

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

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Date of decision: 21st July, 2016

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CS(COMM) No.28/2015

M/S NEW ERA IMPEX (INDIA) PVT LTD

..... Plaintiff

Through: Mr. Pramod Saigal and Mr. N.S.
Bajwa, Advs.

versus

M/S ORIOLE EXPORTS PRIVATE LTD

.... Defendant

Through: Mr. Sunil Magon, Adv. along with
Ms. Parul Gupta.

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CS(COMM) No.27/2015

M/S SAREEN ESTATES PRIVATE LTD

..... Plaintiff

Through: Mr. Pramod Saigal and Mr. N.S.
Bajwa, Advs.

versus

M/S ORIOLE EXPORTS PRIVATE LTD

..... Defendant

Through: Mr. Sunil Magon, Adv. along with
Ms. Parul Gupta.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

C.S.(COMM) No.28/2015

1. The plaintiff company has instituted the present suit for recovery of principal amount of Rs.1.48 crores together with interest at 18% per annum for the period prior to the institution of the suit i.e. for total sum of Rs.1,89,07,000/-, together with future interest at the rate of 18% per annum pleading (i) that the plaintiff company in response to the demand of the defendant for advance/loan , vide its cheque dated 19th May, 2010 advanced

a sum of Rs.48,00,000/- to the defendant; similarly, another advance of Rs.1 crore was given vide cheque dated 6th September, 2010; (ii) that the Directors of the plaintiff company and the defendant company are related parties; (iii) that in the running account maintained between the parties, the said amounts were duly credited and debited to each other's account and as per the said account the sum of Rs.1.48 crores is due from the defendant to the plaintiff; (iv) that the defendant has failed to pay the said amount despite demands; (v) that the duly audited balance sheet of the defendant admits and acknowledges the aforesaid amount to have been received by the defendant and re-payable to the plaintiff; and (vi) that the transaction being a commercial one, the plaintiff is entitled to interest at 18% per annum.

2. The suit was entertained and the defendant has contested the same by filing a written statement on the grounds; (i) that the plaintiff and the defendant are family owned and controlled companies in the nature of quasi partnerships; (ii) that prior to the demise of Shri Sudhir Sareen, till about the year 2010, the plaintiff was being primarily run and managed by Shri Sudhir Sareen who was the majority share holder of the plaintiff as well as the defendant companies; (iii) Shri Sudhir Sareen on 6th November, 2009 gifted more than 95% shares of the defendant company to his daughter Ms. Parul

Gupta; (iv) Shri Sudhir Sareen was the alter ego and directing will and mind of both the plaintiff and the defendant; (v) that the present suit has been filed by the plaintiff at the instance of Mr. Siddharth Sareen who is now the majority share holder of the plaintiff company and a Director therein; (vi) Mr. Siddharth Sareen was served legal notice dated 4th June, 2015 by the defendant company for having committed various offences, thereby making him liable to prosecution; (vii) the present suit is a counterblast to the said legal notice got issued by the defendant company which is now primarily owned by Ms. Parul Gupta who is the sister of Mr. Siddharth Sareen and because Ms. Parul Gupta challenged the Will set-up by Shri Siddharth Sareen of Shri Sudhir Sareen in his favour; (viii) though Shri Sudhir Sareen as aforesaid had gifted 95% shares of the defendant Company to Ms. Parul Gupta but the defendant Company continued to be managed and run by Shri Sudhir Sareen; after he fell ill, the defendant company was managed by Mr. Siddharth Sareen who was also the Director of the defendant company till 3rd December, 2014; Ms. Parul Gupta did not interfere as she trusted Mr. Siddharth Sareen as her brother; (ix) that Ms. Parul Gupta, after the demise of Shri Sudhir Sareen (the counsel informs, on 21st November, 2013), in the year 2015 discovered that Mr. Siddharth Sareen who was in charge of the

