IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 371 OF 2011

Mr. Anthony Maharaj .. Petitioner

Vs

Insight Productions Pvt. Ltd. .. Respondent

Mr. Rahul Narichania, Senior Advocate, instructed by Mr. Nikhil Rodrigues, for the Petitioner.

Mr. Gaurav Joshi, Senior Advocate with Mr. Vivek Kantawala, instructed by M/s. Kantawala & Co. for the Respondent Company.

CORAM: S.J. KATHAWALLA, J.

DATE: 1st April, 2015

1. By the above Petition, the Petitioner seeks winding up of the Respondent Company – Insight Productions Pvt. Ltd. ("the Company") under Sections 433 (e) and (f) and 434 the Companies Act, 1956 ("the Act").

2. The above Petition was admitted by an order dated 8th May, 2012 and was directed to be advertised. The order of admission is not a reasoned order since as recorded therein parties had agreed that no reasons be given in support of the said order dated 8th May,2012.

3. The petition has now come up for final hearing. The Petitioner has advertised the Admission of the Petition as per the directions contained in the Order dated 8th May 2012. Accordingly, the petition is taken up for final hearing.

4. By and under an Agreement dated 2nd January 2010 entered into between the Company and the Petitioner, the Petitioner lent and advanced a sum of US$ 500,000 to the Company on the terms and conditions more particularly set out therein to enable the Company to pay monies owed to Reliance Big Entertainment in respect of the movie "Dulha Mil Gaya".

5. The relevant clauses of the Agreement dated 2nd January 2010 are as under:-

> "*1. The Lender will grant refundable advance to the Producers/Recipients the sum of Five Hundred Thousand US Dollars (US$ 500,000.00) specifically to make payment to Reliance Big Entertainment Private Limited (Reliance) of Mumbai, India being full and final payment for the release of a certain lien on the motion picture film "Dulha Mil Gaya" held against the UK, USA and CANADA territories for them to exploit the film in the said territories.*
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> ....
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> *3. As consideration for this refundable advance, the Lender will receive forty percent (40%) of all profits, of all rights assigned to B4U specifically for UK, USA and CANADA territories. Profits shall mean all monies from the first (1st) dollar after B4U has recouped the cost of the prints and publicity which will not exceed US$225,000.00, unless*

specifically authorized by both parties hereto and 12.5% commission for the UK, USA and CANADA and 7.5% commission for all other territories listed in Appendix A and after the Lender has recouped his US$500,000.00

4. The Lender shall recoup his refundable advance of US$500,000.00 as follows:

a. From all incoming revenue from the theatrical and other rights in the UK, USA and CANADA from the first dollar after B4U have recouped their prints, publicity and commission expenses, or

b. From all revenue of theatrical and other rights sales from all other territories referred to in Appendix A after B4U have recouped their commission expenses, except for the first approx. US$300,000.00 which is expected to be received by Insight/Morpheus, or

c. From all revenues derived from the sale of Global Satellite rights after Reliance have deducted the amount due to them of approx. Rs. 8.0 Crore.

5. Should the Lender not recoup his refundable advance of US$500,000.00 from either (a), (b) or (c) in Clause 4 singly or collectively within ninety (90) days commencing from 8th January 2010 or should there be a shortfall, then the Producers/ Recipients, their heirs, successors and assigns shall upon demand pay to the Lender the full sum or any shortfall thereof, according to the terms and conditions mentioned by an execution of an appropriate document duly confirming the return of refundable advance of the duly notarized document, issued 2nd January, 2010 which covers the *refundable advance of the said US$500,000.00 referred to in this Agreement.*

.....

10. Failure to comply with any of the Clauses herein mentioned will constitute a breach of this Agreement and if such breach is not cured within ten working (10) days, the parties will take the matter to the appropriate legal courts for arbitration and resolution.

11. The Producers/Recipients will be responsible and will ensure that should repayment of this advance have to be made from India that there will be no delays or inconveniences resulting from the Central Bank, Commercial Banking Regulations and or Statutory Regulations in India. The responsibility extends till the recoupment of the advance sum of US$500,000 net to the Lender."

6. Mr. Narichania, learned Senior Advocate on behalf of the Petitioner submits that by virtue of the aforesaid clauses referred to above and in particular clauses 4 and 5, the Company was bound and liable to refund/repay the sum of US$ 500,000 to the Petitioner on demand. He has further drawn my attention to the correspondence exchanged between the parties by which the Company had categorically admitted liability to repay US$ 500,000 to the Petitioner in various installments.

