents are guilty of contempt of court and are liable to be punished for the same. In reply to the present petition, the respondents have submitted that at the material time when the undertaking had been furnished the respondent company was a going concern and was making profits. It is alleged that due to slow down in the global economy, aggressive capacity utilization, the company had incurred heavy losses and several winding up petitions were filed against the respondent company. The relevant extract from the reply filed by the respondent is quoted below:-

“ 2.1. That it is respectfully submitted that although the amount was deposited in order to avoid unnecessary litigation the Respondent had entered into the memorandum of settlement and bonafidely started making payments as per the payment schedule. That it is a matter of record that the MOS dated 03.08.2011, addendum dated 14.09.2011, Second amendment to the MOS dated 06.03.2012 and the undertaking by way of affidavits dated 27.02.2012 were agreed and entered between the parties when the Respondent No. 1 Company was a going concern and was making profits. That without prejudice to the parties, the Answering Respondent had entered into the MOS and agreed to pay the disputed amount by way of installments in order to avoid financial burden upon the Respondent No. 1 Company had such an exorbitant disputed amount had to be paid upfront. That due to slow down in the global economy including the Indian economy, aggressive capacity utilization, rapid expansion relating to increase in the manpower costs, opening of large number of unviable stores and other cogent and compelling reasons which were beyond the control of the Answering Respondent, the Respondent No. 1 Company incurred heavy losses and several winding up petitions were filed against the Respondent No. 1 Company.

2.2 That it is respectfully submitted, that since the Respondent No. 1 Company was facing a setback in the cash flows, the Company went into a deep financial crisis and the Respondent No. 1 Company was forced to shut its operations. That it is also a matter of record that this Hon'ble Court in its order dated 13.05.2013 in Company Petition No. 330 of 2013 has admitted the winding up petition against the Respondent No. 1 Company and has appointed the Official Liquidator attached to this Hon'ble Court as the Provisional Liquidator of the Respondent No. 1 Company. Since, a Provisional Liquidator has been appointed, who has sealed all the offices and assets of the Respondent No. I Company and has also frozen the bank accounts of the Respondent No. I Company. Therefore, the Answering Respondent was not able to make any further payment to the Petitioner herein and hence the defaults of non payment to the Petitioner herein should be considered as neither intentional nor deliberate nor willful and hence the present Contempt Petition under reply is not maintainable and deserves to be outrightly rejected."

18. It is not disputed that the undertakings given by the respondents in the form of affidavits are undertakings given to the court and not the petitioner. The said undertakings were given for the purposes of persuading the court to dispose of the winding up petition and thereby obtain an advantage by avoiding an immediate order admitting the petition for winding up the respondent company. Admittedly, willful and intentional breach of the said undertakings would constitute contempt of court as defined under section 2(b) of the Contempt of Court Act, 1971. The rationale being that dishonoring an undertaking given to the court would amount to a fraud on court and that would inevitably affect the administration of justice. It naturally follows that even furnishing of an undertaking, being fully aware that there was a reasonable probability that it may not be possible to comply with the same, would also be

contumacious. The respondents have argued that the breach of undertakings has been for reasons beyond the control of the respondents and on account of non availability of funds. However, the essential question to be addressed is whether the respondents had furnished the undertakings fully knowing that they may not be able to comply with the same.

19. Viewed from this perspective, the respondents must show that there was a material change during the period March 2012 to August 2012, which was not in the contemplation of the respondents at the material time when they furnished the undertakings. Absent such facts, it would follow that the respondents furnished the undertakings fully knowing that in all probability the same would not be complied with.

20. Although, it is stated that respondent company was a profit making company in March 2012, there is no material that has been produced by the respondents to substantiate this claim. It is also relevant that the several winding up petitions that were filed against the respondent company and have been referred to by the respondents are in respect of past debts which were due and payable by the respondent company. The fact that the respondent company had not been able to adhere to the payment schedules agreed to in the past also indicates that the respondent company was already facing financial difficulties and its Directors were aware of the extent of debts as well as the dismal state of affairs of the company. There is no material to show that any new adverse situation had arisen during the period of March to August 2012 which had altered the financial position of the respondent company. The learned counsel for the respondents submits that at the material time the respondents were hopeful of attracting a

strategic investor to invest in the respondent company and the same would provide the necessary funds required for discharge of the liabilities of the respondent company. It is implicit from this argument that the respondent company by itself did not have the resources for meeting the payment schedule as undertaken by the respondents. The adherence to the undertakings was thus contingent on the respondents finding an investor

21. It is thus, apparent that undertaking given by the respondent was only to enable the respondent to avoid an order of winding up at the material time and the respondents were obviously aware that the respondent company was not likely to meet all its financial obligations. The contention that there had been a general slowdown in the economy cannot be considered to be a defence for breach of undertaking.

22. It also cannot be disputed that a breach of undertaking would obstruct the course of justice as explained by the Supreme Court in the case of **Babu Ram Gupta** (*supra*) as under:-

“10. In fact, the reason why a breach of clear undertaking given to the court amounts to contempt of court is that the contemner by making a false representation to the court obtains a benefit for himself and if he fails to honour the undertaking, he plays a serious fraud on the *court* itself and thereby obstructs the course of justice and brings into disrepute the judicial institution.”

23. In the facts of the present case, there is no doubt that at the time of filing the undertaking the respondents were well aware that it is quite possible that they would not be in a position to adhere to the payment schedule. Nonetheless, in order to avoid an immediate winding up order, the respondents furnished the undertakings. It is clear that the respondents

had played a fraud on the Court by persuading the Court to dispose of the winding up petition on the basis of undertakings which the respondents knew at the material time that it was unlikely that the same would be honoured. The undertakings were given possibly with a view to try and revive the company of which there was no certainty.

24. In this view the respondents are clearly guilty of contempt of court.

25. However, in view of the apology tendered by the respondents, I deem it fit to impose a penalty of ₹ 20,000/- each on respondent nos. 2, 3 and 4. The penalty imposed will be deposited by the respondents with the Official Liquidator within a period of one week from today.

MARCH 26, 2014
RK

VIBHU BAKHRU, J