defendant company had sold properties of the defendant company and withdrawn monies from the defendant company; (x) that the defendant company has never admitted the alleged loan/advance liability of the plaintiff at any time; (xi) that the suit has not been filed and signed by a duly authorised person on behalf of the plaintiff; (xii) that the defendant company had never approached the plaintiff for any loan; (xiii) Shri Sudhir Sareen, father of Ms. Parul Gupta, was the majority shareholder of the plaintiff and had *suo motu* made monetary contributions to the defendant company, 95% shares whereof had been gifted to Ms. Parul Gupta; (xiv) the monies advanced by the plaintiff company to the defendant company from time to time were at the instance of Shri Sudhir Sareen who was the majority shareholder and Director of the plaintiff company at that time; (xv) the monies advanced by the plaintiff company to the defendant company were described as advance in the financial books, only by way of accounting convenience, whereas actually the same were in the nature of gift, given out of natural love and affection between the father Shri Sudhir Sareen and the daughter Ms. Parul Gupta; (xvi) the said monies which were advanced, were never intended to be recovered as loan or to be re-paid and for this reason only neither of the two companies booked any interest on the said

advances/amounts as payable expense or a receivable income; (xvii) Mr. Siddharth Sareen acting in the capacity of a Director enjoying a fiduciary position in the defendant company has stripped the defendant company of its assets; (xviii) that the monies advanced by the plaintiff company to the defendant company are described as advance in the financial books of the company only by way of accounting convenience, whereas actually the same were in the nature of gift given out of natural love and affection between the father Shri Sudhir Sareen and the daughter Ms. Parul Gupta; and, (xix) denying that any legal notice was received.

3. Needless to state that the plaintiff company has filed a replication denying the contents of the written statement which are contrary to the plaint and denying that Mr. Siddharth Sareen is guilty of any acts of misappropriation qua the defendant company and pleading that assets of the defendant company alleged to have been sold fraudulently were sold in the lifetime of Shri Sudhir Sareen.

4. The suit came up for framing of issues on 12th July, 2016 when the following order was passed:-

“1. This suit for recovery of Rs.1,89,07,000/- is ripe for framing of issues.

2. Upon the defence to the claim for recovery of money, by one company against another company, being enquired, the counsel for the defendant states:

(i) that majority shares in both plaintiff and the defendant companies were owned by one Mr. Sudhir Sareen and the transaction of Rs.1.48 crores flowing from the plaintiff to the defendant company was a transaction of gift by the plaintiff to the defendant company;

(ii) however for the purposes of accounting, the said money was shown in the balance sheet of the defendant company as a loan from the plaintiff company but no interest was ever booked in the lifetime of Mr. Sudhir Sareen;

(iii) that after the death of Mr. Sudhir Sareen, the plaintiff company is under the control of the son of Mr. Sudhir Sareen and 95% of the shares of the defendant company are owned by the daughter of Mr. Sudhir Sareen;

(iv) that in the lifetime of Mr. Sudhir Sareen the plaintiff company was not booking any interest with respect to the said amount shown as loan to the defendant company.

3. I have enquired from the counsel for the defendant, how can the said stand of the defendant, even if accepted, constitute a defence in law to the claim for money. In my opinion, the defendant company cannot take a stand contrary to that in its balance sheet and / or cannot be permitted to take the same.

4. The counsel for the defendant has drawn attention to **Ram Niranjana Kajaria Vs. Sheo Prakash Kajaria** (2015) 10 SCALE 98 and **Sheetal Fabrics Vs. M/s. Coir Cushions Ltd.** (2005) V AD (Delhi) 240 but which do not deal with the controversy as has arisen,

where the defendant also admits that as per its balance sheet also the amount which the plaintiff is claiming is shown as the loan from the plaintiff.

