IN THE HIGH COURT OF BOMBAY AT GOA

COMPANY APPLICATION NO. 32 OF 2013

IN

COMPANY PETITION NO. 20 OF 2012

Goan Enterprises Private Limited
Through its Director,
Mr. Eric Sequeira,
Age 65 years (Major)
Having its office at
Flat No. B-7, Leonard Apartments,
St. Mary's Colony,
Near Stella Marie's Chapel ,
Miramar, Panaji.
Goa – 403 001. **… Applicant.**
(Original Respondent in Company Petition No. 20/2012)

Versus

Mr. Gautam Ramanbhai Patel,
Aged 61 years, businessman,
Having office at Abhijit Building,
1st Floor, Plot No. B-9, Kapole Co-op.
Housing Society Ltd. Junction of 11th
& V. M. Road, J. P. V. D. Scheme,
Juhu, Mumbai – 400 049. **… Respondent.**
(Original Petitioner in Company Petition No. 20/2012)

Mr. Sandesh D. Padiyar with Mr. P. Arolkar, Advocates for the applicant.
Mr. R. G. Ramani, Advocate for the respondent.

Coram :- U. V. Bakre, J.

Reserved on : - 30th January, 2015.

Pronounced on : - 25th February , 2015.

<u>ORDER :</u>

Heard Mr. Padiyar, learned counsel for the applicant and Mr. Ramani, learned counsel for the respondent.

2. By this application, the applicant has prayed for recall of the order dated 21.03.2013 passed in Company Petition No. 20 of 2012 whereby the Company Petition No. 20 of 2012 has been admitted and the petitioner has been directed to advertise the petition in terms of rules.

3. The applicant has made various averments on merits of the company petition No. 20/2012. Sans the said details, it is stated as under:-

The applicant is a Company incorporated on 07.11.1990 under the provisions of the Companies Act as private limited company. By order dated 21.03.2013, the said Company Petition No. 20 of 2012 has been admitted and advertisement of the petition in terms of rules has been ordered. The said Company Petition No. 20 of 2012 has been filed alleging that the applicant is indebted to the respondent No.1 in the sum of ₹ 80,00,000/- (Rupees Eighty lakhs only) and that despite notice dated 26.06.2012 for payment of that amount, the applicant had failed and neglected to pay the same. The respondent (original petitioner) has approached the Court with unclean hands by hiding various facts and false statements have been made to achieve illegitimate goal of recovering money, by hiding the true facts. On 05.12.2012 the applicant received the notice in the said Company Petition. In order to defend its interest, before this Court, the applicant appointed and engaged the services of Advocate Shri. Ajit R. Kantak. In terms of the instructions given by the applicant, Advocate Shri. Kantak was duly representing the applicant in the said company petition. Due to the complexity of the matter and due to Advocate Kantak's preoccupation with work, the applicant thought of engaging the services of Advocate Shri. S. D. Padiyar in the matter. The applicant discussed the said aspect with Advocate Shri. Kantak who consented to the same. Accordingly, the applicant through its Director somewhere on or about 18.02.2013 briefed Advocate Shri. S. D. Padiyar in the matter. Since Advocate Kantak had filed his appearance, Advocate Padiyar requested the Director of the applicant for N. O. C. from Advocate Kantak and informed the Director of the applicant that till the N. O. C. is received by him and Advocate appearing earlier is discharged from the matter, he would not be able to represent the applicant. The Director of the applicant accordingly on 21.02.2013 obtained N. O. C. from Advocate Kantak. However, due to his preoccupation in business activities, the applicant could not deliver the same to Advocate Padiyar and Advocate

