

In the High Court of Judicature at Madras

Dated : 04 - 08 - 2015

Coram :

The Honourable Smt. Justice PUSHPA SATHYANARAYANA

C.P. No. 257 of 2013

Tasneem Patel ...Petitioner

Vs.

AAT Academy India Limited
(formerly known as Access Atlantech
Edutainment (India) Limited)
A company registered under the Companies Act, 1956
Having its registered office at
1176 Trichy Road, Ramanathapuram
Coimbatore - 641 045 ...Respondent

PETITION under Sections 433(e), (f), 434(i) and 439 of the
Companies Act, 1956 read with Rule 95 of the Company
(Court) Rules, 1959 seeking to wind up the respondent
company and to appoint the Official Liquidator, High Court,
Madras as the Liquidator to take over the assets of the
respondent company.

For Petitioner : Mr. P. Giridharan

For Respondent : Mr. H. Karthik Seshadri

for Mr. N.P. Vijay Kumar

ORDER

The instant Company Petition is instituted by the
petitioner, Mrs. Tasneem Patel, claiming herself to be the
secured creditor under Sections 433(e), 433(f), 434(1) and

439 of the Companies Act, 1956 (hereinafter referred to as "the Act"), seeking winding up of the respondent company AAT Academy India Limited (hereinafter referred to "respondent company") on the alleged failure of the respondent AAT Academy to pay its debt, which is claimed to be due under promissory note dated 15.4.2010 and to appoint the Official Liquidator to take charge of the affairs of the company and for costs.

2. The respondent company, which was incorporated on 17th November 1999 as Access Atlantech Technologies (India) Private Limited, subsequently changed its name to Access Atlantech Edutainment (India) Limited, changed its name to AAT Academy India Limited and consequent to the change of name, fresh certificate of incorporation was issued as per Annexure No. 1. The main object of the respondent company is to provide generalised and specialised education and training in the field of computers, software, applications, systems analysis and design, software engineering, audio engineering, video engineering, multimedia work, work-based learning, and to design, develop, market and export all kinds of software application, services and products in areas like graphics, communications, operating systems, man machine interface database, expert system, Computer Aided Designs, Computer Aided Manufacturing, Computer aided Software Engineering,

internet and e commerce activities, etc.

3.1. According to the petitioner, when the Promoter Director and CEO of the respondent Company [for short, "Borrower"] approached her for loan for the expansion of business, she provided a sum of Rs.37,50,000/- under a promissory note dated 15th April, 2010, which is shown as Annexure No. 4 and the Managing Director of the respondent company, in turn, executed a Guarantee Agreement dated 17th April, 2010 enclosed as Annexure No. 5, as security for repayment of the loan including interest, costs, charges and / or other monies availed by the Borrower. The further case of the petitioner is that in addition to the guarantee provided under the Guarantee Agreement, the respondent pledged 1,00,000 Equity Shares held by it in M/s Greycells Education Ltd., which was formerly known as Greycells Entertainment Limited [for short, "Greycells") in her favour vide Board Resolution dated 12.4.2010 (Annexure No. 6). During October 2010, since the borrower failed to repay the loan amount along with the outstanding interest @18% p.a. and as it was agreed by the parties to enhance the rate of interest to 24% per annum from August 2011, the petitioner by letter dated 03.10.2011, called upon the borrower to make payment of the outstanding amount followed by another communication dated 11th November, 2011, enclosed as Annexure No. 7, stating that the amount recoverable from

sale of shares, which would be approximately Rs. 21 Lacs, would be appropriated towards part payment principal and interest. In order to recover the outstanding amount, the petitioner also by letter dated 10.02.2012, intimated the Borrower that if he fails to repay the amount of Rs.4,12,500/- towards principal and interest to date, by 16th February, 2012, she will be compelled to sell the 1,00,000 Equity Shares of Greycells pledged by him as security. However, since he has failed and neglected to pay and honour his commitments, she sold the 1,00,000 equity shares of Greycells pledged by him at Rs.19/- per share, in total, to a sum of Rs.19,00,000/- and adjusted the proceeds towards outstanding interest of Rs.4,24,315/- and balance towards principal loan amount after adjustment for stamp duty on transfer of shares and informed the same to the Borrower by letter dated 24th February 2012 (Annexure No. 9) besides indicating that a sum of Rs.22,69,565/- is due as outstanding balance principal loan amount as on that date. She further asked him to settle the same by March 15, 2012.