5. *The counsel for the defendant then states that the suit is not within time. It is stated that the plaintiff along with the plaint has filed only the balance sheet of the defendant company as on 31st March, 2012 and this suit was filed on 8th December, 2015.*

6. *I have enquired from the counsel for the defendant, whether the defendant after 31st March, 2012 has been showing the said amount as loan from the plaintiff company and if not how has the said amount been dealt with in the balance sheet.*

7. *The counsel for the defendant states that he has no instructions in this regard.*

8. *I may in this regard notice that the plea of limitation is shown to be only in paras 2 and 9 of the preliminary objections in the written statement and which is found to be a bald one and the defendant company has not stated that after 31st March, 2012 the amount has not been shown as due to the plaintiff company.*

9. *Be that as it may, let the daughter of Mr. Sudhir Sareen who is the owner of the defendant company be present in person on the next date of hearing.*

10. *The counsel for the defendant states that she is young and the authorised person of the defendant company be permitted to appear.*

11. *Since the defendant company has given a personal colour to the matter, the daughter of Mr. Sudhir Sareen cannot be exempted from appearance. She is however at liberty to bring whosoever she wants to bring with her to the Court.*

12. *List on 21st July, 2016."*

5. In pursuance thereto, Ms. Parul Gupta is stated to be present in Court.
6. The counsel for the defendant company clarifies and has already been noticed to have been pleaded in the written statement, that the amount of Rs.1.48 crores had flown from the plaintiff company to the defendant company after Shri Sudhir Sareen has gifted the 95% shares of the defendant company to Ms. Parul Gupta and what is recorded in para 2(i) of the order dated 12th July, 2016 is not accurate to the said extent.
7. The counsel for the defendant Company on enquiry whether it is the contention of the defendant company that the claim in the suit is barred by time states that the defendant company even as of today is showing the amount of Rs.1.48 crores as received from the plaintiff company by way of loan but subject to the pleas aforesaid taken in the written statement.
8. I have enquired from the counsel for the defendant company as to how any issue can be said to arise on the aforesaid pleas in the written statement. I may in this regard notice that issues are to be framed only on substantial pleas of law and fact and if it is found that the pleas taken in the written statement do not amount to a defence in law, no purpose is served in putting

the said pleas to trial, thereby deferring the decree to another date, when in law the defence is ultimately liable to fail.

9. I have again asked the counsel for the defendant company as to how the defendant, a juristic person and a corporation sole, can be permitted to take inconsistent stands in its books of accounts and/or before taxation authorities and before the Civil Court. It is further enquired whether a corporate entity is entitled to make a gift which as per Section 122 of the Transfer of Property Act, 1882 has to be a transfer, without consideration and whether a company incorporated to carry on business under its Memorandum and Articles of Association part with its funds or receive funds, without any consideration.

10. Though the counsel for the defendant company is unable to answer any of the aforesaid but states that if the corporate veil is pierced, the gift was from Shri Sudhir Sareen to Ms. Parul Gupta.

11. I have further enquired from the counsel, whether Shri Sudhir Sareen and Ms. Parul Gupta in their Income Tax Returns of the relevant year had shown the said money as given and received as gift.

12. The counsel then states that his plea is not that it was a gift but is that it was in the “nature of gift”.

13. The counsel merely reiterates what has been pleaded in the written statement. However the pleas drafted while sitting in chamber have to be substantiated before a Court on the basis of legal principles, law and precedents and none of which is being cited. I am unable to understand the argument of “in the nature of gift”.

14. The counsel for the defendant has then referred to ***Durga Builders P. Ltd. Vs. Motor And General Finance Ltd.*** MANU/DE/4794/2013 to contend that the entries in a balance sheet can be explained and if they do not *per se* reflect the transaction, the matter has to be put to trial.

15. On my reading of the said judgment, it appears that the question there was whether a mortgage decree on admissions could be passed on the basis of the entries in the balance sheet and it was held that entries in the balance sheet were not evidence of mortgage. The said judgment cannot be of any assistance to the counsel for the defendant company who is also unable to show therefrom any ratio thereof which can be applied to the facts of this case.

