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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of Decision : 2<sup>nd</sup> September, 2015**

+ CO.APP. 11/2014 and C.M.No.3358/2014

DALMIA CONSUMER CARE PVT. LTD. .... Appellant

Through : Ms. Maneesha Dhir, Mr. Hemant  
Sharma, Advocates.

versus

PAHARPUR 3P

..... Respondent

Through : Mr. Sanjoy Ghose, Advocate for R1.  
Mr. Rajiv Bahl, Standing Counsel for  
Official Liquidator.

**CORAM:**

**HON'BLE MS. JUSTICE GITA MITTAL**

**HON'BLE MR. JUSTICE I.S.MEHTA**

**GITA MITTAL, J (ORAL)**

1. The petitioner assails the order dated 6<sup>th</sup> February, 2014 in CA No. 2225/2013 in company petition No. 382/2008. The company application No. 2225/2013 was filed by the appellant seeking amendment/modification/recall of the orders dated 3<sup>rd</sup> May, 2013 and 10<sup>th</sup> September, 2013.

2. It appears that by an order dated 2<sup>nd</sup> July, 2008, the appellant had been directed to be wound up in a petition filed by respondent No. 1/creditor. It is submitted that on 26<sup>th</sup> August, 2008, audit of the Balance Sheet of the

company was conducted for the period ended 21st March, 2008, wherein the Auditor had categorically mentioned in Clause 11 of Notes that the Share application money pending allotment was converted into interest free unsecured loan as per the request of the companies. On 31<sup>st</sup> March, 2007, the authorized Share Capital of the company was Rs.5 Crores and share application money (pending allotment) was Rs.73,45,95,287/-. It was stated that the same was converted into unsecured loan and therefore, the same has been shown under the head of 'Unsecured Loan' in the balance sheet of the year ended 31<sup>st</sup> March, 2008.

3. On the basis of the above audited balance sheet, the Board of Directors of the company passed a resolution on 18<sup>th</sup> September, 2008 approving a scheme of arrangement with its unsecured creditors because there were no secured creditors in the company. Pursuant thereto, a petition under Sections 391/394 of the Companies act, 1956 was filed by the company being CA (M) No. 162/2008 along with list of unsecured creditors before the Company Judge. The same was allowed vide order dated 3<sup>rd</sup> October, 2008 passed by the Company Judge.

4. Thereafter, the company filed the second motion petition being Company Petition No. 382/2008, in which notice was issued to the official liquidator. The official liquidator filed its no objection on 20<sup>th</sup> January, 2009 before the learned Company Judge. Some of the creditors on 26<sup>th</sup> April, 2010 had also filed objections in Company Petition No. 382/2008 to the scheme of arrangement suggested by the appellant. The Company Judge had directed the appellant company as well as the official liquidator to file their

replies/objections thereto.

5. Vide an order dated 9<sup>th</sup> October, 2012, the learned Company Judge had directed the appellant company to file the consent of all the share applicants whose share application money had been converted into interest free unsecured loans. The appellant company filed an affidavit dated 6<sup>th</sup> November, 2012 along with the copies of the consent letters of the companies stating that they had already agreed to the conversion of the share application money (pending allotment) into interest free unsecured loans.

6. The learned counsel for the official liquidator pointed out that the affidavit dated 6<sup>th</sup> November, 2012 (filed in Company Petition No. 382/2008) enclosed the copies of consent letters of the 101 companies, stating that they have consented to convert the share application money, amounting to Rs.73,45,95,287/- as is reflected in the company's balance sheet as on 31<sup>st</sup> March, 2008 into interest free unsecured loans. Mr. Bahl submitted that the consent letters cannot be acted upon in the absence of any resolution passed by the shareholders at an Annual General Meeting or extra ordinary annual general meeting of such companies.

7. By the order dated 3<sup>rd</sup> May, 2013, the learned Company Judge directed the appellant company to file an affidavit enclosing the resolutions passed by each of the 101 companies who had given their consent for conversion of the share application money into interest free unsecured loans. Pursuant thereto, the appellant company attempted to approach to the respective companies for their resolutions but the same could not be

obtained. The appellant company sought further time stating that it was impossible to obtain resolutions pertaining to that period ( i.e. year 2008) in the year 2013 and by a subsequent order passed on 10<sup>th</sup> September, 2013 again, the direction was repeated.

8. Mr. Sanjoy Ghose, learned Standing Counsel appearing for the respondent (the petitioning creditor before the company court) submits that consent letters of the 101 companies filed by the appellant company along with an affidavit dated 6<sup>th</sup> November, 2012 agreeing to the conversion of the share application money (pending allotment) into interest free unsecured loans appear to be fraudulent and malafide. He submits that the affidavit neither discloses the genuine and sincere efforts on the part of the appellant to obtain their consent nor the communications addressed to these alleged companies and the responses received from there have been annexed with the affidavit. He further submits that the direction of the learned Company Judge to the appellant company to file the supporting resolution of the companies to consider the scheme of arrangement suggested by the appellant is a legal requirement and justified in the facts and circumstances of the case as the consenting resolutions of the alleged 101 companies have to be available. He submits that no indulgence deserves to be shown to the appellant who is relying on these consent letters.

