

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**COMPANY PETITION NO. 940 OF 2014
WITH
COMPANY APPLICATION NO. 428 OF 2015**

Manjiro Works, ... Petitioner

Vs.

Galaxy Entertainment Corporation Limited ...Respondent

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Mr. Ashutosh Thipsay a/w Burzin Somandy a/w Ms. Sneha Munj I/b Vinod Juwale, for the Petitioner.

Mr. Rohan Cama a/w Ms. Namrata Shah i/b M/s K. Ashar and Co., for the Respondent.

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CORAM : B.P. COLABAWALLA, J.

DATED : JULY 20, 2016

ORAL JUDGMENT:

1. This Company Petition has been filed against the Respondent - Company Galaxy Entertainment Corporation Limited, on the ground that is unable to pay its debts. It is the case of the Petitioner, that the Respondent - Company is indebted to the Petitioner in the sum JPY 64,516,217 (Japanese Yen). It is the case of the Petitioner that these amounts have not been paid and, therefore, the present Company Petition.

2. The brief facts giving rise to the present controversy are that the Petitioner being a proprietary concern is in the business of supplying gaming machines. It is the case of the Petitioner that in furtherance to the business transactions as agreed to between the Petitioner and the Respondent – Company, the Respondent - Company placed an order on the Petitioner with respect to the purchase of certain machines as reflected in the Proforma Invoice dated 28th May, 2007. The said Proforma Invoice was thereafter amended and signed by the Petitioner on 11th April, 2008 and thereafter further amended on 1st November, 2008.

3. Pursuant to this purchase order, the Petitioner supplied the gaming machines to the Respondent - Company on a regular credit basis, which according to the Petitioner, were accepted by the Respondent without any protest whatsoever. For the supply of these machines, the Petitioner raised its 10 invoices, the details of which are mentioned in Paragraph No. 8 of the Petition. Thereafter, it is the case of the Petitioner that the Respondent - Company, before taking delivery of the said machines issued pre-inspection certificates certifying that the goods shipped under the said invoices were checked

by the agent of the Respondent - Company and were found to be in good working and acceptable condition. These certificates have been annexed at **Exhibit 'B'** to the Petition. It is the case of the Petitioner, that as far as the first Invoice Bearing No. GXY-0801 is concerned, the Respondent - Company made part payment of approximately Rs. 47.57 lakhs. As far as the balance invoices are concerned, no payment was made. The Petitioner has also relied upon a balance confirmation issued by the Respondent - Company (Exhibit 'C' to the Petition) to contend that the entire amount claimed in the present Company Petition has been admitted by the Respondent – Company.

4. In view of defaults being committed in payments of the amounts due to the Petitioner, on 23rd April 2012, the Petitioner was constrained to issue a statutory notice under Section 434 of the Companies Act, 1956, calling upon the Respondent - Company to pay its dues failing which winding up proceedings would be initiated. It is not in dispute that this statutory notice has been duly served on the registered office of the Respondent – Company. Despite receipt of the statutory notice, no reply was given and neither were the requisitions contained therein complied with. It is in these circumstances, that the present Petition is

filed.

5. After the Company Petition was accepted, it was served on the Respondent - Company pursuant to which they have filed a detailed affidavit-in-reply dated 23rd March, 2015. By virtue of this reply, they have resisted the admission of this Company Petition.

6. In this factual back ground, Mr. Ashutesh Thipsay, the learned counsel appearing on behalf of the Petitioner, submitted that there was no dispute with reference to the monies owed by the Respondent - Company to the Petitioner. He submitted that in fact the Respondent - Company has admitted its liability in full as evidenced by the balance confirmation dated 23rd April, 2012 (Exhibit 'C' to the Petition). He submitted that the disputes raised by the Respondent - Company in its affidavit-in-reply are wholly illusory and moonshine. He submitted that the defence of defects in the machines supplied by the Petitioner to the Respondent - Company all relate to machines that were supplied much earlier and for which the Respondent - Company had already made full payment. There was no real dispute with reference to the machines supplied under the invoices which form the subject matter of

the present Petition. For all these reasons, he submitted that there is no bonafide defence to the Company Petition and the same ought to be admitted and consequential directions be given for advertisement etc.

7. On the other hand, Mr. Cama, the learned counsel appearing on behalf of the Respondent - Company submitted as follows:-

(a) That, the claim made in the present Petition is clearly barred by the law of limitation.

(b) In view of the explanation given by the Respondent - Company in Paragraph No. 20 of its affidavit-in-reply dated 23rd March, 2015, there is no admission of liability on the part of the Respondent - Company. In other words, the submission was that the so called admission was adequately explained.