16. The counsel for the defendant company has next referred to ***R. Janakiraman Vs. State*** (2006) 1 SCC 697 which is found to be on Sections 91 and 92 of the Evidence Act, 1872. Sections 91 and 92 provide for exclusion of oral by documentary evidence and for the terms of a contract, grant or other disposition of the property reduced in the form of a document being required to be proved by the said document only. I have enquired from the counsel for the defendant company as to how the same would apply to the entries in a balance sheet. Moreover, as aforesaid, the principal question remains, whether a person can be permitted to blow hot and cold and take inconsistent stand before different authorities. The judgment in ***R. Janakiraman*** supra is thus also of no help to the counsel for the defendant company.

17. The counsel for the defendant company has next drawn attention to the auditor's report annexed to the balance sheet of the plaintiff company for the year ending 31st March, 2012 in which it is *inter alia* stated as under:-

(iii) (a) The company has not granted secured or unsecured loans, to the Companies/firms or other parties covered in the register maintained under 301 of the Act therefore clauses 4(iii)(b), 4(iii)(c), 4(iii)(d) are not applicable to the company."

and to the Note therein that Shri Sudhir Sareen was the Key Management Personnel of the plaintiff company and that the defendant company was an enterprise related to the plaintiff company.

18. The counsel for the defendant company on the basis thereof contends that the plaintiff company, till 31st March, 2012 was not showing the amount of Rs.1.48 crores as advance or loan to the defendant company.

19. On enquiry, whether thereafter the plaintiff has been showing so, the counsel for the defendant company states that according to the pleadings of the plaintiff company, the plaintiff company in the balance sheets for the subsequent period has been showing so.

20. The counsel for the plaintiff company in response states that the said auditor's report is only with respect to loans and not with respect to advances and the plaintiff company has throughout shown the said amount as advance to the defendant company.

21. The counsel for the defendant company adds that it has been shown as interest free advance to the defendant company.

22. Neither counsel is able to show any rule under the Income Tax Act or any practices prescribed by the Institute of Chartered Accountants of India in accordance wherewith the auditor's report is prepared. Without the same, the weightage to be given to the Note cannot be deciphered. Even otherwise, I am of the view that the same cannot wash away the liability of the defendant company reflected in its own balance sheet.

23. It is also the argument of the counsel for the defendant company that Ms. Parul Gupta has challenged the Will of Shri Sudhir Sareen under which Mr. Siddharth Sareen claims right to the shares of the plaintiff company and if the present suit is decreed immediately, the plaintiff company may siphon off the monies so paid by the defendant company to the plaintiff company and nothing may remain for Ms. Parul Gupta, even after she succeeds in the challenge to the Will, to earn out of the shares of the plaintiff company.

24. As far as the said apprehension expressed is concerned, it will be open to Ms. Parul Gupta, to in an appropriate proceeding, obtain necessary orders for securing the assets/monies of the plaintiff's company awaiting the outcome of the share in the inheritance.

25. I am of the view that defences which are in violation of laws and amount to defrauding the taxation authorities cannot be permitted to be taken. A litigant cannot be permitted to take a stand in the Court diametrically opposite to the stand taken by it before Taxation Authorities. If the courts permit such stand to be taken in the course of judicial proceedings and should the courts come to the rescue of such a litigant, in this case for avoiding the recovery of dues which the litigant elsewhere has represented to be due from her, I am afraid the courts would be becoming privy to abuse of their own process.

26. In *Ram Sewak Vs. Ram Charan* AIR 1982 All 177 the parties had been keeping double set of accounts for evading payment of income-tax and sales tax; the trial court reported the matter to the Taxation Authorities; the High Court held that the court should have refused to entertain the suit on the ground of public policy as it involved directing the recovery of an amount found to be due to either party as a share of the profits which had been deliberately concealed by the parties from the books of account in order to evade the payment of taxes. It was further held that no court can countenance a deliberate evasion of the tax laws of the country and to lend the aid of the Court for recovering an amount which had been deliberately

kept concealed by the parties in order to evade payment of the taxes due thereon. It was yet further held that if the court was to do so, it would amount to aiding and abetting of the evasion of the laws by the Court itself.