9. Mr. Ghose submits that the argument with regard to the lapse of time years (i.e. from the year 2005 to 2008) is inexplicable as it is unimaginable in ordinary commercial transactions for the parties to advance such a huge amounts as capital to the company facing liquidation.

10. Mr. Rajiv Bahl, learned counsel appearing for the official liquidator has also objected to the grant of the prayer of treating the share application money as unsecured loans on the ground that the amounts are being claimed as having been deposited as back as in the year 2003 and thereafter, the prayer of the appellant that they be treated as interest free unsecured loans cannot be granted.

11. Ms. Manisha Dhir, learned counsel arguing for the appellant has submitted that the learned Single Judge has completely erred in law in ignoring the provisions of sub-clause (g) of Clause G of Schedule VI which has been framed under Section 211 of the Companies Act, 1956 which in fact, provides general instructions for preparation of the balance sheet of a company. The clause G (g) of Schedule VI of the Companies Act reads as under:-

*“G. Other current liabilities*

*The amounts shall be classified as:*

*(a) .....*

*(b) .....*

*(c) .....*

*(d) .....*

*(e) .....*

*(f) .....*

*(g) Application money received for allotment of securities and due for refund and interest accrued thereon. Share application money includes advances towards allotment of share capital. The terms and conditions including the number of shares proposed to be issued, the amount of premium, if any, and the period before which shares shall be allotted shall be disclosed. It shall also be disclosed whether the*

*company has sufficient authorized capital to cover the share capital amount resulting from allotment of shares out of such share application money. Further, the period for which the share application money has been pending beyond the period for allotment as mentioned in the document inviting application for shares along with the reason for such share application money being pending shall be disclosed. Share application money not exceeding the issued capital and to the extent not refundable shall be shown under the head Equity and share application to the extent refundable i.e., the amount in excess of subscription or in case the requirements of minimum subscription are not met, shall be separately shown under 'Other current liabilities.....' ”*

12. It cannot be disputed that the order dated 10<sup>th</sup> September, 2013 notes that time was sought on behalf of the appellant to file resolution of the shareholder companies whose consents had been filed. However, at the same time, it cannot be denied that the Companies Act, 1956 itself prescribes the manner in which the unrefunded share application money or unutilized share application money has to be reflected in the balance sheet. The same is required to be reflected as an unsecured loan therein.

13. We are confining our consideration to the issue pressed by the appellant, that so far as the money received as share application money of the company is concerned, it has to be reflected as unsecured loans in the balance sheet in terms of the Schedule VI of Section 211 of the Companies Act, 1956.

14. We however, find substance in the contention of Mr. Rajiv Bahl, learned counsel for the official liquidator that the appellant would have to

satisfy the Company Judge that these amounts were actually share application money and stood so received by the company. We are told by Mr. Sanjoy Ghose that the respondents had filed objections to the claims which are pending consideration.

15. It is made clear that nothing contained herein shall be treated as an expression of opinion on the merits of the contentions either by the claimant or the objections pressed by the official liquidator as well as by the respondent company.

16. We make it clear that our acceptance of the submission made on behalf of the appellant that the Clause G (g) of the Schedule VI of Section 211 of the Companies Act, 1956 enables the company to reflect the share application money as unsecured loans, does not tantamount to an acceptance of the company's claims that such amounts were received as share application money from genuine applicants. We make it clear that it shall be open to the learned Company Judge to examine the contentions on behalf of the respondents as well as the official liquidator that the appellant company has to first establish that these amounts were actually received from genuine applicants towards share allotment apart from their challenge to these amounts being treated as interest free unsecured loans without prior authorization of the appellant company. The learned Company Judge in the impugned order has correctly relied upon the legal principle that a resolution of the Board of Directors of the company (or the share holders for a certain situation) is essential in order to validate and bind the company.

17. In view of above, we accordingly direct as follows:-

(i) It is open to the appellant company to urge before the learned Company Judge that it can reflect the unutilized share application amounts received by it as unsecured loans in the balance sheet. However, this exercise shall not preclude the Company Judge from undertaking the examination insisted upon by the official liquidator as well as respondent herein to the effect that the same is not permissible in law unless the consenting resolutions of the 101 companies which are stated to have made the deposits are filed on record.

(ii) The Company Judge shall also consider the objection of the official liquidator that the unsecured loans cannot be in any case be so treated without the imposition of interest liability thereon by a resolution passed in accordance with law unless the companies which have made such deposits agree to accept its share application deposit as an interest free loan without resolution.

18. This appeal is disposed of in the above directions.

19. List before the Company Judge on 6<sup>th</sup> November, 2015.

**GITA MITTAL  
(JUDGE)**

**I.S.MEHTA  
(JUDGE)**

**SEPTEMBER 02, 2015**

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