IN THE HIGH COURT OF BOMBAY AT GOA

COMPANY PETITION NO. 24 OF 2015

M/s. Quadros Marketing Co,
a proprietary concern of Shri Evencio Quadros,
having its office at Reva Apts.,
Opp. Multipurpose School Borda,
Margao, Goa. …... Petitioner

Versus

M/s. Impala Distillery & Breweries Ltd.
A Comopany registered under the Companies Act 1956
with its registered office at
Gold Road, Pajifond, Margao, Goa. …... Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Mr. Vijay Palekar, Advocate for the Petitioner.

Mr. C. A. Ferreira, Advocate for the Respondent.

Coram :- **F. M. REIS, J**

Reserved for Order on : **21st October, 2016**

Order pronounced on : **16th December, 2016**

ORDER

Heard Mr. Sudin Usgaonkar, learned Senior Advocate appearing for the Petitioners and Mr. C. A. Ferreira, learned Counsel appearing for the Respondents.

2. The above Petition is filed for winding up of the Respondent-Company under the provisions of the Companies Act, 1956.

3. It is the contention of the Petitioners that the Petitioners entered inter alia an Agreement with the Respondents whereby the Petitioner was appointed as a Distributor somewhere on 21st of July 2011. In terms of the said Agreement, the Petitioner was required to deposit with the Respondent a sum of Rs. 1 Cror being advance towards the supply of goods manufactured by the Respondent. The amount accumulated in the account of the Petitioner on account of the failure to supply goods and make payments in terms of said Agreement was Rs. 1,76,21,062/-. The Petitioner thereafter placed a purchase order for supply of goods for a sum of Rs.1,76,21,062/- as per the schedule of delivery stated in the said order. In view of the said Order, the Respondent-Company were called upon to supply the goods between the period of 31.08.2014 to 15.11.2014. But, however, the Respondents failed to supply the goods as stated. The Petitioner thereafter learnt through a newspaper item that the Respondent-Company is sought to be purchased by M/s. Viking Ventures. As such, the Petitioner issued a notice under Section 434 of the Companies Act and called upon the Respondent to pay the admitted liability within three weeks from the date of the receipt of such notice. But, however, the Respondent neglected to pay any part thereof. Consequently, the Petitioners filed the above Petition for winding up.

4. The Respondents thereafter filed their reply and pointed out that the Petition as filed is not maintainable as the Petitioner is not a Company incorporated under the Companies Act. It is further pointed out that it is well settled that a winding up Petition should not be allowed to take the course or measures to recover the debts which are disputed by the Company. It is also denied that the

Respondents owes to the Petitioner a sum of Rs. 1,76,21,061.50. It is also submitted that the amount of money advanced by the Petitioner has been adjusted to the stock lifted and taken by the Petitioner from time to time and no amount is due and payable. It is further pointed out that a perusal of the Petition revealed that the Petitioner had paid as advance a sum of Rs. 1 Crore in terms of Clause 6 of the said Agreement dated 21.07.2011 and the fact that the Petitioner has not set out the month by month stock lifted and amount adjusted, is indicative that this amount is not repayable to the Petitioner. It is further pointed out that the conduct of the Petitioner in filing the Petition does not entitle the Petitioner to file a Company winding up Petition.

5. In rejoinder to the said affidavit, the Petitioner pointed out that it is a proprietary concern registered under the various statutes applicable including the registration under the Income Tax Act. It is also denied that the Petitioner has an alternate remedy or that the relief sought cannot be granted. It is further pointed out that the amount payable by the Petitioner to the Respondent is reflected in the balance sheet which is already on record. It is further pointed out that the Respondents had never any dispute at earlier point which itself shows the misplaced defence sought to be raised by the Respondents. It is further pointed out that the Petitioner was required to maintain a deposit of Rs.50,00,000/- at any point of time.

6. The Respondents chose to file another affidavit and produced some copies of the ledger of the relevant period as well as the statement showing various

duties paid right from 2012 to 2016. The Respondent also produced the summary of the amounts payable to the Petitioners which, according to the Petitioners, comes to a sum of Rs.11,96,122/-. It is also pointed out that the Petitioners have filed Special Civil Suit no. 75/2015/A before the Civil Court at Margao. It is further pointed out that the Petition itself is a pressure tactic for recovery of amounts which the Respondents are not liable to pay. It is also pointed out that the Respondent has a running business which has not come to a stand still even when the Company had sufficient losses on earlier occasions.

7. Thereafter, an additional affidavit was filed on behalf of the Respondent-Company. It is pointed out that the auditors have completed the audit for the year ending 31.03.2013.

