IN THE HIGH COURT OF BOMBAY AT GOA

COMPANY PETITION NO. 19 OF 2014

MS. AMUDA R. D/O RAMAKRISHNA V. ... Petitioners

Versus

M/S. CARL DAVID HOLIDAY RESORTS PVT. LTD., REP. THR. ITS ADDITIONAL DIRECTOR EDVIN WILLIAM MOREAS ... Respondents

Mr. Sudin Usgaonkar, SeniorAdvocate with Ms. Vinita Palyekar, Advocate for the Petitioners.
Mr. J. J. Mulgaonkar, Advocate for the Respondent.

Coram:- F. M. REIS, J.

Date:- 11th September, 2015

ORAL ORDER

1. Heard Shri Sudin Usgaonkar, learned Senior Counsel appearing for the Petitioners and Shri Mulgaonkar, learned Counsel appearing for the Respondent.

2. The above Petition has been filed for winding up under Section 239 of the Companies Act, 1956, claiming that the Petitioner desired to settle in life by entering into a new marriage basically for having companion during the old age and for financial security and, as such, the Petitioner got acquainted to prospective grooms Shri Krishna Venkatesh, aged 44 years, resident of Devinagar. The said Krishna introduced himself as a MBA degree holder and running a Travel and

Hospitality Agency, having offices at Jaipur, Bombay and Goa. After continuous contact through the website, both of them exchanged their phone numbers and thereafter were in continuous phone conversation. In furtherance of marriage proposal, the said Krishna told the Petitioner that he would come to Bangalore on 12.10.2011 to speak to her parents to fix the date of their marriage. It is further her contention that the said Krishna represented to the Respondent that the said Company owns a Hotel Resort in Goa by name "The Flushing Meadows Country Resort". It is further her case that on 09.10.2011, the said Krishna telephoned to the Petitioner saying that the Respondent Company is in dire need of financial assistance and that the workers of the said Resort are on strike due to non-payment of their dues for the past over two years. Therefore, the said Krishna requested the Petitioner to immediately arrange for a loan amounting to a sum of Rs. 30,00,000/- as a hand loan to the Respondent-Company. It is further her contention that the Petitioner knowing that the said loan was for the Company and believing the undertaking given by the said Shri Krishna, the Petitioner pledged her gold ornaments for Rs.3.8 lakhs and immediately delivered the said amount to said Shri Krishna to be paid to the Respondent-Company. On the very same day, in the evening, the said Shri Krishna arrived in Bangalore to meet the Petitioner. Due to repeated requests of said Shri Krishna for another loan, the Petitioner arranged for an amount of Rs.20,00,000/- and personally handed over the said amount to Shri Krishna to be paid to be Respondent-Company. Thereafter, on account of persistent request on behalf of the Respondent-Company for more advances, the Petitioner arranged for a loan and paid to the Respondent-Company. Eventually, the total amount Respondent-Company had received was a sum of

Rs.1,38,15,287/- from the Petitioner as on 20.02.2011. contrary to the assurance given for the repayment of said amount, no such amount was repaid to the Petitioner. Therefore, to keep the records straight and the financial dealings transparent, the Petitioner requested said Shri Krishna that the Respondent-Company acknowledges the said debt in writing. As such, the Respondent-Company represented by its Managing Director, said Krishna acknowledged and confirmed the total debt of Rs.1,38,15,287/- paid by the Petitioner and received by the Respondent-Company under a receipt dated 20.02.2012 executed before the Notary Public at Bangalore. Simultaneously, on the same day, a mutual Agreement was signed by the said Krishna on behalf of the Respondent-Company before the Public Notary at Bangalore. By virtue of the Memorandum of Understanding, the Respondent-Company\ categorically admitted of having received the said amount and had agreed the payment of the said amount by hypothecating movables of the Respondent-Company and by mortgaging the immovable property admeasuring 3698 square metres from survey no. 443/3 known as *"Katya Munag Chivari"* situated at the Village of Anjuna. On 29.11.2012, the Petitioner and the said Krishna married in Bangalore and later got their marriage registered before the Sub-Registrar at Bangalore. It is further contended that in partial repayment of the loan borrowed, the Respondent-Company had issued the following cheques :