Kantak was also to seek discharge from the matter on the next listing date of the matter. In the meantime, the reply was prepared but the same could not be filed as the time limit in terms of order dated 14.12.2012 had already expired. The applicant intended to file reply on the next listing date of the petition by seeking extension of time before the Court. On 25.02.2013, on account of non availability of Division Bench of this Court a board of Single Judge was listed. The said board was listed without sufficient prior notice and therefore the Judge was pleased to accommodate and adjourn most of the matters. The board being listed for on Monday, which otherwise was not a normal listing day for company matters, the said company petition which came to be listed thereon was called out and as none appeared for the parties, the matter was ordered to stand over to 07.03.2013. However the matter was not listed on the board on 07.03.2013. The weekly cause list of matters for 21.03.2013 at 2.30 pm. and on 22.03.2013 on 10.30 am. onwards was displayed on 15.03.2013 by 17.00 hours. The said company petition was not listed on the regular admission board for 21/03/2013 at 2.30 pm. and on 22/03/2013 from 10.30 am. onwards. Advocate Shri. Kantak had duly verified the listing of matters on the regular board. On 20.03.2013 after 17.21.51 hours, an additional board was displayed and made available to the general public. In this cause list at serial no. 44 the said Company Petition came to be listed. The said additional board got skipped from the attention of Advocate Shri. Kantak and his office as N. O. C. had already been issued to the applicant. On having verified the weekly company board displayed on 15.03.2013 and on having found that aforesaid company petition has not being listed for admission, Advocate Shri. Kantak was under a bonafide impression that there was no listing of the said company petition in the cause list displayed for the said week. The said additional board also skipped the attention of Advocate Shri. Padiyar and his office and the applicant had delivered the N. O. C. issued by Advocate Kantak to Advocate Padiyar and the name of Padiyar was not displayed on the additional board. Advocate Padiyar was also under an impression that Advocate Kantak was yet to issue N. O. C. and seek discharge in the matter. The Director of the applicant bonafidely believed that since Advocate Padiyar was briefed in the matter he would be representing him and hence did not apprehend that non delivering of the N. O. C. of Advocate Kantak would preclude Advocate Padiyar from appearing in the matter. Since no specific date was fixed in the matter nor matter was mentioned for circulation, Advocate Kantak and Advocate Padiyar bonafidely did not expect the company petition to be listed for admission on an additional board displayed 20.03.2013. The matter thus skipped the notice of Advocate Kantak, Advocate Padiyar and their offices. On account of the above facts, when the matter came up for admission on 21.03.2013, the applicant was not represented before this Court. The matter was taken up for admission and order for admission and advertisement of the petition came to be passed. On or about 24.03.2013 when Advocate Kantak checked the weekly board for next week and the status of Company Petition No. 20 of 2012 on the internet website of the High Court, it was revealed that the said company petition was listed for admission on 21.03.2013 and the order admitting and advertising the petition in terms of the Companies (Court) Rules, came to be passed. On 25.03.2013 the applicant sought information as to the date and time in the said additional board on which the company petition was displayed. The said information was given to the applicant only on 09.04.2013. The applicant thus has made efforts to move this Court as early as possible. The petition was heard and admitted ex parte on account of the circumstances which were beyond the control of the applicant. The order admitting the petition would prejudicially affect the company and its share holders. The applicant has substantial defense and therefore there are good and sufficient grounds for recalling the order dated 21.03.2013 and for hearing the company petition for admission.

4. The application is supported by the affidavit of the Director of the applicant namely Shri. Eric Sequeira and also by the affidavits of Advocates Shri A. R. Kantak and Shri S. D. Padiyar.

5. By way of affidavit-in-reply, the respondent has vehemently opposed the application for recall of the order. The averments made in the application, on merits, have been denied. The respondent has made further averments on merits insofar as the case of the respondent is concerned have also been made. Apart from that, it is stated as under:-

The application is not maintainable. The order dated 21.03.2013 is not a decree. It is not the case of the applicant that no notice of the petition was served on it. Although, the applicant, by its former Advocate Shri Kantak and another succeeding Advocate Shri Padiyar was briefed much prior to the date of the order and both of them admit having seen the board for the said date, both Advocates and the applicant appear to have skipped the appearance of the above matter on board when the Advocate for the petitioner had notice of appearance of the matter on the board. The above is not believable. The applicant still have ample opportunity in law to defend the company petition by filing appropriate reply. The major portion of the contents of the application and most of the documents annexed thereto are irrelevant insofar as the application for setting aside the order of admission, is concerned. It is nowhere the case of the applicant that statutory notice under Section 433 and 434 of the Companies Act was not received. It is also not the case of the applicant that there are no bonafide dues as admittedly declared and voluntarily stated in the audited balance sheet submitted to the Registrar of companies, which balance sheet was duly certified by Chartered Accountant of the company on the basis of true facts of the books of accounts of the company. The application has been deliberately filed with malafide intention of creating undue hurdles and to get the order of admission of petition set aside by suppressing the true and correct facts as admittedly declared in the audited balance sheet of the company. No case has been made out for setting aside the admission order.

6. The applicant has filed affidavit-in-rejoinder and in answer to it, the respondent has filed affidavit-in-sur-rejoinder.

