IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 01 - 09 - 2015

Coram :

The Honourable Smt. Justice PUSHPA SATHYANARAYANA

C.P. No. 262 of 2014
and
Comp. A. No. 756 of 2014

M/s Spencer's Retail Limited
Having its registered office at
Duncan House, 1st Floor
31 Netaji Subhash Road
Kolkata
rep. by is Authorized signatory Jatin Das ... Petitioner

vs.

M/s Ramaniyam Real Estates Private Limited
having their registered office at
No. 17/35 2nd Main Road
Gandhi Nagar
Adyar, Chennai - 20 ... Respondent

PETITION under Sections 433(e) and (f) read with Section 434 (1)(a) of the Companies Act, 1956 seeking to wind up Ramaniyam Real Estates Private Limited, having their registered office at No. 17/35, 2nd Main Road, Gandhi Nagar, Adyar, Chennai - 20 as per the provisions of the Company Act, 1956.

For Petitioner : Mr. Arun C. Mohan

For Respondent : Mr. S. Sundaresan

ORDER

Claiming to have a pan India presence, the petitioner, has filed this petition against the respondent company (hereinafter referred to as `the company') having its registered office at No. 17/35, 2nd Main Road, Gandhi Nagar, Adyar, Chennai - 20, praying for its winding up under Sections 433 (e) and (f) and 434(1)(a) of the Companies Act, 1956 (for short `the Act'). The ground for winding up is the debt allegedly owed by the company to the petitioner which according to the petitioner, the company is unable to pay.

2.1.The petitioner, having decided to launch its outlet in Chennai, on 25th September, 2010, entered into a Lease Agreement with the respondent for construction of a building for opening their hypermarket in Chennai, to an extent of 33,869 sq.ft. as chargeable area comprising about 32,177 sq.ft. of carpet area including part of stilt, first and second floors [for short, 'the proposed premises / demised premises) at GST Road near Zamin Pallavaram. The said Agreement has been annexed to the petition as Serial No. 1. As per the Agreement, the respondent had agreed to hand over the physical possession of the leased premises on or before

31st March 2011.

2.2.Pursuant to the Lease Agreement, the petitioner, as per its obligations under the Agreement, paid the respondent a sum of Rs.36,57,852/- towards two instalments of interest free refundable security deposit. Since the respondent was not able to complete the process, the parties entered into a supplementary agreement dated 7th May 2011, which is annexed as serial No. 4 of the List of documents, as per which the fit-out date was changed to 15th August, 2011. Even after that, the respondent did not adhere to the timeline agreed upon by the parties in the Lease Agreement, and considerably delayed in getting planning approval from the Chennai Metropolitan Development Authority. Though the petitioner had entered into an agreement for opening the hypermarket, the respondent company applied for planning approval for "building for official purposes".

2.3.On 30th November, 2011, the respondent, according to the petitioner, with a view to evade repayment of security deposit, transferred the demised property to third parties during the existence of the Lease Agreement. In such circumstances, the petitioner sought for repayment of interest free security deposit already paid, on or before 20th January 2014, followed by a notice of termination dated

13th January 2014, copy of which has been annexed to the petition as Serial No. 5, pursuant to clause 5(a) of the Agreement for Lease stating that the respondent company had defaulted in fulfilling its obligations under the Agreement. Proof of service of this notice is also on record.

2.4.As the respondent failed to respond despite notice of termination nor attempted to repay the security deposit due and payable, the petitioner issued statutory notice on 5th March, 2014 under Sections 433 and 434 (a) of the Companies Act, annexed as serial No. 7 of the List of Documents, calling upon them to pay the outstanding sum of Rs. 36,57,852/- together with interest at the rate of 15% per annum till payment for which a reply was made stating that the petitioner was not properly corresponding with the new owners of the property for entering a lease agreement in respect of the property. Since all its efforts went in vain, the petitioner company filed the instant petition seeking to wind up the respondent Company, viz., Ramaniyam Real Estates Private Limited.

3.1.The petition for winding up was resisted by the respondent.While admitting the ownership of the petitioner, the main averment of the respondent company is that it is not indebted to the petitioner or having any liability towards the petitioner. According to the respondent, though as per the Agreement, the handing over date for fit outs has been fixed as 31st March 2011, one of the clauses of the Agreement provides for 90 days grace time. It is the further case of the respondent that anticipating the sanction, it commenced the construction and completed the First Floor prior to the cut-off date but because of some delay in processing the application in CMDA, planning permission was issued only on 08.6.2011, which fact, according to the respondent, was acknowledged by the petitioner. It is also averred that the petitioner company did not adhere the dates as per the Agreement to fulfill its obligations in paying Security Deposit on the due dates and that it did not pay the 3rd to 5th instalments.