1. Cheque dated 01.06.2013 for a sum of Rs.30,00,000/- drawn on Axis Bank, Jaipur.
2. Cheque dated 06.05.2013 for a sum of Rs.25,00,000/- drawn on IndusInd Bank, Jaipur.
3. Cheque dated 06.05.2013 for a sum of Rs.25,00,000/- drawn

on IndusInd Bank, Jaipur.

4. Cheque dated 09.05.2013 for a sum of Rs.25,00,000/- drawn on IndusInd Bank, Jaipur.
5. Cheque dated 09.05.2013 for a sum of Rs.30,00,000/- drawn on IndusInd Bank, Jaipur.
6. Cheque dated 07.06.2013 for a sum of Rs.1,00,000/- drawn on HDFC Bank, Calangute, Goa.
7. Cheque dated 07.06.2013 for a sum of Rs.1,00,000/- drawn on HDFC Bank, Calangute, Goa.
8. Cheque dated 07.06.2013 for a sum of Rs.1,00,000/- drawn on HDFC Bank, Calangute, Goa.

It is further contended that when the said cheques were presented for payment, the same were returned dishonoured with an endorsement account blocked and insufficiency of funds. It is further her contention that on 09.07.2013, the Petitioner through her Advocate sent a notice under the Negotiable Instruments Act to repay the said amount and ultimately the Petitioner initiated proceedings against the Respondent-Company represented by the Managing Director, Shri Krishna, under the provisions of the Negotiable Instruments Act, before the Judicial Magistrate at Bangalore. Thereafter by notice dated 12.10.2013, the Respondent-Company and the other Directors of the Respondent-Company were again called upon to pay the debt along with interest at the rate of 18% per annum. Inspite of receiving the said notice, the Respondent failed to repay the amount. Again on 11.12.2013, a statutory notice under Section 434 of the Companies Act was addressed to the Respondent-Company by registered post AD at his registered address to pay the said debt but, however, the said notice came returned unserved with an endorsement refused. It is further the contention of the Petitioner that in terms of provisions of the Companies Act, the Respondent-Company is deemed to be unable to pay the debt and, consequently, filed the above Petition for winding up of the said Company.

3. The Respondent-Company filed their reply contending that the present Petition is without jurisdiction and not at all maintainable. It is further their contention that the allegation made by the Petitioner and the documents annexed thereto do not disclose any debt, let alone an admitted debt, payable by the Respondent-Company to the Petitioner. It is further their case that what emerges from the reading of the allegations made in the Petition as well as in the document which have been produced is that the Petitioner has fallen a victim to a deceitful attitude of one Krishna Venkatesh who has lured by his false promises and representations and conman-ship not only to enter into a matrimonial relationship but also let him extract from the Petitioner large sums of money. It is further their case that the said Krishna is absconding since about February, 2010, after swindling the Respondent-Company, misappropriating the Company funds and committing theft including of several Company's documents like the Company cheque books, stationery and letter heads. It is further their case that the Respondents have taken all appropriate steps to protect the Companies interest by instructing the Bank to stop operations of its Bank accounts by filing police complaints and passing appropriate Board Resolutions withdrawing all authority