7. Shri. Padiyar, learned counsel for the applicant, submitted that the applicant has a strong case for rejecting the petition summarily and that sufficient cause for not appearing in the matter on 23.03.2013 has been given by the applicant in the present application. He submitted that an admission order can be recalled. He pointed out that in the present matter there is direct order of admission without giving opportunity to the other party. Learned counsel submitted that if the present recall application is allowed and after hearing the parties the company petition is again admitted, the applicant shall bear all the costs of advertisement of the petition. He submitted that if the applicant succeeds in showing that there is absolutely no merit in the petition, nothing will remain. He therefore submitted that no prejudice would be caused to the other side. Learned counsel urged that non appearance was not deliberate and the applicant will not gain anything by not appearing in the matter. He submitted that even after winding up, the said order of winding up can be recalled. Learned counsel relied upon the following authorities :

(1) ***Anil Kumar Sachdev vs. Four Asbestos Private Limited,*** [1978 Law Suit (Del) 184] : [1980 (50) Comp Cas 122].

(2) ***Kerala State Industrial Development Corporation Limited vs. Poonmudi Tea Pack Limited,*** [1987 Law Suit (Ker) 221].

(3) ***The National Conduits (P) Ltd. vs. S. S. Arora*** (AIR 1968 SC 279).

(4) ***G. T. Swamy vs. Goodluck Agencies*** [1988 Law Suit (Kar) 135] : [1990 (69) Comp Cas 819]

(5) ***Cotton Corporation of India Limited vs. United Industrial Bank Limited and others*** (AIR 1983 SC 1272).

(6) Judgment dated 31.12.2008 in the case of ***Walnut Packaging Private Limited vs. The Sirpur Paper Mills Limited and another.***

(7) Order dated 16.09.2010 of this Court in Company Petition No. 30 of 2010 ***(Shri. Gajanan Distributors vs. Kare Health Specialities Pvt. Ltd.)***

(8) Order dated 07.04.2011 of this Court in Company Petition No. 4 of 2011 ***(Kare Health Specialities Pvt. Ltd. vs. Shri. Gajanan Distributors)***

(9) Orders dated 09.12.2009, 17.02.2010 and 21.07.2010 of this Court in Company Petition No. 879 of 2009 ***(M/s. Sun Enterprises vs. M/s. Kare Labs Pvt. Ltd.)***

8. On the other hand, Mr. Ramani, learned counsel for the respondent, submitted that all the facts on merits which are stated by the applicant have been disclosed by the respondent in the company petition. He further submitted that all the said facts are irrelevant for the purpose of deciding the application for recall of the order. He submitted that the respondent is not disputing the power of the Court to recall the order. He urged that absolutely no case is made out for such recall. He submitted that absolutely no cause has been shown for not appearing on the date when the order of admission was passed. He submitted that advertisement of the petition has been already made and therefore whatever prejudice was to be caused to the applicant has been already caused. He submitted that power to recall cannot be exercised for the sake of asking. He urged that the application does not bear any merits and therefore is liable to be rejected. Learned counsel relied upon the following Judgments :

(1) ***S. Natrajanvs. Sama Dharman,*** MANU/SC/0698/2014 : [2014 (9) SCALE 3].

(2) ***The Commissioner of Income Tax – III vs. Shri. Vardhman Overseas Ltd.,*** MANU/DE/7014/2011:

[(2012) 343 ITR 408 (Delhi)].

(3) Judgment dated 23.07.2012 of Delhi High Court in Company Petition No. 209/2004 ***(ESPN Software India (P) Ltd. vs. Modi Entertainment Network Ltd.)***

(4) ***M/s. R. Sureshchandra & Co. vs. M/s. Vadnere Chemical Works And …*** (AIR 1991 Bom 44).

9. I have gone through the material on record. I have considered the arguments advanced by the learned counsel for the parties and I have also considered Judgments relied upon by the parties.

10. In the case of ***"Anil Kumar Sachdev"*** (supra), by an ex parte order the petition for winding up was admitted and notice of admission was published in two newspapers as well as in official gazette. By further ex parte order dated 22.11.1976, the respondent-company was ordered to be wound up. Even the Official Liquidator had taken charge of the affairs of the company. The learned Single Judge of the High Court of Delhi held that even in the above facts of the matter, an application for seeking to set aside the winding up order was maintainable. However, in the above case, the said company petition had been earlier admitted and notice of admission had also been published in two newspapers as well as in the official gazette. But only the winding up order was sought to be set aside. The order of admission was not set aside in the above case, nor was sought to be set aside. In the present case, the petition has been already advertised, as per the Companies (Court) Rules. Hence the above judgment cannot help the applicant in any manner.