27. Supreme Court, in *Nair Service Society Ltd Vs. Rev. Father K. C. Alexander* AIR 1968 SC 1165 quoted with approval *Lord Mansfield, C.J. in Holman v. Johnson*, (1775) 1 Cowp 341 holding that though the objection that a contract is immoral or illegal sounds very ill in the mouth of the defendant but it is however not for his sake that the objection is ever allowed; it is a general principle of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident. The principle of public policy was held to be *ex dolo malo non oritur action* i.e. no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. It was further held that in a case in which the plaintiff must rely upon his own illegality, the court may refuse him assistance. Similarly in *Surasaibalini Debi Vs. Phanindra Mohan Majumdar* AIR 1965 SC 1364 it was reiterated that if the plaintiff seeks the assistance of the Court to effectuate an illegal transaction, the Courts will refuse assistance. Supreme Court in *S.P Chengalvaraya Naidu Vs.*

Jagannath (1994) 1 SCC 1 also cautioned against allowing the process of the Court being used *inter alia* by tax evaders.

28. I am therefore of the view that it is not open to the defendant to before this Court contend that the monies which the defendant in its books of accounts and balance sheet has shown as loan from the plaintiff and repayable to the plaintiff (and on the basis whereof the defendant has been assessed for tax) are not a loan from the plaintiff but “in the nature of gift” from the plaintiff and not repayable to the plaintiff.

29. Supreme Court, in ***Karam Chand Thapar & Bros. (P) Ltd Vs. Commissioner of Income Tax, Calcutta*** (1971) 82 ITR 899 held the circumstance that the assessee was showing the shares as investment shares in its books of accounts as well as in the balance sheet, though not conclusive, but is relevant circumstance on which reliance could be placed upon and necessary inference drawn. It was further held that the explanation, that the Company had to do so because of provisions of the Company Law, was unfounded.

30. The same is the position here. The pleas of the defendant have no foundation and the counsel for the defendant is unable to state as to what

evidence the defendant can possibly lead. Though undoubtedly per Section 34 of the Indian Evidence Act, 1872 the entries in the books of accounts are relevant whenever they refer to a matter into which the Court has to inquire and are not by itself sufficient evidence to charge any person with liability but the defendant in the present case has not pleaded any defence on which, if proved, it can succeed and to prove which it should be given an opportunity to lead evidence. The defence pleaded, of the amount having been received from plaintiff as gift or in the nature of gift and hence being not repayable, has already been dealt with above. Code of Civil Procedure, 1908 does not require the Courts to blindly and mechanically frame issues on the pleas which do not constitute a defence to the claim and to take all suits through the rigmarole of trial when the defence, at the very threshold, is unsustainable in law and has no legs to stand on. Significantly, the defendant here is not challenging the correctness of its own books of accounts. It also cannot be forgotten that reflecting an amount as outstanding in the balance sheet of a company has been held to be an acknowledgement of debt.

31. Mention may also be made of *Kilpest Pvt. Ltd. Vs. Shekhar Mehra* (1996) 10 SCC 696 where Supreme Court held that the promoters of a

Company having elected to avail of the advantages of forming a limited company and having voluntarily and knowingly bound themselves by the provisions of the Companies Act, could not be heard to submit that a limited company should be treated as a quasi-partnership. The defendant here also, cannot be heard to submit that the monies aforesaid flowed not from plaintiff to defendant but from Sh. Sudhir Sareen to his daughter Ms. Parul Gupta.