(c) Though, the Petitioner in the present Company Petition has made a claim only with reference to the invoices that arise under the third purchase order, in fact they were two earlier purchase orders under which machines were supplied by the Petitioner to the Respondent - Company and which machines

were defective and had to be re-exported for repairs etc. Even, as far as the machines supplied under the invoices which form the subject matter of this Petition are concerned, a lot of these machines also were found to be defective. This alone would give rise to a bonafide defence to the Company Petition as the Respondent - Company had a counterclaim in damages against the Petitioner in the sum of rupees approximately 15 Crores.

8. For all the aforesaid reasons, Mr. Cama, submitted this is not a fit case where this Court should exercise its equitable jurisdiction and admit this Company Petition.

9. I have heard, the learned counsel for the parties at length and perused the papers and proceedings in the Company Petition as well as the annexure thereto. On the first contention raised by Mr. Cama, I find considerable force that the claim made in the present Petition, *Prima facie* would appear to be barred by the law of limitation. It is not in dispute that the supplies of these machineries took place between the period of 10th June, 2008 to 25th February, 2009. Even, if where to go by the credit period mentioned in the third purchase order (being a

period of 730 days), the Respondent - Company was required to make payment by 24th February, 2011. The period of limitation of 3 years would start from this date. Admittedly, the present Company Petition has been lodged on 31st July, 2014. This would clearly be beyond the period of 3 years and, therefore, the claim on the face of it would appear to be time barred.

10. Being faced with this situation, Mr. Thipsay, the learned counsel appearing on behalf of the Petitioner, placed reliance on the balance confirmation dated 23rd April, 2012 to contend that this letter would extend the period of limitation. At this stage, I am not impressed with this argument. It is true that this balance confirmation has been issued on the letter head of the Respondent - Company. However, the Respondent - Company in Paragraph No. 20 of its affidavit-in-reply has specifically averred that the gentleman who has issued this balance confirmation was taking care of the accounts department of the foods and beverage division of the Respondent - Company. The said balance confirmation appears to have been issued by the said gentleman on a simple mathematical computation of the invoices raised versus the amounts paid. The said gentleman was not aware of the disputes

raised between the Petitioner and the Respondent - Company in relation to the defective machines supplied as well as the delay in supplying the said machines. What is important to note is that, despite giving several opportunities to the Petitioner, no affidavit-in-rejoinder has been filed controverting the averments made in the affidavit-in-reply. At this stage, I am not inclined to reject this explanation outright and therefore proceed to admit this winding up Petition. The Petitioner may very well be right that the balance confirmation issued by the Respondent - Company is binding on them which would then extend the period of limitation. However, this would have to be established by leading necessary evidence and I, cannot, in my summary jurisdiction, reject this contention outright. In any event, this being something that is certainly arguable would certainly give rise to a bonafide defence to the Company Petition which would entail its dismissal.

11. Even otherwise, I find considerable force in the argument of Mr. Cama, that in the facts of the present case, the debt claimed by the Petitioner is bonafide disputed. The Respondent - Company has filed a detailed affidavit-in-reply with voluminous correspondence and

documents which to my mind clearly establish that there were serious disputes with reference to the machines that were supplied by the Petitioner to the Respondent - Company. In fact, the Respondent - Company has done an internal audit which would reflect that even under the third purchase order, as many as 37 machines were not working. It is also the case of the Respondent – Company, that there was a serious delay in supplying the machines, which has caused great loss to the Respondent - Company by virtue of the fact that they lost the security deposit on premises that they had taken on leave and licence in which these machines where to be housed. Looking to all these factors, I do not think, that this is a case where the debt of the Petitioner is undisputed. To my mind, there is a bonafide dispute raised by the Respondent – Company. In these circumstances, I have no hesitation in dismissing this Company Petition.

12. It is however clarified that the observations made herein are only *Prima facie*. The Petitioner is at liberty to adopt appropriate proceedings for recovery of its dues by approaching the Regular Civil Court which proceedings, if and when filed, will be decided on its own merits and uninfluenced by any observations made in this order. It is

also further clarified that for the purposes of limitation, the time expended in pursuing this Company Petition shall be excluded under Section 14 of the Limitation Act, 1963.

13. With this clarification, the Company Petition stands dismissed. However, given the facts and circumstances of the case, there shall be no order as to costs.

14. Since, the Company Petition itself is dismissed, nothing survives in Company Application No. 428 of 2015 and the same is disposed of accordingly.

(B P. COLABAWALLA, J.)