11. In the case of ***"Kerala State Industrial Development Corporation Limited"*** (supra), learned Single Judge of the Kerala High Court has observed thus:

> *"[6] Now, we are only at the stage of admitting the winding-up petition in order to decide whether the advertisement should be made. Hearing given to the company under Rule 96 of the Companies (Court) Rules, 1959, is not for the purpose of deciding the manner of advertisement under Rules 24 and 25 but for deciding whether the advertisement should be made at all and the petition proceeded with. The question of advertisement and directions regarding advertisement will arise only when the court makes up its mind to admit the petition and proceed with the same. Especially when the petition is filed by a contributory, as in this case, it is the duty of this court before admitting the winding-up petition, to satisfy itself that there are prima facie grounds for winding up. Now it is well settled that even after the court has admitted a winding-up petition, it can, on being moved for that purpose by the company or some other interested*

person, stay the proceedings and revoke the admission if it is so satisfied. It is true that such a situation has not arisen and no petition for stay was filed. Though a company could be wound up for reasons enumerated in Clauses (a) to (f) of Section 433, this petition is only under the just and equitable clause in Section 433(f) as well as under Section 433(c). Under Section 433(c), if the company does not commence its business within a year of its incorporation, or suspends its business for a whole year, that will be ground for initiating winding up proceedings. Especially, in such a case, there is all the more reason for the court to be overcautious to find, on the allegations in the petition and the materials placed before it, that there are prima facie grounds. Even admission of a petition which will lead to advertisement of the winding-up proceedings is likely to cause serious injury to the company, if ultimately the application has to be dismissed. It will result in loss of reputation to the company and its credibility in the eyes of the public will be lost resulting in loss of business also. The interest of the applicant alone is not the predominant consideration. The interest of the shareholders of the company as a whole and other interests also will have to enter the area of judicial satisfaction before giving a verdict on the question of admission. The cause shown by the company will have to be carefully analysed along with admission and issuing the advertisement. (See National Conduits P. Ltd. V. S. S. Arora [1967] 37 Comp Cas 786 (SC), George V.

Alhimaltam Rubber Co. Ltd, [1965] 35 Comp Cas 17 (Ker) and Rind Overseas P. Ltd. V. Raghunath Prasad Jhunjhunwalla, [1976] 46 Comp Cas 91 (SC)]."

12. In the case of ***"Kerala State Industrial Development Corporation Limited"*** (supra), though the petition was admitted, however, the same was not published in the news papers and official gazette and thus was not yet advertised. The question was whether the advertisement should be made. In the present case, the statutory notice under Sections 433 and 434 of the Companies Act was duly received by the applicant. On 14/12/2012, Advocate Ms. R. Kantak had appeared on behalf of the applicant and had sought time of four weeks to file reply. Time was granted to the applicant. However, on 21.03.2013, when the matter was called out, none appeared in the said Company Petition No. 20/2012, on behalf of the applicant. This Court held that a perusal of the petition discloses that prima facie the Company (applicant) owes an amount of ₹ 80.00 lakhs to the petitioner. The petition was therefore admitted and advertisement of the petition in terms of rules was ordered. The advertisement of the petition for winding-up proceedings, in terms of Companies (Court) Rules, has already been done. Hence, the serious injury, if any, has been already caused to the applicant-company and thus recalling the order of admission will be wastage of time as the said injury, if caused, can now be made good by filing appropriate reply and by getting the petition dismissed finally, if the applicant is entitled to such relief on merits. The applicant will have all the opportunity to file the said detailed affidavit-in-reply in the matter and to contest the winding up petition. The above judgment also cannot help the applicant, in any manner.

13. In the case of ***"The National Conduits (P) Ltd."*** (supra), the Hon'ble Supreme Court has held that it is clear from the terms of Rule 24(2) of the Companies (Court) Rules that a petition for winding up cannot be placed for hearing before the Court unless the petition is advertised. It is observed that the same however does not mean that as soon as the petition is admitted, it must be advertised. In answer to a notice to show cause why a petition for winding up be not admitted, the Company must show cause and contend that the filing of the petition amounts to an abuse of the process of the Court. It has been held that if the petition is admitted, it is still open to the Company to move the Court that in the interest of justice or to prevent abuse of the process of the Court, the petition be not advertised. It is held that such an application may be made where the Court has issued notice under the last clause of Rule 96, and even when there is an unconditional admission of the petition for winding up. It has been further held that the power to entertain such an application of the Company is inherent in the

Court and Rule 9 iterates that power. The above power of the Court is not disputed by the respondent in the present case. However, in the above case also the effect of advertisement of the petition being already made has not been considered and hence the above judgment does not help the applicant in any manner. In the case of ***" G. T. Swamy"*** (supra), also only the order of winding up was sought to be recalled and not the order of admission and advertisement and hence the above case does not help the applicant.