3.2. Since all her efforts went in vain, the petitioner issued a notice of demand on December 3, 2012. Subsequently, as no amount was forthcoming, a statutory notice under Sections 433 and 434 of the companies was

issued on 25th March 2013 (Annexed as Annexure No. 11) calling upon the respondent to pay the dues of

Rs.28,65,014/- along with interest @ 24% within 21 days of the receipt of the notice. According to the petitioner, the respondent company is in an extremely precarious and unstable financial position and its liability exceeds its assets. The company does not possess the requisite funds to meet the financial obligations and also to make payments towards the admitted contractual commitments. With these averments, the petitioner has filed the petition for winding up of the respondent-company.

4.1. The petition for winding up was resisted by the respondent. It is stated that when the respondent was on the look out for funds for expansion and was seeking investment from various investors, Mr. Rathish Babu, Managing Director of the respondent Company was introduced to one Vivek Suchanti, founder of Concept Communications Limited, who, in turn, introduced him to Bela Desai, (hereinafter called "Bela") and Sanjay Chainani (referred as, 'Sanjay'). According to the respondent, Bela and Sanjay, who are promoters of Greycells, also carry on business in a company called Value Line Advisory Pvt. Ltd.

4.2. It is also the case of the respondent that Concept Group has significant investments in Greycells, which is engaged in event management business and had pan

India presence in Media and Communication and even outside India in Dubai. It is stated that the respondent company

and Greycells decided to join hands in making investment and accordingly, Greycells proposed investment of Rs.12.48 Crores for acquiring 26% of paid up capital of the respondent company and the same was agreed by memorandum of understanding dated 18.7.2008. Greycells invested upto 11% of paid up capital by bringing in Rs.5.04 Crores.

4.3. The main averment of Rathish Babu, Managing Director and promoter of the respondent is that, when he was in need of financial assistance, Bela promised to arrange financial assistance of Rs. 37.50 Lakhs at interest of 18% p.a. payable on monthly basis, for a period of 180 days and he made it clear that the respondent was not part of this financial transaction as financial assistance was sought by him. It is also stated by him that he solely relied on Bela and has never met the petitioner and that the creation of pledge of 1,00,000 shares held by answering respondent in Greycells as security for payment of the financial assistance availed by the Managing Director was not accepted by the respondent. While so, Bela managed to obtain the Letter of Guarantee dated 15.04.2010, Board Resolution dated 13.4.2010 and Share Transfer Deeds dated 13.4.2010 convincing the respondent that it would only be an administrative formality and he received the financial assistance of Rs.37,50,000/- on 21.4.2010.

4.4. It is further averred that the petitioner is not an independent financier and that her husband Abbas Patel, who is Chairman and Director of Greycells, and Bela and Sanjay, Director and promoter respectively of Greycells are closely associated. As such, according to the respondent, the loan transaction with the Managing Director and various sham documents executed by the answering respondent was device to retrieve the 1,00,000 shares of Greycells. The further case of the respondent is that the present winding up petition is filed to exert pressure on respondent company, which is a going concern and is for collateral purpose. In the circumstances, the respondent prays that the petition may be dismissed with costs.

5. Heard Mr. P. Giridharan, learned counsel appearing for the petitioner and Mr. H. Karthik Seshadri, learned counsel for the respondent and perused the records.

6. The main contention of the learned counsel for the petitioner is that right from the beginning of the transaction, both the borrower and the respondent had dishonest intentions to defraud the petitioner and at a later point of time, since they were unable to pay the dues, they have become inaccessible. He further

submitted that the liability of the respondent company as guarantor is coextensive with that of the borrower, who is

also the Director and CEO of the respondent company. It is also the contention of the learned counsel for the petitioner that the respondent had not replied for the statutory notice dated 25.03.2013. According to him, if the company is allowed to carry on business, unsecured creditors like the petitioner will be put to great hardship and inconvenience.

7. On the contrary, the main contentions of the respondent - Company in defence are:-

- (a) The very claim of the petitioner is fraudulent and the same is challenged by the respondent by way of civil suit, which is pending;
- (b) The petitioner, being wife of claimant Director of Greycells had trapped the respondent and made him to part with the 1,00,000 shares of Rs.3.74 crores. In the absence of original Board resolution, the transfer is invalid;
- (c) The respondent challenges the manner in which the shares were sold, the possession of the share certificates and the rate arrived at therein;

(d) No notice under section 176 of Contract Act was issued before invoking the pledge;

(e) The conduct of Bela Desai amounts to total breach of trust reposed on her by the Managing Director of respondent-company and that the petitioner collusively deprived the respondent of its shares; and

(f) Winding up is resorted to by the petitioner having allowed the alleged debt to become time barred.

8. The claim of the petitioner is founded on a loan extended by her to the Managing Director of the respondent company to the tune of Rs.37,50,000/- under promissory note dated 15.4.2010. The Borrower has also executed a Guarantee Agreement besides pledging 1,00,000 Equity shares held by the respondent company in M/s Greycells, in favour of the petitioner.