given to the said Krishna Venkatesh. The Respondents also caused a notice to be published by their Advocate in a widely circulated newspaper in Goa alerting and cautioning the public against dealing with the said Krishna Venkatesh on Company's behalf. None of his alleged acts were authorised by the Company. In particular, at no point of time, Krishna Venkatesh was authorised to raise loans for and on behalf of the Company in February, 2010. and the Company found that Krishna having abandoned the hotel, was absconding from Goa after committing theft including its cheque books and after having misappropriated huge sums of the Respondent-Company. It is also contended that all the allegations made by the Petitioner are directed against said Krishna Venkatesh, who allegedly, represented the Petitioner that he was the authorized Managing Director of the Respondent-Company and signed the alleged documents which were authorised by the Respondent-Company. It is further their case that somewhere in the year 2006, the said Krishna Venkatesh approached the Respondent-Company's Director Mr. David William Parker and volunteered to assist in carrying on Company's hotel business contending that he was well experienced in such activities. That by resolution passed by the Board of Directors at its meeting held on 22.09.2005, the said Krishna Venkatesh was authorised to sign and verify all documents and submit the necessary information/statements and give explanation on behalf of the Company to any authority including Central/State/Government Departments, Banking Institutions, local bodies and any authorities on behalf of the Company concerning any legal financial or administrative matters on behalf of the Company. However, he was not authorised by any Company resolution to raise loans or to deal with any individual person on Company's behalf. The appointment of said Shri Krishna

Venkatesh to the Directorship of the Company was without any financial involvement and at no point of time, the said Shri Krishna Venkatesh had any financial stakes in the Respondent-Company. Since February, 2010, having misappropriated the Company's hotel business, the said Venkatesh has been absconding from Goa. The Respondent-Company through their Advocates, therefore, published a public notice in the daily newspaper dated 08.08.2010 cautioning and alerting the public that Krishna Venkatesh had committed several illegalities in the name of the Company and had withdrawn large sums of money from the Company's Bank Account and having committed such unauthorised acts, had been absconding. It is further their case that said Krishna Venkatesh had misappropriated substantial amounts of the Respondent-Company besides putting the Respondents to huge loss in other ways and acting in complete breach of trust and also committed theft of the Company documents as referred to herein above. The Respondents have specifically denied that Krishna Venkatesh was requesting hand loans on behalf of the Respondent-Company as he was not authorised to raise any such loans. The fact that any amounts were received by Respondent-Company through Krishna Venkatesh has also been disputed and denied by the Respondents. It is also contented that the Respondent-Company has not received any of the amount from the Petitioner and, therefore, denied that any debt was payable to the Petitioner. It is further their contention that on perusal of the Memorandum of Understanding dated 20.02.2012, the same is executed on the strength of an alleged resolution dated 20.03.2009 authorising Krishna Venkatesh to execute documents on behalf of the Respondent-Company. The Respondents state that no such resolution dated 20.03.2009 was passed by the Company authorising Krishna Venkatesh to execute any such document and to act on behalf of such Company. It is, therefore, specifically denied that Krishna Venkatesh had any authority to acknowledge or confirm any debt on behalf of the Company. The contents of the Memorandum of Understanding have been seriously disputed and denied by the Respondent-Company. It is further their case that by letter dated 03.08.2010, the HDFC Bank, Calangute branch, was asked on behalf of the Respondent-Company not to accept any cheque with the number starting from 277326 to 277375 or accept any payments into the said account. At the Board of Directors meetings of the Respondent-Company held on 04.03.2010, a resolution was passed in super session of the earlier resolution by withdrawing the Power of Attorney and the authority given to the said Krishna Venkatesh, the Managing Director of the Company with immediate effect. It is further their contention that no debt is payable to the Petitioner and, consequently, the Petition deserves to be rejected.

4. The Petitioner thereafter filed an affidavit, inter alia, contending that the said property and the hotel have been sold during the pendency of the above Petition. An affidavit in reply has also been filed by the Respondents to the said application, inter alia, stating that Respondent-Company has not transferred the said properties bearing survey no. 443/3 of Village Anjuna. It is also contended that the said Deed discloses that it is executed by one M/s. Surya Chanwani Enterprises in favour of M/s. Stanferns C.C. Pvt. Ltd. It is also contended that the said Chanwani Enterprises has no right, title or interest in the said property and, therefore, the said Sale Deed is illegal and null and void. It is further their case that

certain unknown persons have trespassed into the said property, broken the locks of the main door and civil and criminal proceedings have been initiated challenging the said Deed of Sale and also to regain possession of the disputed property.