14. In the Company petition No. 30 of 2010 (supra), by order dated 16th September 2010, the petition for winding up was admitted after hearing learned Counsel for both the parties. But the publication of the notice was deferred for a period of two weeks to enable the respondent to pay/deposit in the Court the sum of Rs. 7,84,000/-. The Company Application No. 4 of 2011 was filed by the respondent to recall the order dated 16th September 2010 admitting the Company Petition. What had happened was that the condition imposed in the order dated 16th September 2010 was fulfilled since the respondent had deposited the said sum of Rs. 7,84,000/- and the applicant had filed a Regular Civil Suit No. 325/2010/III in the Court of Additional Civil Judge Senior Division, which suit was pending. By order dated 7th April, 2011, this Court observed that the interest of justice would be served if the said amount of Rs. 7,84,000/- is transferred to the Court of Additional Civil Judge Senior Division, Margao to the credit of Regular Civil Suit No. 325/2010/III. It was found that the order of admission had served the purpose and the said order could not be implemented because no advertisement could be published. Hence in the peculiar circumstances of that case, the order of admission was recalled. In the present case the order of admission has not served its purpose since the applicant has neither deposited any amount nor the respondent has filed any suit. The above orders do not come to the rescue of the applicant in any manner.

15. In the Company Petition No. 879 of 2009, by ex parte order dated 17th February 2010, the petition for winding up of the respondent-company was admitted and made returnable on 15the April, 2010, and was directed to be advertised in two local newspapers and in the official gazette. By subsequent ex parte order dated 21st July, 2010, the winding up petition was allowed and made absolute in terms of prayers (a) and (b), thereof. It appears that by an order dated 2nd September 2010, passed in Company Application No. 438 of 2010, both the orders i.e. order of winding up the company as well as the order of admitting the company petition were recalled and the matter was posted on board for hearing on admission. Again, by order dated 16th March, 2011, the said Company Petition no. 879 of 2009 was disposed of in terms of the minutes of

Order agreed to and signed by the parties. Thus, the above Company Petition No. 879 of 2009, after the order of admission and the order of winding up was recalled, was settled amicably between the parties. Such is not the case in the present case. The parties do not say that they have agreed for some terms. The main order dated 2nd September 2010 passed in Company Application (L) No. 438 of 2010 has not been produced by the applicant, for reasons not known. It is possible that since the matter was to be disposed of as per the minutes, the parties agreed for recalling the earlier orders. The above orders, in my view, cannot help the applicant in the present case.

16. The other judgments relied upon by the parties are on merits of the matter and hence I am not inclined to discuss them here.

17. The order of admission was passed on 21.03.2013. The advertisement was made on 19.04.2013. On 24.03.2013, the applicant through Advocate Shri Kantak had come to know that the Company petition was listed for admission on 21.03.2013 and order admitting and advertising the petition in terms of the rules came to be passed. Nothing had prevented the applicant from immediately moving the Court requesting to direct that the advertisement may not be made by informing the Court that they intend to file an application for recalling the ex parte order of admission. The applicant has stated that on 25.03.2013, the applicant sought for the information as to the date and time in the additional board on which the Company Petition was displayed and that such information was received by the applicant on 09.04.2013. From 09.04.2013 till 18.04.2013, the applicant had ample time to move the present application or at least an application to request the Court to direct that the advertisement may not be made as they were to file an applicant to recall the order of admission. As already stated above, the advertisement was done on 19.04.2013.The applicant filed the present application on 25.04.2013. There is no sufficient cause shown for such delay.

18. The applicant has, otherwise, made various averments on merits running in at least 22 pages and has also produced various documents. In answer to that, the respondent has filed a detailed reply containing at least about eight pages on merits. The applicant has filed affidavit-in-rejoinder of 14 pages and one more document along with the same. The respondent has filed affidavit-in-sur-rejoinder and has produced the balance sheet. The learned counsel for the parties also made several submissions on merits. It can be said that there was prima facie case for admitting the petition.

19. In view of the discussion supra, the application for recall of order dated 21.03.2013, is rejected. No order as to costs in the facts and circumstances of the case.

U. V. BAKRE, J.

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