IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 311 OF 2014

M/s. Liedia Networks Service Telematics S.A. … Petitioner

Versus

M/s. Global SMS Networks Private Limited … Respondents

Mr. Shabhir T. Kapadia for the Petitioner.
Mr. Sachin Mhaske, instructed by M/s. Lex Remedeum, for the Respondents.

CORAM : S.J. KATHAWALLA, J.
DATED : 19TH March, 2015

P.C.

1. By the above Company Petition, the Petitioners - M/s. Liedia Networks Service Telematics S.A. seeks winding up of the Respondent - M/s. Global SMS Networks Private Limited (the Company) under Sections 433 (e), 434 and 439 of the Companies Act, 1956. The Petition is taken up for hearing and final disposal.

2. According to the Petitioners, they are a telecommunication operator and are pioneers in providing services like SMS operator. One of the services they provide is called SMS hubbing, which enables broad international SMS coverage for mobile operators through the connection of independent hubs, who have multiple agreements in place with other operators therefore being able to route messages on behalf of client operators. The Respondents were engaged in a similar business in India.

3. According to the Petitioners, sometime around September-2011, the Company approached the Petitioners to provide the hub services to them. After

detailed discussion, the Petitioners provided the said services between September to November, 2011 and generated 21 invoices corresponding to the usage of services of the Company. The invoices were due and payable within a period of 15 days from the date on which they were generated. A total amount of (Euro) € 305,712.49 worth of services were availed, however only partial payments totalling to (Euro) € 42,888.03 were made.

4. According to the Petitioners, in good faith they originally assigned a credit exposure limit of € 25,000 to the Company and soon realized that the Company did not have the financial capacity to meet their obligation/s as several invoices sent by the Petitioners remained unpaid.

5. According to the Petitioners, they contacted the Company on 23rd November, 2011 to follow up on payments due and were assured by the Company that there was a banking issue and the payments would be made shortly. The Company further persuaded the Petitioners not to restrict its access to the system / channel and in good faith and without suspecting any foul play, the Petitioners obliged and reactivated their account. Immediately thereafter on 24th November, 2011 the Company emailed the details of a SWIFT payment purportedly made to the Petitioners and further stated that another six such payments had already been made. The Company requested that their access to the Petitioners channel be restored as it was disconnected for the second time on account of credit limit exposure. Once again the Petitioners restored the access based on the representation made by the Company. A copy of the emails

exchanged on 23rd November, 2011 and 24th November, 2011 are annexed and marked as Exhibit-A-1 and Exhibit-B to the Petition.

6. According to the Petitioners, since no payments were received on 28th November, 2011, the Petitioners barred the Company access to their channel for the third time. Thereafter, the Company represented that they had made the payments of 8 invoices. The Company further sought time to make the balance payments and urged that they be allowed to use the services till the next morning. The request was again acceded in good faith. A copy of the email dated 28th November, 2011 is annexed and marked as Exhibit-C to the Petition.

7. By email dated 30th November, 2011, the Company claimed to have reconciled all the invoices and was waiting at the bank to collect the SWIFT. The Company assured proof of the same by end of the business hours in India, however no such proof was sent to the Petitioners. A copy of the email dated 30th November, 2011 is annexed and marked as Exhibit-D to the Petition.

8. According to the Petitioners, the Company acknowledged and accepted their outstanding liabilities and sought extension of time to pay the same. A copy of the emails exchanged between 1st December, 2011 to 11th January, 2012 are annexed and marked as Exhibits-E-1 to E-8 to the Petition.

9. According to the Petitioners, with an intention to bring the matters to its logical end, they even offered to settle the outstanding dues and made an offer to the Company, which was acknowledged by them and assurances were given that the matter will soon be resolved. A copy of the email dated 26th

January, 2012 is annexed and marked as Exhibit-F to the Petition.

10. According to the Petitioners, after the initial settlement talks having failed the Company agreed on a series of occasions that the remaining outstanding dues would be paid to the Petitioners, however they willfully failed and neglected to honour their commitment. A copy of the email dated 30th January, 2012 assuring that the payment will be made in the first week of March, 2012 and another email dated 9th March, 2012 stating that the payment will be made on 15th March, 2012 are annexed and marked as Exhibits-G and H to the Petition.