5. An affidavit in rejoinder has also been filed by the Petitioner. It is contended that the resolution dated 22.05.2005 clearly discloses the authority given to Krishna Venkatesh to sign documents. It is also contended that on other occasions, the said Krishna Venkatesh had borrowed money from different creditors, one of them being Mrs. Shilpa S. and he had also borrowed finance from one Advocate C. Chopdekar by creating equitable mortgage by depositing all the Deeds of the subject property. The Petitioner has also produced statement of account with some amount which have been transferred into the Respondent-Company from the personal account of said Venkatesh. It is also pointed out that based on the said resolution dated 20.03.2009, the Respondent-Company through its Managing Director, said Krishna Venkatesh, had entered into a contract with M/s. Elite Developers in pursuance of which the suit property was agreed to be sold to the said developers for a sum of Rs,40,00,000/- only. The copy of the resolution dated 20.03.2009 have also been produced. It is also contended that said Krishna Venkatesh has a personal account with HDFC, Calangute branch and the Respondent-Company had also an account with the same branch and from time to time, the said Krishna Venkatesh used to transfer the fund from the said personal account to the Respondent-Company.

6. Shri Sudin Usgaonkar, learned Senior Advocate appearing for the

Petitioner that on the basis of the Memorandum of Understanding as well as the cheques which have been produced signed on behalf of the Respondent-Company, the Petitioner has brought enough material on record to substantiate her contention that a debt is due from the Respondent-Company. Learned Counsel further submits that the contention of the Respondent-Company that the said Venkatesh was not authorised to take loans, is totally far-fetched as, according to him, the resolution and the Power of Attorney produced on record would clearly disclose that the said Venkatesh was in fact authorised to obtain loans on behalf of the Company-Respondent. Learned Senior Advocate further pointed out that the statement of accounts of the Petitioner-Bank clearly discloses that amounts have been transferred from the bank account to said Venkatesh, Learned Senior Advocate further pointed out that, at this stage, the prima facie material produced by the Petitioner would establish that a legally recoverable debt is to be paid to the Petitioner and, consequently, the Respondent-Company is not in a position to pay the debt, the above Petition deserves to be admitted.

7. On the other hand, Shri Mulgaonkar, learned Counsel appearing for the Respondents, has pointed out that said Krishna Venkatesh was a conman who lured to the Petitioner to get married and, in such process, the Petitioner became a victim of malafides of the said Krishna Venkatesh to receive amounts from the Petitioner alleged to be on behalf of the Respondent-company. Learned Counsel further pointed out that there is no material on record to show that any of the amount allegedly received from the Petitioner have been transferred into the account of the Respondent-Company. Learned Counsel further pointed out that

there is no material on record to show that the said Venkatesh was authorised to collect any loan amounts and, as such, the question of contending that the Respondents are liable to pay a sum of Rs.1,38,15,287/- is totally false. Learned Counsel further pointed out that said Krishna Venkatesh is under the custody of the police for committing such crimes and, as such, this behaviour of the said Krishna Venkatesh would itself show that the alleged documents relied upon by the Petitioner are totally dubious and not genuine. Learned Counsel further submits that the curious aspect of the subject dispute is that the Petitioner is only producing false documents which have been allegedly executed by said Krishna Venkatesh which would clearly show that the Petitioner is acting at the behest of the said Krishna Venkatesh on false grounds. Learned Counsel further pointed out that admittedly said Krishna Venkatesh is married to the Petitioner and, consequently, there is every reason to raise suspicion of the alleged documents produced by the Petitioner based on which the purported claim is being put up by the Petitioner against the Respondents. Learned Counsel, as such submits, that the Petition be rejected.