7. By an email dated 10th April 2010 (Exhibit 'H' to the Petition), the Company informed the Petitioner that it would revert back by Monday /Tuesday on corrective measures for the refund of advance made against the film "Dulha

Mil Gaya". By another email dated 13th April 2010 (Exhibit 'I' to the Petition), the Company sought a moratorium for payment till September 2010 and gave a schedule for repayment of the entire sum of US$ 500,000 in various installments commencing from October end 2010 and ending March end 2011. Another email came to be addressed dated 3rd May 2010 by the Company (Exhibit 'K' to the Petition) which was followed thereafter by an email dated 28 May 2010 (at Exhibit 'M' to the Petition) by which the Company attached a revised acknowledgment of liability which contained a schedule for repayment of the Petitioner's dues. Finally, the Company issued a formal "acknowledgment of refundable advance" signed by two directors of the Company (Exhibit 'O' to the Petition), giving a revised schedule for repayment of entire US$ 500,000. The said "acknowledgment of refundable advance" categorically acknowledges and admits liability of the Company to pay the Petitioner the sum of US$ 500,000 latest by 31st December 2011.

8. Despite the aforesaid acknowledgment of liability and promises and assurances to make payment of US$ 500,000, the Company failed and neglected to make payment. The Petitioner therefore addressed an email dated 14th February 2011 (Exhibit 'Q' to the Petition) to the Company demanding payment of sum of US$ 500,000. As no response was received, the Petitioner vide its Advocates' letter dated 8th August 2011 (Exhibit 'R' to the Petition) served a statutory notice upon the Company.

9. In reply to the statutory notice, the Company vide its Advocates' letter dated 30th August 2011 (Exhibit 'S' to the Petition) declined to make payment on grounds set out therein.

10. Mr. Narichania, learned Senior Advocate submits that the clauses in the Agreement dated 2nd January 2010 are very clear in their interpretation and import in that it entitles the Petitioner to recoup its refundable advance of US$ 500,000 under any of the scenarios mentioned in clauses 4 (a) to (c). In the event of the Petitioner not being able to recoup refundable advance of US$ 500,000 under any of the sub clauses (a), (b) or (c) of clause (4) within 90 days commencing from 8th January 2010, the Company was liable on demand to pay to the Petitioner, the entire sum of US$ 500,000 or any short fall thereof. On a plain reading of the clauses in the Agreement dated 2nd January 2010, the Company is bound and liable to refund the said sum of USD 500,000 to the Petitioner. Apart from the Agreement dated 2nd January 2010, there are various unequivocal admissions liability by the Company to make payment of the said amount of US$ 500,000 to the Petitioner (Exhibits 'H', 'I', 'M', 'O' to the Petition) albeit in installments.

11. The Company however reneged on its assurances and promises to pay the said amount to the Petitioner. It is therefore submitted that the Company is liable to refund the said amount of US$ 500,000 to the Petitioner. It is further submitted that the Company has failed and neglected to make payment of USD

500,000 to the Petitioner when it became payable. The Company is therefore deemed to be unable to pay its debts as and when they fall due for payment. The Company is therefore liable to be wound up in accordance with law.

12. Mr. Gaurav Joshi, learned Senior Advocate appearing on behalf of the Company submitted that the Agreement dated 2nd January 2010 was not signed by the Petitioner and has therefore not come into effect. I am not in agreement with this submission of Mr. Joshi and the same is rejected for the following reasons:

(i) An agreement can fructify even by exchange of correspondence. An agreement need not be signed by the parties. Further, both parties have acted upon the said Agreement; the Petitioner having lent and advanced US$ 500,000 to the Company and the Company having accepted the said amount and utilized it for its business.

(ii) The Company has admittedly signed the Agreement dated 2nd January 2010. Merely because the Petitioner did not sign the Agreement does not mean that the Agreement dated 2nd January 2010 did not come into effect. Both parties by their conduct have affirmed the said Agreement and acted upon it. The Petitioner stands by the said Agreement. It therefore does not lie in the mouth of the Company who has received benefits under the Agreement to now raise such a plea.

(iii) The correspondence exchanged between the parties also demonstrates that the Agreement dated 2nd January 2010 was very much in place and binding on parties.