8. Mr. Sudin Usgaonkar, learned Senior Advocate appearing for the Petitioners, has submitted that there was an Agreement between the Petitioner and the Respondent-Company which was entered into on 21.07.2011. The learned Senior Advocate has thereafter pointed out that in terms of clause 6 of the said Agreement, the Petitioner was required to pay a sum of Rs. 1 Crore on execution of such Agreement towards advance against supplies by the Respondent. It was also stated that in terms thereof once the said sum of Rs. 1 Crore is adjusted against the supplies made to the Petitioner, the Distributor had to always keep a deposit with the Respondent-Company of an amount of Rs.50,00,000/- towards the advance against the supplies. Learned Senior Advocate has thereafter taken me through the balance sheet as on 21.03.2012 to point out that as on 31.03.2012

under the head of Long Terms Liabilities, the Petitioners are shown to have a sum of Rs.1,10,00,000/- payable by the Respondent-Company. The learned Senior Advocate has thereafter pointed out that under the head of Sundry Creditors a sum of Rs.22,37,045.50 is shown to the credit of the Petitioner. The learned Senior Advocate thereafter submits that a notice dated 06.08.2015 was served on the Respondents under Section 434 of the Companies Act calling upon the Respondents to pay the admitted liability within three weeks. Despite of the said notice, the Respondents failed though indebted to pay the amount demanded which was admittedly due to the Petitioners. Learned Senior Advocate as such submits that the Petitioner is entitled for the reliefs sought in the above Petition. Learned Senior Advocate also pointed out hat in the said notice, the Petitioner has claimed a sum of Rs.1,76,21,062/- towards the amount outstanding along with interest from 26.08.2014.

9. On the other hand, Shri C. A. Ferreira, learned Counsel appearing for the Respondent-Company has disputed the said contention. It is pointed out that proceedings for winding up cannot be a tool to recover unlawful claims put forward by the Petitioner. It is further pointed out that the Petitioners have already instituted a suit which is pending and, as such, the question of proceeding with the above Petition would not be justified. It is further submitted that the Respondents have brought material on record to show that the Respondents have been paying regularly the statutory dues and are a running concern and, as such, the question of exercising discretion in favour of the Petitioners to admit the above winding up Petition, would cause grave injustice to the Respondents. Learned Counsel further

pointed out that there is a bonafide dispute raised by the Respondents and, according to the Respondents, the amount due is only in a sum of Rs.11,96,122/-. Learned Counsel further submits that in such circumstances, the question of proceeding with the above winding up Petition would result in grave injustice to the Respondents and, as such, the Petition be rejected.

10. I have carefully considered the submissions of the learned Counsel and I have also gone through the records. The main contention of the Respondents to dispute the claim of the Petitioners is essentially on the ground that a Civil Suit has been filed by the Petitioner for recovery of the amount due. It is further pointed out that the Respondents are financially sound and, as such grave injustice would occasion to the Respondents in case the winding up Petition is admitted. It is further pointed out that there is a bonafide dispute raised by the Respondents with regard to the claim put forward by the Petitioners and, as such, the question of exercising discretion to proceed with the winding up Petition would not at all be justified. On perusal of the records, the fact that the Petitioner had kept a deposit of Rs. 1 Crore in terms of Clause 6 of the Agreement has not been disputed. As pointed out herein above, the clause in Agreement clearly suggests that at any given time during the subsistence of the Agreement, a sum of Rs.50,00,000/- had to be maintained as advance by the Petitioners with the Respondent-Company. On bare perusal of the reply filed by the Respondent, the vagueness therein would clearly suggest that the conduct of the Respondents in disputing the claim of the Petitioners, prima facie, appears to be only to delay the payment of the legal debt payable to the Petitioners and not bonafide.

11. The Andhra Pradesh High Court in the Judgment reported in ***(2008) 144 Company Cases 454 (AP)*** in the case of ***Walnut Packaging Private Limited vs. The Sirpur Paper Mills Limited & anr.,*** has observed at Paras 16, 17 and 18 thus :

> "16. In Softsule (P) Ltd. Re (1977) 47 Comp Cas 438 (Bombay), Bombay High Court laid down the principles as below. Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order. Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated. Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434(1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956. Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company

is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

17. In Tube Investments of India Ltd v. Rim and Accessories (P) Ltd (1990) 3 Comp LJ 322 (Mad), the following principles are laid down.

(i) If there is a dispute as regards the payment of the sum towards principal however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a Civil Court;

(ii) The existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to a Civil Court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding up proceedings; and

(iii) If there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.

