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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 25 OF 2014

Haabia Advertising (I) Pvt. Ltd. ...Petitioner
vs
Supermax Personal Care Pvt. Ltd. ...Respondent.

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Mr Shailesh Shah Sr. Advocate a/w Mr Karl Shroff, Jaideep Mitra, Ms Sabeena Mahadik and Mr Pankaj Uttaradhi i/b Sabeena Mahadik for the Petitioner
Mr D.D.Madon, Sr. Advocate a/w Cyrus Ardeshir, Ranjit Shetty, Rohan Agrawal i/b Argus Partners for the Respondent.

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CORAM : S.C. GUPTE, J.

JUNE 11, 2015

P.C. :

The Company Petition is for winding up of the Respondent Company for inability to pay debt. The debt alleged against the Respondent consists of a sum of about Rs.5 crores arising out of an award passed against three companies, the business of which is alleged to have been taken over by the Respondent company.

2 The Petitioner is a small scale industrial unit, engaged in the business of printing and manufacturing of packing wrappers and cartons. M/s Vidyut Metallics Pvt. Ltd. ("Vidyut"), M/s RCC Sales Pvt. Ltd.("RCC") and M/s Tigaksha Metallics Pvt. Ltd. ("Tigaksha") were indenting packing materials from the Petitioner from the year 2004 onwards under purchase orders placed from time to time. The principal invoice value of some of the supplies being overdue on account of defaults of these three companies, the Petitioner invoked provisions of Section 27 of the Micro, Small and Medium Enterprises Development Act, 2006, and lodged a claim before Andhra Pradesh State Micro & Small Enterprises Facilitation Council at Hyderabad. Four separate awards came to be passed in favour of the Petitioner in these references. The awards

have been unsuccessfully challenged by the three companies, firstly, before the Principal District Judge, City Civil Court at Hyderabad and, later, before High Court and, then, the Supreme Court. The awards have now become final. In pursuance of these awards, the Petitioner lodged four execution petitions before the Principal District Judge, R.R.District, Andhra Pradesh for the sums, respectively, of Rs.1,17,34,500/-, Rs.62,33,241/-, Rs.13,68,566/- and Rs.10,77,168/- together with interest. It is the case of the Petitioner that on 17 May 2012 during the visit of the court bailiff appointed by the executing court, the Petitioner came to know that the entire business, assets and immovable properties as well as liabilities of the three companies, who were judgment debtors of the Petitioner, have been taken over by the Respondent company. The Petitioner thereupon claims to have made enquiries and searched the ROC records of all the four companies. The Petitioner also claims to have received a letter dated 7 June 2012 from the Respondent company seeking confirmation of balance of Rs.40,67,630/- as due and payable by the Respondent company to the Petitioner as on 31 March 2012. It is the Petitioner's case that the Respondent company has been a lis pendence transferee of the entire bulk of assets and liabilities belonging to two companies, namely, Vidyut and RCC, and has also purportedly entered into some business privity with Tigaksha and thus, become a surrogate, or substituted or deemed judgment (award) debtor in place of these three companies. It is also the case of the Petitioner that in the backdrop of these facts, the Respondent company even offered to pay the Petitioner's dues amounting to Rs.2.35 crores on behalf of all the three award debtors towards the full and final settlement of the award debts. The Petitioner has given particulars of cheques forwarded by the Respondent to the Petitioner in this behalf. It is the Petitioner's case that the Petitioner declined this offer and instead issued a statutory notice to the Respondent under Section 434 of the Companies Act, 1956, calling for payment of the entire adjudicated liabilities of the three companies aggregating to a sum of Rs.2.71 crores. It is the case of the Petitioner that in spite of receipt of the statutory demand notice, the Respondent has neither paid the dues nor even replied to the notice. The Petitioner has, in the premises, moved the present Petition.

3 In defence, it is mainly submitted by the Respondent that the Respondent is not a debtor of the Petitioner. It is submitted that the debt is owed to the Petitioner by three separate companies, namely, Vidyut, RCC and Tigaksha, who are the award debtors of the former. It is submitted that the Respondent has by business transfer agreements taken over the business of two of these three companies, namely, RCC and Vidyut, but not of Tigaksha. It is submitted that the business transfer between the parties is binding on the parties to the agreement and the Petitioner cannot seek any benefit of the transfer agreement. It is submitted that the Petitioner has already initiated execution proceedings against the award debtors in the court of the Principal District Judge, R.R.District in Hyderabad, not having accepted the assignment of liability in favour of the Respondent company. It is submitted that, in the premises, the Petitioner cannot indulge in multiplicity of legal proceedings *inter alia* by filing winding up proceedings against the Respondent. Mr Madon, learned Senior Counsel appearing for the Respondent, relies upon the judgment of the Supreme Court in the case of **Khardah Company Ltd. Vs. Raymond & Co. (India) Pvt. Ltd.**[1] in support of his submissions.

4 The main controversy in the present company petition is whether or not the Respondent company is liable for the award debts owed by three companies, namely, Vidyut, RCC and Tigaksha. The Supreme Court in the case of **Khardah Co. Ltd.** (supra) has held that an assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there was a well recognized distinction between these two classes of assignment. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under the agreement between the parties. In the present case far from there being a case of acceptance or consent on the part of the promisee, namely, the Petitioner, the facts on record show that the Petitioner promisee has objected to the transfer or assignment. It is pertinent to

1 AIR 1962 Supreme Court 1810

note that when the Respondent required the Petitioner to confirm the balance due to the Petitioner from the Respondent company as of 31 March 2012 presumably on the footing that the balance was taken over from two companies named above, the Petitioner challenged the outright slump sale of the companies in favour of the Respondent on the ground that such sale was to defeat / defer the payment of its dues and that the Petitioner had objection to the slump sale of the companies to the Respondent. This objection was repeated even after this Petition was filed, when the Respondent required the Petitioner to acknowledge the balance confirmation as of 31 March 2014. Learned Counsel for the Petitioner, however, submits that what the Petitioner had objection to was transfer of assets and not transfer of liabilities. In any event, there is no positive evidence to show that the Respondent had consented to the assignment of debt to the Respondent. The Petitioner had obviously objected to the outright slump sale of the business of two companies, namely, Vidyut and RCC to the Respondent, which comprises both of transfer of assets as well as liabilities. In the face of its express objection to the slump sale, reiterated even after the filing of the present petition, and consistently with prosecution of the execution applications against the original award debtors, it cannot be even suggested that there was any implied acceptance of transfer or sale of business. In any event, the effect of the Petitioner's objection and the consequences following such objection are matters of trial, which raise serious disputes as to the existence of the debt. In the premises, the Respondent has shown bona-fide disputes as to the alleged debt owed by the Respondent to the Petitioner.

5 Accordingly, there is no merit in the Company Petition and the same is dismissed. There shall be no order as to costs.

(S.C.GUPTE J.)