3.2.It is also contended that the petitioner company, apprehending that its business may get affected due to construction of the fly-over in front of the property, with a view to wriggle out of the contract, has terminated the Lease Agreement and avoided taking possession of the property by citing an ostensible reason, which, according to the respondent, is not part of contractual obligation. It is also stated in the counter that only after entering into the Agreement, the petitioner company changed the plan as per clause 3 of the Agreement and approved the same after verifying the planning details and that only after giving Planning Approval letter, the petitioner started to insist to change the plan by entering into a Supplementary Agreement. According to the respondent, the termination clause did not authorize the petitioner to terminate the Agreement for ostensible reasons without paying compensation.

3.3.It is also averred by the respondent company that the building was designed for the petitioner foregoing the FSI advantage and constructed at the cost of Rs. 12 Crores in the process of which it has sustained a loss by way of rental income which, according to the respondent, should have been from September 2011 onwards totalling to a sum of Rs. 16,14,00,000/- by way of counter claim from the petitioner and that the security deposit amount is adjustable towards the counter claim.

3.4.The respondent also stated in the counter statement that the property was sold to four persons in terms of the clauses of the Agreement and the same has been duly notified and informed to the petitioner. The further allegation of the respondent company is that the petitioner, besides attempting to escape from the liability, tried to gain unjust enrichment by causing heavy loss to it and that the question of repayment does not arise in view of the adjustment of the Security Deposit amount towards the sale price with the subsequent purchaser and that the petitioner is liable to a sum of Rs.13,78,00,000/-.

3.5.With the above averments, the respondent company prayed for dismissal of the Company Petition and sought for a direction, by way of counter claim, to the petitioner to pay a sum of Rs.13,78,00,000/- together with interest @ 24% per month from the date of counter claim till the date of realization as compensation towards the cost of the building and rental loss.

4. In reply to the counter statement, the petitioner filed a rejoinder stating that there were multiple delays and the progress did not meet the deadlines besides denying the allegation of any outstanding. It is further stated that the respondent company is contractually under obligation to refund the Security Deposit to the petitioner.

5. In the reply to the rejoinder, the respondent company, denying the allegation that it is liable to repay the petitioner, contended that the petitioner committed breach of contractual terms causing loss to them. Further denying the averment that the respondent company is unable

to discharge its liability, it is stated that the Company is doing well by making more than Rs. 40 Crores on profit after payment of tax. The respondent has also filed a Civil Suit against the petitioner.

6. Heard Mr. Arun C. Mohan, learned counsel appearing for the petitioner and Mr. S. Sundaresan, learned counsel for the respondent and perused the records.

7. Learned counsel appearing for the petitioner company contended that even after extension of time for completion of the project, the petitioner company was not handed over possession of the demised premises. It is submitted that a sum of Rs. 36,57,852/- is a debt payable by the respondent company. According to the learned counsel, the respondent company has failed to comply with the terms and conditions of the Lease Agreement and since no payment was forthcoming from the respondent company, the petitioner issued a legal notice reminding of its obligations under the Agreement. As regards the sale of property to third parties, learned counsel submitted that the terms of the sale of property were an arrangement between the respondent and the third party.

8. Denying the liability to pay the amount as alleged by the petitioner, learned counsel for the

respondent company raised a contention that the respondent company is commercially solvent and capable of discharging its debts, if legally due. Learned counsel submitted that the company is in sound position earning substantial profit of Rs.40 Crores and Rs. 30 Crores after deducting tax in the earlier years and hence, according to the learned counsel, the allegations raised by the petitioner company are totally frivolous which would require detailed investigation and recording evidence.

9. The precise issue that now needs to be considered by this court is that would it be just, fair and even proper for this court to order the winding up of the respondent company for alleged default in payment of the claim ?

10.As stated earlier, the ground for winding up is the debt allegedly owed by the respondent company to the petitioner which according to the petitioner, the company is unable to pay. There has been an attempt by the petitioner company to force the payment of alleged debt by the respondent company. Clause (c) of the Agreement speaks about the commercial building and clause (d) speaks about commercial likewise. Clause 3 of the Agreement speaks about the additions and modifications which have to be carried out according to the wishes of the petitioner.