18. In Mediquip Systems (P) Ltd vs. Proxima Medical System Gmbh., Supreme Court quoted with approval principles laid down in Softsule (supra) and principles laid down by Madras High Court in Tube Investments (supra). The Supreme Court held that, "a debt under (this)

> Section 433 of the Act must be determined or a definite sum of money payable immediately or at a future date and that inability referred to in the expression 'unable to pay its dues' in Section 433(e) of the Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company". It was also observed that if there is prima facie dispute as to the debt, company petition for winding up under Section 433 of the Act would not lie. "

Taking note of the said observations, the question to be examined is whether the debt claimed by the Petitioners is a definite amount and whether the Respondents have raised a bonafide defence to dispute the correctness of the said amount.

12. Looking into the balance sheet statement of accounts and the admissions of the Respondents of the amounts due and payable to the Respondents, would itself show that the Respondent-Company is indebted to a sum of exceeding Rs. 1 Crore and in terms of the provisions of the Companies Act would itself justify to admit and proceed with the above winding up Petition. The fact that the Respondent Company has stopped supplies to the Petitioner is not in dispute. In such circumstances, I find that the Petitioners have made out a case to admit the above winding up Petition. On the basis of the material on record, the Respondents are liable to pay to the Petitioners, prima facie, a sum of more than

Rs. 1,50,00,000/-. Though the Respondents have made a vague attempt to dispute the correctness of the said amount and have brought voluminous document only to make a semblance of a dispute to the claim of the Petitioners, I find that the statement of account itself and the balance sheet produced by the Petitioners would disclose that for the financial year ending on 31.03.2012, the Respondent-Company was having a deposit of Rs.1,10,00,000/- with the Respondent-Company. The certificate of the auditors produced by the Respondents does not in any way assist the Respondents to claim that there is a bonafide dispute with regard to the amounts payable by the Respondents to the Petitioners. The certificate prima facie does not corroborate the statement of accounts and the financial statements on record.

13. The fact that the Respondent-Company is a running concern, is not in dispute. Prima facie, whether the relationship between the parties subsists or not cannot be clearly established from the material on record though no supplies are shown forthcoming from the Respondent – Company. Admittedly, the Petitioners have filed a suit for recovery of money in the Civil Court. In such circumstances, the Civil Court will adjudicate the dispute between the parties. But the fact remains that the Respondents cannot dispute that the Petitioners have maintained the advanced payable in terms of Clause 6 of the Agreement with the Respondents. The amount as stipulated therein was a sum of Rs.50,00,000/- and I find that the Respondents should be directed to deposit the sum of Rs.50,00,000/- which is a definite sum of money admittedly payable by the Respondents to the Petitioners considering the material on record and the Agreement executed between the

parties.

14. In the peculiar facts and circumstances of the case, I find that the Respondent-Company should be given an opportunity to deposit the said sum of Rs.50,00,000/- and in default thereof the Petition for winding would have to be admitted to proceed in due process of law.

15. The Division Bench of this Court, Principal Seat at Mumbai, in the case of **Videocon Industries Limited Vs Intesa Sanpaolo S.P.A., in Appeal (L) No. 29 of 2014 in Company Petition No. 528/2012** has observed at

paras 42 and 43 thus :

> "42. When we so indicated at the conclusion of the arguments, learned counsel for Videocon, however, submits that in any view of the matter the learned Company Judge erred in directing Videocon to pay the amount to the Bank. It is submitted that at the most the amount could have been directed to be deposited in Court but not paid over to the Bank. It was vehemently submitted that the winding up petition is for the benefit of all the creditors and any amount paid after filing of the winding up petition would enure for the benefit of all the creditors and, therefore, the impugned direction given by the learned Judge requiring Videocon to pay 38 Million Euros to the Bank is contrary to the settled legal

position.

43. The argument is fallacious for the simple reason that after Videocon pays the amount to the Bank, the winding up petition would stand dismissed and, therefore, there would be no order of admission of the winding up petition or publication of the advertisement for inviting other creditors to come forward with their claims. That stage would not at all arise if Videocon makes the payment. It is only if Videocon fails to make payment even after three adjudications that Company Petition would stand admitted, which would be followed by publication of the advertisement for inviting claims from the other creditors. We, therefore, do not find any merit in this contention also."

16. In view of the above, I pass the following :

<u>ORDER</u>

(i) The Respondent-Company is directed to deposit in this Court Rs.50,00,000/- within two months from today.

(ii) In case the Respondent-Company fails to deposit the said sum of Rs.50,00,000/- within the said period, the Petition would stand admitted and the Petitioners shall proceed to publish the notice in two newspapers one in “The Navhind Times” and other in regional language

Marathi "Gomantak Times"

(iii) In case the amount is deposited within the said period stipulated herein above, the petition shall stand accordingly dismissed with liberty to the Petitioner to recover the total legal dues from the Respondent in accordance with law.

(iv) The Petition stands disposed of accordingly.

F .M. REIS, J.

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