8. I have given my thoughtful consideration to the rival contentions. I have also gone through the records. On perusal of the reply of the Respondents, it appears that in February, 2010, the said Krishna Venkatesh had absconded from Goa. It is also contended that in a public notice in the daily news paper Navhind Times dated 08.08.2010, the Respondent-Company cautioned and alerted the public that Krishna Venkatesh had committed several illegalities in the name of the Company and had withdrawn large sums of money from the Company's bank

account and having committed such illegal and unauthorised acts, had been absconding. It is also brought on record that several documents from the Respondent-Company including cheque books, letter heads and other material were stolen by said Krishna Venkatesh from the time he has been absconding. It is pertinent to note that the alleged transaction of the Petitioner on behalf of the Respondent-Company is subsequent to said date when said notice was published. There is no material, prima facie, on record to suggest that said Krishna Venkatesh had any legal dealings with the Petitioner. Even on perusal of the alleged resolution, it clearly shows that there was no specific authority to said Krishna Venkatesh to receive any hand loans from any private individual. Admittedly, such huge amounts allegedly handed over to Krishna Venkatesh were not paid by cheque in the name of the Respondent-Company. The Petitioner has also not brought anything on record to show when such amounts were in fact received by the Respondent-Company in their bank account. The bank statements produced do not, prima facie, disclose that any such amounts were transferred into the bank accounts of the Respondent-Company. The notice stopping the payments from the bank account of the Respondents were much prior to the alleged transaction with the Petitioner. The alleged amounts referred to by the Petitioners with regard to other borrowers have also not been duly established and, prima facie, they appear to be much prior to the said date when said Venkatesh has been absconding. The notice issued to ICICI Bank to stop all payments is dated 30.07.2010, the notice to HDFC Bank at Calangute is dated 02.08.2010, the notice issued to ICICI Bank Mapusa Branch, is dated 02.08.2010. These notices itself disclose that the Respondent-Company had already taken measures to stop any transactions with the said Bank in respect of the cheques issued from such Bank. In such circumstances, I find that there is a serious dispute raised by the Respondent-Company to the alleged claim of the Petitioner that a debt is payable to the Petitioner. These questions of fact would have to be established in a trial in legal proceedings. At this stage, I find that there is no material on record to prima facie establish that a debt is payable by the Respondent-Company to the Petitioner. As a serious dispute has been raised which, prima facie, appear to be a bonafide defence raised by the Respondent-Company, I find that the question of entertaining the present winding up Petition, is not at all justified.

9. In ***2010(10) Scale 151*** in the case of ***M/s. IBA Health (I) P. Ltd. vs. M/s. Info-drive Systems Sdn. Bhd.***, it has been observed at para 25 thus :

> "25. We may notice, so far as this case is concerned, there has been an attempt by the respondent company to force the payment of a debt which the respondent company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt. Of late, we have seen several instances, where the jurisdiction of the Company court is being abused by filing winding up petitions to pressurise the companies to pay the debts which are substantially disputed and the Courts are very casual in issuing notices and ordering publication in the

> newspapers which may attract adverse publicity. Remember, an action may lie in appropriate Court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds. A creditor's winding up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public."

10. Taking note of the observations of the Apex Court in the said Judgment, I find that the Respondent-Company has raised a bonafide defence with regard to the alleged claim of debt by the Petitioner. The authenticity of the alleged documents relied by the Petitioner are seriously disputed by the Respondent-Company. The material on record suggests that such dispute appears to be bonafide based on record. The Petitioner, if so advised can take legal recourse to recover the alleged debt from the Respondent-Company in accordance with law. It is also pointed out that the Petitioner has initiated proceedings under the ? Negotiable Instruments Act against the Respondent-Company and others in respect of the same amounts.

11. In such, circumstances, I find no merit in the above winding up Petition which stands accordingly dismissed.

F. M. REIS, J.

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