32. I find Supreme Court, in ***Dr. A. Lakshmanaswami Mudaliar and Vs. Life Insurance Corporation*** AIR 1963 SC 1185 held that a Company is competent to carry out its objects specified in the Memorandum of Association and cannot travel beyond its objects. Finding the objects to be authorising the Company in that case, only to carry on Life Insurance business and to enter into contracts for that purpose and not finding the Memorandum of Association of the Company to be authorising the Company to make any donations, it was held that the same could not be traced to the residuary clause authorising the Company to do all other things as are incidental or conducive to the attainment of the main objects. It was further held that the act of the Company of making donations being not within the objects mentioned in the Memorandum of Association, the act of making donations was *ultra vires* and no legal relationship or effect could

ensue therefrom. It is not the case of the defendant in the present case that the plaintiff Company was authorised to make gift or that the defendant Company was authorised to receive gift. For this reason also the defence of the amount being by way of gift or in the nature of gift cannot be entertained.

33. Though the defendant company in the written statement has also challenged the authority of the person who has instituted the suit and signed and verified the plaint but in view of the aforesaid state of affairs, where the defendant is accusing the plaintiff to be acting at the behest of Mr. Siddharth Sareen and attributing motives to the plaintiff company for instituting the present suit, need to frame the said issue which in any case is of technical and vexatious nature is not felt inasmuch as the defendant company has otherwise admitted the suit to be on behalf of the plaintiff company. Moreover, the monies payable under the decree will also flow to the plaintiff company and not to Mr. Siddharth Sareen individually.

34. I therefore do not find any basis in law to put the present suit to trial insofar as the claim of the plaintiff company for recovery of principal amount of Rs.1.48 crores is concerned.

35. However as far as the claim for interest is concerned, the counsel for the plaintiff company has not controverted the contention of the counsel for the defendant company that the plaintiff company has not been crediting any interest as receivable on the said amount. In this view, the claim for interest till the amount was demanded by the plaintiff company from the defendant company cannot be entertained.

36. Though the defendant company has denied the receipt of legal notice dated 7th March, 2015 but it is quite evident that the plaintiff company since then is demanding the amount.

37. In the entirety of the facts and circumstances, it is deemed appropriate to award interest to the plaintiff company on the said sum of Rs.1.48 crores w.e.f. 1st April, 2015, at the rate of 8% per annum till the date of this decree and for a period of three months from the date of this decree within which time the defendant company is expected to discharge its debt under the decree. However if the decretal amount is not paid within three months herefrom, with effect from the expiry of three months, the principal amount of Rs.1.48 crores shall incur interest @ 15% per annum. Further, if the payment of the entire decretal amount is made within three months, the

plaintiff company shall not be entitled to any costs of the suit; however if no such payment is made, the plaintiff company shall also be entitled to costs of this suit. Counsel's fee assessed at Rs.55,000/-

38. Decree sheet be drawn up.

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39. This suit is for recovery of the principal amount of Rs.1,30,43,901/- along with interest till the date of institution i.e. for total amount of Rs.1,86,72,434/- with future interest.

40. I have enquired from the counsels for the parties whether there is any need to replicate the facts of the present suit in the judgment or it can generally be observed that the position in this suit is the same as the other suit and the decree as aforesaid can be passed.

41. The counsel for the defendant company has fairly stated that the position is the same save for the fact that in the present case there is an express admission on the part of the plaintiff that the loan was interest free and that the terms and conditions of re-payment of the principal amount of loan had not been agreed.

42. In this view of the matter, need to write a detailed judgment is not felt. The suit is decreed in favour of the plaintiff and against the defendant for recovery of principal amount of Rs.1,30,43,901/- with interest at the rate of 8% per annum till the date of this decree and for a period of three months from the date of this decree within which time the defendant company is expected to discharge its debt under the decree. However if the decretal amount is not paid within three months herefrom, with effect from the expiry of three months, the principal amount of Rs.1,30,43,901/- shall incur interest @ 15% per annum. If the payment of the entire decretal amount is made within three month, the plaintiff company shall not be entitled to any costs of the suit; however if no such payment is made, the plaintiff company shall also be entitled to costs of this suit. Counsel's fee assessed at Rs.55,000/-

43. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JULY 21, 2016

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