9. From the materials available on record, it is seen that the 1,00,000 shares of Greycells were sold to Keynote Commodities Limited (for short, Keynote Commodities), which is owned and controlled by Vineet Suchanti and Nirmal Suchanti, brothers of Vivek Suchanti, founder of Concept Communication, who introduced the Managing Director of the answering respondent to Bela and

Sanjay with whom Vivek Suchanti is closely associated.

It is also seen that Keynote Commodities is engaged in stock broking business and has close links to the stock broking business carried on by Bela and Sanjay.

10. First of all, this Court 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. 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.

11. In the counter filed by the respondent, it has been categorically alleged that there was a nature of fraud and breach of trust played by the petitioner-company with the connivance of Greycells, Bela and Sanjay. As the petitioner is the wife of the Chairman of the Keynote commodities, the sale of the shares held by the respondent-company on 24.02.2012 is only sham and nominal as there was no valid transfer of shares by deeds. This is also confirmed by the mail dated 12.10.2011, wherein, the petitioner has communicated that she would sell the shares which was held by her as security and appropriate the sale proceeds towards repayment of the principal loan.

12. The respondent also contended that the pledge of shares is barred by the provisions of Section 295 of Companies Act and hence, the sale of the same is also a violation under Section 295 of Companies Act. Therefore, according to the learned counsel, there is no pledge as alleged by the petitioner-company.

13. In the above factual matrix, the alleged "Inability to pay its debts" by the respondent has to be considered and examined taking into various aspects. It is settled principle that winding-up is not a matter of right but it is the discretion of Court on any one of the grounds mentioned in Section 433 of the Companies Act. Though the statutory notice raised the presumption as to the inability to pay its debts, it is rebuttable. Admittedly, in this case, the company is only a guarantor for the loan borrowed by the Director without any resolution of the Board. Therefore, the question would be whether the Court can presume the inability of respondent to pay the alleged debt due under the notice.

14. The respondent claims to be financially sound and has been carrying on its operations with 60 employees. The respondent-company is going concern, which is an unique organization providing education in specialized fields of Arts, Commerce, Sound Engineering and Management studies. Though, ordinarily the petitioning-

creditor may be entitled to an order of winding-up, considering the business in which the respondent is involved, the same becomes the discretion of the Court.

It has also been held in a catena of cases that even if more than one ground is made out as enumerated under Section 433 of the Companies Act, there is no compulsion on the part of the Court to order winding-up. In the case on hand, the indebtedness is vehemently disputed by the respondent-company. Therefore, an order of winding-up at the instance of the company - petitioner would affect the career prospectus of many of the students who are undergoing education training during the current year and also in the ensuing years.

15. Even looking at the angle whether such winding-up order would benefit the company's Creditors in general, the answer would be 'no'. The reason is that the respondent-company is alleged to have played fraud and foul play in getting the shares transferred in their names and in the process of realising the debt. The said allegations are contentious in nature that it may require to be tested in a civil suit.

16. The respondent has specifically alleged that the winding-up petition is filed only at the instance of

Bela, Sanjay and Greycells for the purpose best known to them. Unless, the above said persons are cross-examined,

it would not be possible for the respondent to prove its case. In fact, the respondent-company had filed a Civil Suit before this Court with an application in A. No. 1152 of 2014 seeking leave of this Court to sue the petitioner, Bela, Sanjay and keynote commodities, inter alia, for the reliefs of declaration that the sale of shares by the company-petitioner is illegal and null and void and for a mandatory injunction, directing the said defendants to return the suit schedule shares. Though the said application was dismissed, the same is now pending in O.S. Appeal.

17. Turning to the question of solvency of the respondent-company, it is stated in the counter affidavit that the respondent-company is going concern indulging in providing education in specialized fields of studies and it is also commercially solvent. Admittedly, the respondent-company has not become defunct or closed. The business of the company is only providing educational services employing more than 60 persons. In such circumstances, winding-up of the same at the instance of the Petitioning-Creditor would deprive the employment of the persons with the respondent organization, resulting in great prejudice and serious hardship to them. The respondent-company being only a guarantor, in the absence of resolution to sell the shares of the company or even act as a guarantor without a resolution, the alleged transactions by the

Petitioning-Company are subject matter of proof and evidence. While so, ordering winding-up would be like pressurizing the respondent to pay the money. Even presuming that there is a dispute with the respective debt payable, in the given circumstances, the dispute can be resolved only before the Civil Court and not through the company Court.

In the result, the Company Petition filed as such is not maintainable and hence, the same is dismissed.

sd/.P.S.N.J

04.08.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/01.10.2015

COURT OFFICER

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