11. According to the Petitioners, finally the matter was handed over to the Petitioners legal team and the same was intimated to the Company vide email dated 9th January, 2013. A copy of the email is annexed and marked as Exhibit-I to the Petition.

12. According to the Petitioners, their legal team engaged in dialogue with the Company, who agreed and admitted to its liability. Several emails were exchanged to reach an amicable settlement and both parties finally agreed to settle the outstanding dues. A copy of the emails exchanged is annexed and marked as Exhibit-J to the Petition. A settlement agreement was reached between the parties and the same came to be signed by both the parties on 25th February, 2013 at Barcelona (Spain). A copy of the duly executed settlement agreement is annexed and marked as Exhibit-K to the Petition.

13. According to the Petitioners, as per the settlement it was agreed that :

"Lledia Networks Service Telematics S.A. and Global SMS networks Private Limited hereby agree to compromise the debt amount under the terms and conditions that follow :

..........both parties agree that the outstanding and due debt is HUNDRED EIGHTY THOUSAND EUROS (1,80,000 Euros).

Moreover, Lledia Networks Service Telematics S.A. accepts to receive payment from GLOBAL SMS NETWORKS PRIVATE LIMITED not later than 15th June 2013 and to suspend any debt collection procedure during this period of time that it might have taken against the GLOBAL SMS NETWORK PRIVATE LIMITED.

The payment of the total above-mentioned amount by the GLOBAL SMS NETWORKS PRIVATE LIMITED will be paid in two tranches ;

-FIRST Payment on March 15th, 2013 : NINETY THOUSAND EUROS (90,000 EUROS)

-SECOND Payment on June 15th, 2013 : NINETY THOUSAND EUROS (90,000 EUROS)

....

This agreement will be valid till the 15th June, 2013 and will be treated as null and void if the debtor fails to make the payment within the due date and the account status will immediately stand as due."

14. According to the Petitioners, despite the agreement the Company defaulted in making payment of both the instalments as per the settlement agreement thereby frustrating the said settlement agreement. After the default of the first instalment, the Petitioners contacted M/s. Mira Inform Private Limited, a company incorporated under the Companies Act and authorized them

to initiate legal action against the Company. A copy of the resolution dated 1st June, 2013 of the Petitioners to this effect is annexed and marked as Exhibit-L to the Petition.

15. According to the Petitioners, immediately thereafter statutory notice dated 17th June, 2013 was issued calling upon the Company to pay the sum of € 2,62,824.46 (Two lakhs sixty two thousand eight hundred and twenty four euros and forty six pence) together with interest @ 18% per annum from December, 2011. The Company by its reply dated 15th July, 2013 responded to the statutory notice, wherein it inter alia contended there was a change in the management of the Company effective from July, 2012. In view thereof, the earlier Directors including Mr. Ashok Iyengar had resigned from the Company with effect from 10th July, 2012 and the relevant formalities thereto regarding intimation to the concerned Registrar of Companies have immediately been complied with and is deemed to be public notice of the same. It is contended that on and from the date of change of management and cessation from directorship, none of the Directors including Mr. Ashok Iyengar had any powers to take any decision without the knowledge and prior consent of the Board. Hence, any document signed by Mr. Ashok Iyengar is null and void. The financial statements of the Company do not recognize any claim raised by the Petitioners nor do the said financial statements show any outstanding dues supporting the claims of the Petitioners.

16. The Petitioners by their letter dated 2nd August, 2013 responded to

the reply sent by the Company. The Petitioners denied the claims / allegations made by the Company and recorded that apart from the fact that the same are illusory and misconceived, the Company has taken up the said stand only to evade their outstanding liability.

17. According to the Petitioners, on 12th September, 2013 Mr. Ashok Iyenger also responded to the statutory notice and inter alia alleged that the settlement agreement which was signed by him is null and void. The Petitioners have submitted that the Company and Mr. Ashok Iyenger are acting in connivance and collusion to evade payment of the legal dues payable by the Company to the Petitioners. The Petitioners therefore filed the present Petition seeking winding up of the Company and copy of the Petition is served on the Company as far as back on 13th June, 2014. However, the Company has failed and neglected to file its Affidavit in Reply.