11.In the instant case, the respondent company has made a counter claim stating that the construction in question, has been made with certain specifications as sought for by the petitioner company for its sole use and hence, according to the learned counsel for the respondent, the building cannot be used for any other purpose. Learned counsel for the respondent contended before this Court that subsequent to the construction of the flyover, the access to the petitioner's property was changed from side entrance and not directly from the main road and hence, the petitioner, with a view to wriggle out of the contract, terminated the agreement on 13.01.2014.

12. In this backdrop, the first question that arises for consideration is that when there is a substantial dispute as to liability, can a lease agreement-holder prefer Company Petition for winding up for discharge of that liability under Sections 433 (e) and (f) read with Section 434(1)(a) of the Companies Act, 1956. Simultaneously, this Court also has to see whether there is a debt and if, so, whether it is admitted and if admitted, whether the company can pay the same.

13. For better appreciation of the case, it would be relevant to extract Sections 433 (e) and (f) and 434(1) (a)

of the companies Act, 1956.

"***433. Circumstances in which company may be wound up by Tribunal.--*** A company may be wound up by the Tribunal, --

(a) ....

(b) ....

(c) ....

(d) ....

(e) if the company is unable to p ay its debts;

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up

....

....

434. Company when deemed unable to pay its debts.--(1) A company shall be deemed to be unable to pay its debts--

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding [*one lakh rupees]* then due, has served on the company, by causing it to be

> delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to securie or compound for it to the reasonable satisfaction of the creditor;
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> ....
> ....
> ....
> ....
> ...."

14. At the outset, it is to be pointed out that the instant Company Petition is liable to be dismissed on the ground of maintainability for the simple reason that it has been filed by a agreement holder based on a Lease Agreement, which is an unregistered document. As per Section 434(1)(a) of the Companies Act, 1956 under which the present petition is filed, only a creditor can initiate the proceeding against a company for winding up. Even if there is any default by the respondent company as alleged by the petitioner, the same cannot be decided by a Company Court as it arises out of Lease Agreement and violation of the same is a breach of contract, which requires a trial by letting

in oral and documentary evidence after full-fledged trial.

15. While deciding the question of inability to pay the debt alleged, it is to be seen whether it is genuine. Inability is the non-payment of the debt within the statutory period. However, such inability has to be determined from the facts of each case. It is not the duty of the Company Court to examine whether the Company has a genuine dispute to the claimed debt. A dispute would be substantial and genuine only if it is *bona fide* and not speculative. The Company Court is not expected to hold a full trial of the matter.

16. In this connection, learned counsel relied on the decision of the Hon'ble Supreme Court in ***IBA HEALTH (INDIA) PRIVATE LIMITED vs. INFO-DRIVE SYSTEMS SDN. BHD. [(2010) 10 SCC 553]*** and more particularly, referred to paragraph 20 of the judgment wherein with regard to the liability, it has been held as follows:-

> "The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to

examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt."

17. On the other hand, where the company has a *bona fide* dispute, the petitioner cannot be regarded as a creditor of the company for the purposes of winding up.

"*Bona fide* dispute" implies the existence of a substantial ground for the dispute raised. The Company Court is expected to go into the causes of refusal by the Company to pay before coming to any conclusion. It is also expected to ascertain that the company's refusal is supported by a reasonable cause or *bona fide* dispute in which the dispute can only be adjudicated by a trial in a civil Court.

18. In this regard, it would also be relevant to refer to Section 439 of the Companies Act, which says about the provisions under which a petition for winding up can be filed. Section 439 reads as follows:-

> "**439. Provisions as to applictions for winding up:**-- (1) An application to the [Tribunal] for the winding up of a company shall be by petition presented, subject ot the provisions of this Section, --
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> (a) by the company; or
>
> (b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or
>
> (c) by any contributory or contributories; or
>
> (d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately; or

(e) by the Registrar; or

(f) in a case falling under Section 243, by any person authroised by the Central Government in that behalf; or

....

....”

19. It is settled law that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is *bona fide* disputed by the Company. Admittedly, the petitioner company is not a shareholder or creditor of the respondent company nor is a contributory. Therefore, I am of the opinion that in view of the bar under Section 439 of the Companies Act, this petition is not maintainable as the petitioner company, which is only a lease agreement-holder, has no *locus standi* to maintain the petition.

20. In view of the finding arrived at by this Court with regard to the maintainability of the company petition by the petitioner based on a Lease Agreement, the question of debt or liability on the part of the respondent need not be gone into by this Court.