13. Mr. Joshi next contended that the Agreement dated 2nd January 2010 was not stamped and therefore cannot be looked into by this Court. In support of this contention Mr. Joshi relied upon the judgment of Hon'ble Supreme Court of India in the case of *SMS Tea Estates vs Chandmari Tea Co. (P) Ltd.* (2011) 14 SCC 66. In my view this submission has no merit. Mr. Joshi, has not shown the Court any specific provision under the Stamp Act which requires the said agreement between the parties to be stamped. In any event, even assuming that the Agreement is required to be stamped, as rightly pointed out by the learned Senior Advocate appearing for the Petitioner, the subsequent correspondence exchanged between the parties and in particular the Acknowledgment of Refundable Advance (Exhibit 'O' to the Petition') clearly and unequivocally establishes the assurances and promises of the Company to pay to the Petitioner, the sum of US$ 500,000 in installments. Thus, the Petition is maintainable even on the basis of the Company's categorical and unequivocal admission of liability to make payment to the Petitioner.

14. Mr. Joshi next submitted that the various emails/correspondence acknowledging liability was also required to be stamped as it constituted a contract. This submission too has no merit. The Company by its emails has

admitted its liability to make payment to the Petitioner in the sum of US$ 500,000 in various installments. E-mail correspondence acknowledging liability is not required to be stamped. The "acknowledgment of refundable advance" (Exhibit 'O' to the Petition) is not required to be stamped in law and Mr. Joshi has not shown me any provision under the Stamp Act which requires a document acknowledging liability to be mandatorily stamped under the Stamp Act. Therefore, this contention is also liable to be rejected.

15. Mr. Joshi further submitted that the Petitioner was acting as a distributor on behalf of the Company in the West Indies territory and thus there was no loan to repay as the Petitioner had to account for the distribution undertaken by him. Reliance was placed on two emails dated 28th March 2007 and 11th December 2009 Exhibit '1' and '2' respectively to the Affidavit dated 29th September 2014 filed by the Company. This submission once again has no merit because both these emails pertain to the period prior to the Agreement dated 2nd January 2010. It is the Agreement dated 2nd January 2010 which is the only document that can be looked at, since it is later in point of time and therefore, overrides or supersedes the said emails referred to above regarding the alleged agreement of distribution. Furthermore, the Petitioner has disputed these emails in its Affidavit in Rejoinder. There is no connection between these emails and the Agreement dated 2nd January 2010. This defence has now been taken clearly as an afterthought.

16. Lastly Mr. Joshi, learned Senior Advocate submitted that the emails in acknowledgment of liability were marked “without prejudice” and therefore could not be looked at. This submission also has no merit because the acknowledgment of refundable advance (Exhibit ‘O’ to the Petition) is not marked without prejudice and this document has been signed by two directors on behalf of the Company. Furthermore, on a perusal of the correspondence, it is evident that the Company vide its email dated 10th April 2010 (Exhibit ‘H’ to the Petition) has categorically acknowledged its liability by stating:

“….. *please note that we will revert back to you by Monday/ Tuesday on corrective measures for refund of advance made against film “Dulha Mil Gaya*”.

The Company also cannot escape its liability in view of clauses 4 and 5 of the Agreement dated 2nd January 2010 which are reproduced hereinabove.

17. In the circumstances, I am satisfied that the Company is liable to refund the sum of US$ 500,000 to the Petitioner. The defences raised by the Company are sham, bogus, moonshine and not bona fide. The Company has failed to make payment of US$ 500,000 to the Petitioner when it became payable. The Company is therefore deemed to be unable to pay its debts as and when they fall due for payment. Consequently, the Company is liable to be wound up in accordance with law.

18. The Company Petition is therefore allowed in terms of prayer clauses (a) and (b) which are reproduced hereunder:

> "(a) That IPPL, viz. Insight Productions Private Limited, be ordered to be wound up by and under the provisions of the Companies Act, 1956 by and under the orders and directions of this Hon'ble Court;
>
> (b) that the Official Liquidator, High Court, Bombay, be appointed as the Liquidator of IPPL with all the powers under the Companies Act, 1956."

The Official Liquidator is directed to forthwith act on an ordinary copy of this Order duly authenticated by the Associate of this Court without waiting for any further notification.

(S.J. KATHAWALLA, J.)