18. The above Company Petition was admitted by an order dated 19th January, 2015, and was directed to be advertised. Paragraphs 18 and 19 of the said order are relevant and reproduced hereunder:

> *18. The learned Advocate appearing for the Company was given time on several occasions to enable the Company to file their Affidavit-in-Reply. The Company has not filed its Affidavit in Reply till date. Today, the learned Advocate appearing for the Company has informed the Court that on several occasions he has requested the Company on telephone to come forward and give instructions to him to enable him to file the Affidavit-in-Reply. However, the Company has failed and neglected to come forward to*

give instructions in the matter.

19. From the aforestated facts, I am prima facie satisfied that the amount as claimed by the Petitioners is due and payable by the Company to the Petitioners. Despite several promises made by the Company and even after executing the settlement agreement, the Company has in response to the statutory notice denied and disputed the claim of the Petitioners on grounds which appear to be baseless and untenable. Though the Company has received a copy of the Petition in June-2014, the Company has not filed its Affidavit -in-Reply and has failed to give any instructions to its Advocate. In view thereof, the statements / submissions made by the Petitioners in the Company Petition have remained uncontroverted and there is no reason why the statements / submissions made by the Petitioners in the Company Petition should not be accepted. I am therefore prima facie satisfied that the Company is unable to pay its debts and the Company Petition deserves to be admitted and advertised."

19. The Petition is now taken up for final hearing.

20. It is submitted on behalf of the Company that there was a change in the management of the Company pursuant to the Share Purchase Agreement dated 10th July, 2010, entered into between the then shareholders and the present shareholders and pursuant to the Share Purchase Agreement, the Directors of the earlier management including Mr. Ashok Iyengar had resigned from the Company with effect from July, 2012. Mr. Iyengar had no power and authority to take any decision without the knowledge and prior consent of the Board. Hence any document as allegedly claimed as an "Agreement of Debt Recognition

and Payment" is null and void and shall only be accountable to Mr. Ashok Iyengar personally. It is submitted that the claim of the Petitioner is not reflected in the accounts of the Company and the entire claim of the Petitioner is bogus. It is submitted that the Petitioner and Mr. Iyengar have been acting in collusion.

21. I have perused the annexures to the Petition and have also considered the submissions advanced by the Learned Advocates appearing for the parties. Mr. Iyengar has intimated his resignation to the ROC on 18th July, 2012. From the e-mails annexed to the Petition, particulars of which are set out hereinabove, Mr. Iyengar whilst he was admittedly the Director of the Company has not disputed the request for payments repeatedly made by the Petitioner on the Company and has in fact agreed to pay the same. The Petition is filed on 15th November, 2013. The Petition is maintainable on the basis of the e-mails executed by Mr. Iyengar on behalf of the Company before his resignation. The fact that Mr. Iyengar also responded to the statutory notice by his letter dated 12th September, 2013, inter alia, alleging that the settlement agreement which was signed by him is null and void only goes to show that the collusion is between the Company and Mr. Iyengar to defraud and defeat the rights of the Petitioner and not between the Petitioner and Mr. Iyengar as alleged by the Company. It is also relevant to note that admittedly the Company is not functioning since 2012. In fact, after Mr. Iyengar resigned, the Company has not functioned at all. The Court is informed that the Company has no workers and no accounts of the Company have been

filed with the ROC for the period after 31st March, 2013. I am therefore satisfied that the Company is unable to pay its debts and has raised a defence which completely lack bona fides and smacks of mala fides. The Company Petition is therefore allowed in terms of prayer clauses (a) and (b) which are reproduced hereunder:

> *(a) That the Respondents Company M/s. Global SMS Network Private Ltd. be wound up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956;*
>
> *(b) That the Official Liquidator, High Court, Bombay be appointed as Liquidator of the M/s. Global SMS Network Private Ltd. with all powers under the Companies Act, 1956."*

22. The Official Liquidator to forthwith act on an ordinary copy of this order, duly authenticated by the learned Associate of this Court without waiting for any further notification from this Court or from any other authority.

The above Company Petition is accordingly disposed of.

(S.J. KATHAWALLA, J.)