21. However, an order of winding up on the ground that a company is unable to pay its debts is a discretionary remedy. In the instant case, the petitioner had deposited certain amount of money as security deposit in terms of the Agreement between the parties. On the respondent's failure to fulfill its obligations under the said Agreement, the petitioner company chose to terminate the Agreement by a written notice, and called for refund of the security deposit. In view of the fact that the Agreement to Lease was an unregistered document, it is clear that the said Agreement was terminated unambiguously by the petitioner, once it became apparent that the respondent was unable to hand over possession of the Demised Premises within the stipulated time. Further, in reply to the legal notice, the respondent has not denied the fact of the payment of security deposit by the petitioner.

22. Admittedly, in the instant case, the dispute is based on a Lease Agreement dated 25.9.2010 entered into between the parties for construction of a building to house the retail outlet of the petitioner company. Pursuant to the Lease Agreement, the petitioner had paid two instalments as per the clauses of the Agreement ond

different stages. At this juncture, it is pertinent to point out that the petitioner had paid the above two instalments under the contractual obligation and hence, the same cannot be termed as debt. It is also settled law that all liabilities are not debts. Therefore, the petition under Section 433(e) and (f) is not maintainable as the same is applicable only if the company is unable to pay its debt.

23. While dealing with the commercial solvency of the company, a reference may be made to the judgment of the Hon'ble Supreme Court in ***IBA HEALTH (INDIA) PRIVATE LIMITED vs. INFO-DRIVE SYSTEMS SDN. BHD. [(2010) 10 SCC 553]*** (cited supra) wherein in paragraph 24, Their Lordships have observed as follows:-

> "…. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under

> Section 434 (1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay it debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption."

24. In this regard, stating that the respondent company is commercially solvent, it was contended by the learned counsel that the company is earning substantial profit of Rs. 40 Crores after deduction of tax in years prior to filing of the Company Petition.

25. Assailing the contention of the respondent regarding construction of flyover, learned counsel for the petitioner, by way of reply, vehemently contended across the bar that the said defence was not taken in the counter affidavit nor in reply to the rejoinder and for the first

time, the respondent company has come up with such a stand across the bar only defeat the rights of the petitioner. Therefore, the said contention of the learned counsel for the respondent is rejected.

26. The Hon'ble Apex Court as well as this Court, in a catena of decisions, have held that winding up petition cannot be treated as an alternative to the suit or the legal process of a suit. Certain controversies can only be properly adjudicated in the proceedings other than winding up.

27. In the instant case, admittedly, the respondent company has filed a suit in C.S. No. 849 of 2014 and the same is pending. The provisions of sections 433 and section 434 of the Act do not vest any right in the petitioner company, but cases have to be considered on their own merits and keeping in view the facts and circumstances of each case by the court.

28. The entire controversy in the present case, can be viewed from another angle as well. It is a settled principle of law that if the dispute raised by the petitioner company in a winding up petition is *bona fide* and just, the winding

up court would be very reluctant to pass any adverse order. In the instant case, indebtedness is vehemently disputed by the respondent-company besides making a counter claim. Therefore, an order of winding-up at the instance of the petitioner company would affect the future business of the respondent Company. It is not for this court to comment upon the merits or otherwise of this dispute but at least *prima facie* these disputes cannot be termed to be *mala fide* or totally unfair or unreasonable.Besides, passing any order for winding up or even ordering the admission of this petition at this stage would apparently affect the proceedings in the Civil Suit and would foreclose the merits of the objections filed by the respondent company before the Civil court, which are to be decided on merits by that court by letting in evidence.

29. To put it in a nutshell, no grounds have been made out *prima facie* to order winding up of the company. Since the dispute involved in this petition is with respect to the liability on the ground of breach of agreement between the parties which can be adjudicated only after recording evidence of the parties as it is subject matter of proof and evidence and as the same would fall beyond the scope of

enquiry by the Company Court under Sections 433 and 434 of the companies Act, 1957, this Court is not going into the merits of the case. If at all the petitioner company is aggrieved, the remedy open to it, is to agitate in the Suit pending in C.S. No. 849 of 2014 for adjudication of its claims and not by way of a winding up petition, especially when there is a substantial dispute between the parties. It is made clear that any observation rendered in this petition, will not prejudice either of the parties in the proceeding pending before the Civil Court.

In view of the foregoing discussion, ***I find no merits in this Company Petition and the same stands dismissed as not maintainable.*** However, in the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Application is closed.

sd/.P.S.N.J
01.09.2015

//Certified to be a true copy//
Dated this the day of 2015.

R.s/09.10.2015 COURT OFFICER

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